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# Dynamic Incorporation of the General Part: Criminal Law’s Missing (Hyper)Link

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*In theory, the law that defines criminal offenses is exclusively statutory. In practice, though, criminal statutes often leave important offense-requirements undefined or even unexpressed. In particular, criminal statutes often fail to address questions that belong to the criminal law’s so-called General Part — questions like what counts as a “cause,” for example, or what culpable mental states are required of accomplices. When courts face fundamental questions like these, as the Supreme Court did twice last year, they often turn for guidance to the judge-made law of the General Part, which is vast and rich. But this resort to judge-made criminal law raises a difficult, if usually unacknowledged, methodological question: How, if at all, does the judge-made law of the General Part bear on the interpretation of statutes that define individual criminal offenses?*

*This Article argues that the answer to this question lies in the idea of dynamic incorporation — in the idea that the words of criminal statutes sometimes contain hyperlinks, so to speak, to bodies of still-evolving judge-made law. It argues, specifically, that when criminal statutes leave critical offense-requirements undefined or unexpressed, and these requirements fall within the subject matter of the General Part, the courts’ best alternative usually is to fill the “gap” by dynamically incorporating the judge-made law of the General Part. In support of this view, the Article compares dynamic incorporation to the alternatives — static incorporation, for example, and strict construction — and shows that only dynamic incorporation provides a workable solution to the gap-filling problem.*

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## INTRODUCTION

Scholars of criminal law distinguish criminal law's "General Part" from its "Special Part." The Special Part is the law devoted to the definition of specific criminal offenses.<sup>1</sup> It encompasses, for example, the definitions of murder and rape, as well as the definitions of telephonic harassment and credit-card fraud. By contrast, the General Part is the body of "basic principles that govern the existence and the scope of liability" in relation to all offenses,<sup>2</sup> or at least across a wide array of different offenses.<sup>3</sup> Among the subjects of the General Part are causation, culpable mental states, the requirement of a voluntary act, general justification and excuse defenses, accountability for conduct of another, and inchoate offenses like attempt, solicitation, and conspiracy.<sup>4</sup>

Twice last year the Supreme Court addressed important questions from the General Part. The first of the two cases, *Burrage v. United States*, was about causation.<sup>5</sup> Petitioner Marcus Burrage had sold heroin to Joseph Banka, who died shortly after ingesting it.<sup>6</sup> Burrage was charged under 21 U.S.C. § 841(b)(1)(C), which imposes an enhanced sentence on a drug dealer "if death or serious bodily injury results from the use of such substance."<sup>7</sup> This statute required the government to prove that the heroin supplied by Burrage had caused Banka's death.<sup>8</sup> The evidence of causation was problematic, however. The government's experts were able to testify only that the heroin supplied by Burrage had "contributed" to Banka's death from "mixed-

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<sup>1</sup> JOHANNES ANDENAES, *THE GENERAL PART OF THE CRIMINAL LAW OF NORWAY* 13 (Thomas P. Ogle trans., 1965); Leo Zaibert, *The Richness of the Special Part of the Criminal Law*, 10 *NEW CRIM. L. REV.* 470, 471 (2007) (book review) ("[T]he special part concerns itself with the conceptual contours of specific crimes.").

<sup>2</sup> Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 *COLUM. L. REV.* 1425, 1429 (1968) (explaining the scope of Part I of the Model Penal Code); see also ANDENAES, *supra* note 1, at 13-14 ("The general part deals with the general conditions for criminal liability and the system of sanctions.").

<sup>3</sup> See Zaibert, *supra* note 1, at 470-71 ("Roughly, the distinction between the general and the special part of the criminal law is this: the general part, as its name indicates, concerns itself with the most general doctrines, principles, and concepts of the criminal law, which may in fact apply to all (or to many) crimes (or families of crimes), whereas the special part concerns itself with the conceptual contours of specific crimes.").

<sup>4</sup> See Wechsler, *supra* note 2, at 1429.

<sup>5</sup> See *Burrage v. United States*, 134 S. Ct. 881, 885 (2014).

<sup>6</sup> See *id.*

<sup>7</sup> 21 U.S.C. § 841(b)(1)(C) (2012).

<sup>8</sup> See *Burrage*, 134 S. Ct. at 887.

drug intoxication.<sup>9</sup> They could not say that Banka would not have died “but for” the heroin.<sup>10</sup> The question that reached the Supreme Court was whether the causation element in § 841 could be satisfied by proof of causal “contribution” or instead required but-for causation.<sup>11</sup>

The second of the two General-Part cases, *Rosemond v. United States*, was about accomplice liability.<sup>12</sup> Petitioner Justus Rosemond was one of several participants in a drug deal that ended in gunfire.<sup>13</sup> The government later charged Rosemond under 18 U.S.C. § 924(c)(1)(a), which imposes an enhanced sentence on “any person who, during and in relation to any crime of violence or drug trafficking crime[,] . . . uses or carries a firearm.”<sup>14</sup> The government’s main theory at trial was that Rosemond himself had fired a gun during the drug deal.<sup>15</sup> But the government asked the judge also to instruct the jury on the alternative theory that another participant in the drug transaction, Joseph, had fired the gun and that Rosemond had aided and abetted Joseph.<sup>16</sup> The principal question that reached the Supreme Court was what mental states the government was required to prove of Rosemond in order to satisfy the conditions of accomplice liability, as articulated in the federal aiding-and-abetting statute, 18 U.S.C. § 2(a).<sup>17</sup> Was the government required to prove, for example, that Rosemond affirmatively had “intended” that Joseph carry a gun?<sup>18</sup>

The Supreme Court’s answers to these two substantive questions are fascinating in their own right.<sup>19</sup> But the cases also raise an equally

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<sup>9</sup> *Id.* at 885-86.

<sup>10</sup> *Id.* at 892.

<sup>11</sup> *See id.* at 886.

<sup>12</sup> *See* *Rosemond v. United States*, 134 S. Ct. 1240, 1245 (2014).

<sup>13</sup> *See id.* at 1243.

<sup>14</sup> *Id.* (alteration in original) (quoting 18 U.S.C. § 924(c)(1)(A) (2012)) (internal quotation marks omitted).

<sup>15</sup> *See id.* at 1243-44.

<sup>16</sup> *See id.* at 1244.

<sup>17</sup> *See id.* at 1245; *see also* 18 U.S.C. § 2(a) (2012) (“Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”).

<sup>18</sup> *See* *Rosemond*, 134 S. Ct. at 1250.

<sup>19</sup> In *Rosemond*, the Court held with respect to the mens rea question that “[a]n active participant in a drug transaction has the intent needed to aid and abet a [18 U.S.C.] § 924(c) violation when he knows that one of his confederates will carry a gun,” but that the knowledge required is advance knowledge. *Id.* at 1249. In *Burrage*, the Court held that “at least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim’s death or serious bodily injury, a defendant cannot be liable under the penalty enhancement provision of 21 U.S.C.

fascinating and far more important methodological question, namely: What role, if any, do the mostly judge-made doctrines of the General Part play in the interpretation of criminal statutes that define offenses? *Burrage* and *Rosemond* both were, at some level, about the meaning of offense-defining criminal statutes. In both cases, though, the statutes said next to nothing about the questions facing the Court. The statute in *Burrage*, 21 U.S.C. § 841(b)(1)(C), said only that the victim's death must "result[] from" the drugs supplied by the defendant; neither it nor any other statute said exactly what was required by way of causation.<sup>20</sup> Likewise, the accomplice-liability statute at issue in *Rosemond*, 18 U.S.C. § 2, said nothing at all about mental states; it said only that whoever "aids, abets, counsels, commands, induces or procures [a crime's] commission. . . is punishable as a principal."<sup>21</sup>

At the same time, though, the questions facing the Court in *Burrage* and *Rosemond* were the subjects of a rich profusion of judge-made law. The judge-made law of causation occupied fifty-three pages in the 1969 edition of Rollin Perkins's criminal-law treatise, for example — a fact to which the House Judiciary Committee adverted in explaining its 1980 decision not to propose a federal statutory definition of causation.<sup>22</sup> Likewise, the question of what mental state or states are required for accomplice liability is the subject of a vast — if not always consistent<sup>23</sup> — body of judge-made law, encompassing among many

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§ 841(b)(1)(C) unless such use is a but-for cause of the death or injury." *Burrage v. United States*, 134 S. Ct. 881, 892 (2014). My own views of the substantive issue in *Burrage* are reflected in an amicus brief I filed in the case on behalf of nine state attorneys general. See Brief of Amici Curiae States of Alaska, Colorado, Hawai'i, Kansas, New Mexico, South Dakota, Tennessee, Wisconsin, and Wyoming in Support of Respondent at 4-5, *Burrage*, 134 S. Ct. 881 (No. 12-7515), 2013 WL 5616723.

<sup>20</sup> See *Burrage*, 134 S. Ct. at 887.

<sup>21</sup> *Rosemond*, 134 S. Ct. at 1245.

<sup>22</sup> H.R. REP. NO. 96-1396, at 12 (1980) ("The Committee further intends that issues involving causation continue to be resolved according to the principles developed through the common law."). See generally WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., HANDBOOK ON CRIMINAL LAW 246-67 (1972) (discussing the concept of causation); ROLLIN M. PERKINS, CRIMINAL LAW 685-738 (2d ed. 1969) (discussing the concepts of responsibility, actual causation, and proximate cause over a span of fifty-three pages). In the third edition of Perkins's treatise (written with co-author Ronald Boyce), causation occupied fifty-six pages. See ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 769-825 (3d ed. 1982).

<sup>23</sup> WAYNE R. LAFAVE, CRIMINAL LAW § 13.2, at 708 (5th ed. 2010) [hereinafter CRIMINAL LAW] ("There is a split of authority as to whether some lesser mental state [less than purposely] will suffice for accomplice liability, such as mere knowledge that one is aiding a crime or knowledge that one is aiding reckless or negligent conduct which may produce a criminal result."); Robert Weisberg, *Reappraising Complicity*, 4 BUFF. CRIM. L. REV. 217, 236 (2000) ("For decades, the American courts and

others Judge Learned Hand's often-cited 1938 opinion in *United States v. Peoni*.<sup>24</sup> This rich profusion of judge-made law on the subjects of causation and accomplice liability seems to bear, somehow, on the questions facing the Court in *Burrage* and *Rosemond*, particularly given the failure of the statutes themselves to address these questions. The methodological question posed by the cases is how, exactly, this judge-made law bears on the interpretation of the statutes.

In neither *Rosemond* nor *Burrage* did the Court address this question directly. In *Rosemond*, the Court did what lower courts often do when faced with questions from the General Part: Without pausing even to acknowledge the methodological dilemma, the Court unselfconsciously adapted the judge-made law of the General Part to the case before it.<sup>25</sup> The Court made law, in other words. In *Burrage*, meanwhile, the Court took the opposite tack: It treated the causation question as a standard-issue statutory-interpretation problem. The Court explored the "ordinary meaning" of the phrase "results from" with the help of the *Oxford English Dictionary*.<sup>26</sup> And the Court relied, too, on a canon of statutory interpretation — the so-called "rule of lenity," which requires courts to resolve ambiguities in favor of criminal defendants.<sup>27</sup> The judge-made law of causation figured in the Court's decision only as a static "background" against which Congress had enacted 21 U.S.C. § 841(b)(1)(C).<sup>28</sup>

The confusion that characterizes decisions like *Burrage* and *Rosemond* is not confined to the Supreme Court. Judges and lawyers often seem to lack the conceptual tools to bridge the divide between the subject of statutory interpretation, on the one side, and the doctrines of the General Part, on the other. For judges and lawyers, the subject of criminal statutory interpretation usually seems to revolve around problems from the Special Part — what counts as "carrying" a firearm, for example, or whether a bicycle counts as a "mechanical transport."<sup>29</sup> At the same time, judges and lawyers usually

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legislatures have debated whether knowledge or 'true purpose' should be the required mens rea for accomplice liability.").

<sup>24</sup> See *United States v. Peoni*, 100 F.2d 401 (2d Cir. 1938).

<sup>25</sup> See *Rosemond*, 134 S. Ct. 1248-52; see also *infra* notes 128-48 and accompanying text (discussing the tendency of lower courts to adapt judge-made law unselfconsciously when resolving questions of criminal statutory interpretation).

<sup>26</sup> See *Burrage v. United States*, 134 S. Ct. 881, 887 (2014).

<sup>27</sup> See *id.* at 891.

<sup>28</sup> See *id.* at 889.

<sup>29</sup> This tendency of lawyers to focus on problems from the Special Part in thinking about criminal statutory interpretation is reflected in criminal-law casebooks. See, e.g., KATE E. BLOCH & KEVIN C. MCMUNIGAL, *CRIMINAL LAW: A CONTEMPORARY APPROACH*

conceive of the General Part as the domain of judge-made law, despite occasional intrusions by Model Penal Code–derived state statutes.<sup>30</sup> The effect of this unconscious bifurcation is that cases like *Burrage* and *Rosemond* usually are framed either as posing questions only about statutory interpretation (as in *Burrage*) or as posing questions only

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127-48 (2005) (including, as problems in criminal statutory interpretation, the questions whether a bike qualifies as “mechanical transport” for purposes of a statute prohibiting vehicles in wilderness areas, whether aluminum knuckles are covered by a statute prohibiting possession of “brass knuckles,” and whether a shod foot qualifies as a “dangerous instrument” under an aggravated assault statute); JOSHUA DRESSLER & STEPHEN P. GARVEY, *CASES AND MATERIALS ON CRIMINAL LAW* 119-126 (6th ed. 2012) (using, as the principle case in the section on “statutory interpretation,” *Muscarello v. United States*, 524 U.S. 125 (1998), a case where the question was “whether the phrase ‘carries a firearm’ [in 18 U.S.C. § 924(c)(1)] is limited to the carrying of firearms on the person”); CYNTHIA LEE & ANGELA HARRIS, *CRIMINAL LAW: CASES AND MATERIALS* 59-66 (2d ed. 2009) (using, as the principle case in a section on “statutory interpretation,” *United States v. Dauray*, 215 F.3d 257 (2d Cir. 2000), where the question was “whether individual pictures are ‘other matter which contain any visual depiction’ within the meaning of [18 U.S.C.] § 2252(a)(4)(B),” a child-pornography statute); ANDRE A. MOENSSENS ET AL., *CRIMINAL LAW: CASES AND COMMENTS* 171-179 (8th ed. 2008) (featuring *Caminetti v. United States*, 242 U.S. 470 (1916) — a case where the question was whether the so-called “White Slave Traffic Act,” 18 U.S.C. § 2421, was intended to reach only commercialized vice, or instead was intended to reach any transportation of women across state lines for immoral purposes — as the principal case in section on “Statutes and Judicial Construction”); PAUL H. ROBINSON, *CRIMINAL LAW* 87-98 (1997) (focusing the book’s discussion of “statutes and statutory interpretation” on the question whether propping up a corpse to deceive passersby qualifies as “abuse of a corpse”).

<sup>30</sup> This tendency, too, is reflected in the criminal-law casebooks. Where the General Part is concerned, it is probably no less true than when Pound said it that “[t]ext-writers . . . seldom cite any statutes . . .” Roscoe Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 383 (1908). Take the subject of proximate cause, for example. One of the most popular casebooks (and the one I use), by Joshua Dressler and Stephen Garvey, treats the subject of proximate cause using edited versions of two cases: *People v. Rideout*, 727 N.W.2d 630 (Mich. Ct. App. 2006); and *Velazquez v. State*, 561 So. 2d 347 (Fla. Dist. Ct. App. 1990). See DRESSLER & GARVEY, *supra* note 29, at 218-32. Neither case, as edited, treats proximate cause as a matter for statutory interpretation. Interestingly, the casebook’s edited version of one of the cases, namely *Velazquez*, leaves out a portion of the opinion that treated the proximate-cause question as requiring interpretation of Florida’s vehicular-homicide statute. Compare *Velazquez*, 561 So. 2d at 350 (holding that a “cause-in-fact showing is insufficient in itself to establish the aforesaid ‘proximate cause’ element in a vehicular homicide case”), with DRESSLER & GARVEY, *supra* note 29, at 229-30 (omitting this portion of court’s opinion). Dressler and Garvey are by no means alone (nor are they wrong) in treating proximate cause as if it were primarily, if not exclusively, a common-law subject. See, e.g., JOHN KAPLAN ET AL., *CRIMINAL LAW: CASES AND MATERIALS* 275-302 (6th ed. 2008); WAYNE R. LAFAVE, *MODERN CRIMINAL LAW: CASES, COMMENTS AND QUESTIONS* 336-55 (4th ed. 2006); LEE & HARRIS, *supra* note 29, 280-96.

about the still-evolving judge-made doctrines of the General Part (as in *Rosemond*).

In this Article, I will argue that the answer to this methodological dilemma lies in the idea of dynamic incorporation.<sup>31</sup> When the statutes defining an offense fail adequately to articulate critical offense-requirements, and these requirements fall within the subject matter of the General Part, courts should construe the statutes as “hyperlinked” to the still-evolving judge-made law of the General Part. In resolving cases like *Burrage* and *Rosemond*, then, judges ought not to engage in “imaginative reconstruction” of the legislature’s intent.<sup>32</sup> Nor ought they to treat the statutes as freezing the judge-made law as of the moment of the statutes’ enactment.<sup>33</sup> Rather, as Judge Pierre Leval has said, judges should treat the statutes as “preserv[ing] in the court the function by which it developed the body of rules newly given statutory recognition.”<sup>34</sup> Judges should continue to *make* the law of the General Part, as they always have done.

The Article’s aim is partly explanatory. Courts already do, sometimes, what this Article recommends: They draw upon, and adapt and refine, the judge-made law of the General Part in applying offense-defining statutes.<sup>35</sup> Like the Supreme Court in *Rosemond*, though, these courts usually appear not to know why this recourse to judge-made law is permissible. Moreover, as *Burrage* illustrates, the courts’ methodological innocence sometimes gets them into real trouble. It leads them to conclude mistakenly, as the Supreme Court apparently did in *Burrage*, that recourse to the judge-made law of the General Part cannot, in fact, be justified. Where decisions like *Burrage* are concerned, this Article is reformist. It aims to forestall further decisions like *Burrage* by rigorously formulating and defending dynamic incorporation as a methodology of the General Part.

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<sup>31</sup> See *Krolick Contracting Corp. v. Benefits Review Bd.*, 558 F.2d 685, 688 (3d Cir. 1977) (using the phrase “dynamic incorporation” to refer to a “rule of construction” under which a statute is interpreted to incorporate “the law as it might develop,” rather than the law of a particular historical moment); David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 NW. U. L. REV. 497, 524 (1992) (using the phrase “dynamic incorporation” to the same effect).

<sup>32</sup> See *infra* Part IV.D (arguing that dynamic incorporation is preferable to “imaginative reconstruction”).

<sup>33</sup> See *infra* Part IV.B (arguing that dynamic incorporation is preferable to “static incorporation”).

<sup>34</sup> Pierre N. Leval, *Trademark: Champion of Free Speech*, 27 COLUM. J.L. & ARTS 187, 197 (2004).

<sup>35</sup> See *infra* text accompanying notes 128–48.



The rigorous formulation of this methodology occupies Parts I and II, below. In Parts III and IV, the Article defends dynamic incorporation by arguing: (1) that no alternative methodology really is workable in cases like *Burrage* and *Rosemond*; and (2) that dynamic incorporation, by comparison, better serves fundamental values like coherence, fairness, and predictability.

#### I. THE NATURE OF THE PROBLEM

The cases that concern us — cases like *Burrage* and *Rosemond* — share three defining features: (1) the statutes to be applied in the case leave a “gap,” that is, they leave unanswered some question that the judge must address in his or her instructions to the jury; (2) this gap in the statutes concerns the elements of the offense, rather than matters of defense; and (3) the gap falls within the traditional subject matter of the General Part. It is from these three features that the difficulty arises, as I will explain.

##### A. “Gaps”

At least in criminal cases, to say that a statute leaves a “gap” is to say, roughly, that neither the statute’s text nor its context supplies a clear answer to a question that nevertheless will have to be addressed in the trial judge’s instructions to the jury.<sup>36</sup> Sometimes this “gap” arises — as it did in *Burrage* — from the legislature’s failure to define a word or phrase that appears in the statute defining the offense. The statute applied in *Burrage*, 21 U.S.C. § 841(b)(1)(C), says that the victim’s death must “result[] from” the victim’s use of drugs obtained from the defendant, but the statute does not say, or imply, anything about the precise nature of the required causal relationship.<sup>37</sup> Nor does any other federal statute, for that matter. Like many state codes, but unlike the Model Penal Code, the federal criminal code includes no general definition of causation.<sup>38</sup> Congress’s use of the phrase “results

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<sup>36</sup> In criminal cases, every offense requirement must be articulated in the judge’s instructions to the jury. See *Apprendi v. New Jersey*, 530 U.S. 466, 476-77 (2000) (holding that the constitutional rights to due process and to a jury trial “together . . . indisputably entitle a criminal defendant to ‘a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt’” (alteration in original) (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995))).

<sup>37</sup> *Burrage v. United States*, 134 S. Ct. 881, 887 (2014).

<sup>38</sup> See MODEL PENAL CODE & COMMENTARIES § 2.03 cmt.5 at 265 (1985) (“In the majority of jurisdictions that have adopted or considered revised codes, no explicit provision on causation has been included . . .”).

from” in § 841(b)(1)(C) represents a “gap” in the code, then, since just about everybody agrees that judges, in cases charged under § 841(b)(1)(C), are required to define causation in their instructions to the jury.<sup>39</sup>

Not all gaps arise, though, from the legislature’s failure to adopt a definition of a critical term. Sometimes, as in *Rosemond*, a gap will arise because the definition adopted by the legislature leaves some critical question or questions unaddressed.<sup>40</sup> The federal code does include a generally applicable statute defining the conditions of accomplice liability: 18 U.S.C. § 2. Unfortunately, though, this definition is rudimentary.<sup>41</sup> It says only that whoever “aids, abets, counsels, commands, induces or procures [a crime’s] commission[] is punishable as a principal.”<sup>42</sup> It does not say or imply what mental states, if any, the government must prove of the defendant in relation to the aiding and abetting — or in relation to the target offense.<sup>43</sup> Since accomplice liability depends, critically, on the defendant’s mental states,<sup>44</sup> and since judges, therefore, must instruct juries on these mental states,<sup>45</sup> the federal criminal code’s silence on the subject of mental states qualifies as a gap.

Sometimes, finally, a gap will arise not because the criminal code leaves a term undefined, nor because the code’s definition of a term is rudimentary, but because the code doesn’t mention at all a critical

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<sup>39</sup> For a discussion that addresses the view that judges need not explain causation in their instructions to the jury, see *infra* Part IV.A.

<sup>40</sup> See *Rosemond v. United States*, 134 S. Ct. 1230, 1245 (2014) (discussing 18 U.S.C. § 2 (2012)). Section 2 amounts to a general definition of an accountability requirement that is implicit in every statute. See *United States v. Calhoun*, 859 F. Supp. 1496, 1500 (M.D. Ga. 1994) (“[S]ection 2 is a definitional statute.”).

<sup>41</sup> See Paul H. Robinson, *Reforming the Federal Criminal Code: A Top Ten List*, 1 BUFF. CRIM. L. REV. 225, 228 (1997) (characterizing 18 U.S.C. § 2 as “less than helpful”).

<sup>42</sup> 18 U.S.C. § 2 (2012).

<sup>43</sup> See Baruch Weiss, *What Were They Thinking?: The Mental States of the Aider and Abettor and the Causer Under Federal Law*, 70 FORDHAM L. REV. 1341, 1361 (2002) (“Congress left § 2(a), the aiding and abetting subsection, without a statutorily prescribed mental state.”).

<sup>44</sup> The particular importance of mental states in accomplice liability probably is attributable to the fact that accomplice liability requires next to nothing by way of objective contribution to the proscribed result. See Weisberg, *supra* note 23, at 228 (“[T]he actus reus issue devolves into a sort of requirement that the state prove that the accomplice acted in a time and manner such that her actions might have played some causal role.”).

<sup>45</sup> See *People v. Beeman*, 674 P.2d 1318, 1326 (Cal. 1984) (disapproving a pattern jury instruction on aiding and abetting that failed explicitly to require the government to prove that the defendant intended to bring about the offense).

offense-requirement. For example, some criminal codes leave unaddressed the question whether, or under what circumstances, an omission — as distinct from an affirmative act — will qualify as a basis for criminal liability.<sup>46</sup> In Massachusetts, for example, the statutes defining specific offenses like murder and manslaughter don't say anything about whether an omission will suffice for liability, nor does any general provision.<sup>47</sup> This doesn't mean, however, that an omission *always* will suffice. Nor does it mean that an omission *never* will suffice. In Massachusetts as elsewhere, an omission *sometimes* will suffice.<sup>48</sup> The Massachusetts code's failure to specify the circumstances under which an omission will suffice is a gap, then, since judges naturally will have to instruct the jury on this subject in cases involving omissions.

### B. Offense Elements

The second defining feature of cases like *Burrage* and *Rosemond* is that the question left unanswered by the statutes — the “gap” — pertains to the elements of the offense, rather than to matters of defense. Part of what makes cases like *Burrage* and *Rosemond* problematic is that the definition of criminal offenses is the

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<sup>46</sup> This is true, for example, of the federal criminal code, though Congress considered adding a section on omissions during the code-revision efforts of the 1970s. See S. 1437, 95th Cong. § 111, at 22 (1978) (“[O]mission’ means a failure by a person to perform an act that he has a legal duty to perform.”); NAT’L COMM’N ON REFORM OF FED. CRIMINAL LAWS, FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS § 301(2) (1971) [hereinafter FINAL REPORT] (“A person who omits to perform an act does not commit an offense unless he has a legal duty to perform the act.”). Some state codes also lack a general provision on liability for omissions. See MODEL PENAL CODE & COMMENTARIES § 2.01 cmt. 3 n.35 at 224 (1985) (listing those states that have adopted a provision on omissions similar to the Model Penal Code’s). Even the Model Penal Code’s general provision on omissions leaves much of the work to judges. See *id.* § 2.01 cmt. 3 at 222-23 (“It should, of course, suffice, as the courts now hold, that the duty arise under some branch of the civil law.”).

<sup>47</sup> See MASS. GEN. LAWS ch. 265, § 1 (2014) (defining murder); *id.* § 13 (defining manslaughter). Though Massachusetts courts have held that an omission can qualify as the basis for a homicide prosecution in Massachusetts, this holding appears to be based on the common law, rather than on any statute. See *Commonwealth v. Pugh*, 969 N.E.2d 672, 683 (Mass. 2012) (“Without question, parents owe a duty to provide medical services to their independently living children, breach of which may form the basis of an involuntary manslaughter conviction.”).

<sup>48</sup> See *Commonwealth v. Twitchell*, 617 N.E.2d 609, 613 (Mass. 1993) (“A charge of involuntary manslaughter based on an omission to act can be proved only if the defendant had a duty to act and did not do so.”).

responsibility of the legislature, at least in the first instance.<sup>49</sup> There are no common-law crimes, after all. By contrast, the definition of criminal *defenses* often is the responsibility of the courts. In many jurisdictions, the legislature has left the subject of criminal defenses entirely or almost entirely uncodified.<sup>50</sup> The effect of this legislative inactivity is that — in some jurisdictions anyway — the judge-made law of criminal defenses continues to exist, and evolve, alongside the criminal code.<sup>51</sup> Thus, a “gap” in the law of defenses often functions unproblematically as an invitation to judicial lawmaking.

Judicial lawmaking is, or at least seems, more problematic when the gap falls within the law defining the offense itself. From the fact that courts “have no authority to create new crimes” — from the non-existence of common-law crimes, in other words — most scholars and a few judges have inferred that courts also have no authority to refine or develop “the definitions of *existing* offenses.”<sup>52</sup> For example, the

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<sup>49</sup> See *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.) (“It is the legislature, not the Court, which is to define a crime, and ordain its punishment.”).

<sup>50</sup> See Paul H. Robinson et al., *The Five Worst (and Five Best) American Criminal Codes*, 95 Nw. U. L. REV. 1, 40 (2000) (“North Carolina, Michigan, Massachusetts, West Virginia, Rhode Island, Mississippi, and Maryland are among the states that fail to define any excuses or nonexculpatory defenses in their penal codes. Numerous other codes include only a fraction of the commonly recognized excuses and nonexculpatory defenses.”).

<sup>51</sup> See, e.g., *Allison v. City of Birmingham*, 580 So. 2d 1377, 1379-80 (Ala. Crim. App. 1991) (recognizing that the Alabama criminal code, which does not include a definition of the necessity defense, was “not intended to preclude further judicial, or statutory, development of these, or other, justifications”); *People v. Dupree*, 771 N.W.2d 470, 480 (Mich. Ct. App. 2009) (“Because there is no indication that the Legislature intended to abrogate or modify the application of traditional common-law affirmative defenses . . . I conclude that the defenses of duress and self-defense are still applicable to a charge of being a felon-in-possession.”), *aff’d*, 788 N.W.2d 399 (Mich. 2010); *Hoagland v. State*, 240 P.3d 1043, 1046 (Nev. 2010) (“Since the Nevada Legislature has not precluded the use of necessity as a defense, we conclude that it is available and can be asserted as a defense to a DUI violation.”); *State v. Johnson*, 399 A.2d 469, 474 n.4 (R.I. 1979) (“The defense of lack of criminal responsibility due to a mental illness in this jurisdiction is a judicial creation which we are free to alter. . . . Our determination that we can judicially alter the standard is buttressed by the Legislature’s conscious inactivity in this area. In 1965 the Legislative Council issued a comprehensive report recommending that any changes in this field be left to the initiative of this court. . . . The Legislature’s inactivity in this context reflects to us their adherence to the recommendations of the 1965 report.” (citations omitted)); Caleb Nelson, *State and Federal Models of the Interaction Between Statutes and Unwritten Law*, 80 U. CHI. L. REV. 657, 760 (2013) (“In states that have not comprehensively codified the generic defenses . . . it remains possible for common-law defenses to survive as such.”).

<sup>52</sup> ROBINSON, *supra* note 29, at 67 (emphasis added) (“Today, courts generally no

Wyoming Supreme Court applied roughly this view in *Yellowbear v. State*,<sup>53</sup> where it refused to fill the gap created by the state legislature's failure to specify the circumstances under which an omission would qualify as basis for murder liability.<sup>54</sup> Filling this gap, the court said, would amount to the creation of "a common-law crime."<sup>55</sup> Justice Scalia adopted much the same approach in *Skilling v. United States*,<sup>56</sup> where he dissented from the Court's decision upholding 18 U.S.C. § 1346, the statute defining "honest-services" wire fraud.<sup>57</sup> Justice Scalia said that the Court had saved the statute only by "writ[ing] in specific criteria that its text does not contain."<sup>58</sup> This, he said, courts cannot do.<sup>59</sup>

Not everyone shares Justice Scalia's view that legislatures must exhaustively articulate the definitions of offenses.<sup>60</sup> Even for those who reject Justice Scalia's view, however, judicial-gap filling remains more problematic in relation to offenses than in relation to defenses. The judge-made law of defenses can readily be pictured as operating alongside, and independently of, the statutes defining the offense.<sup>61</sup> It is harder to situate the judge-made law of offenses. Where offenses are

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longer have the role of refining and developing the criminal law. That function has been taken over by the legislatures. . . . Courts interpret the code but generally have no authority to create new crimes or change the definitions of existing crimes."); see also *United States v. Bass*, 404 U.S. 336, 348 (1971) (arguing that "legislatures and not courts should define criminal activity"); GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 78-79 (1982) (assuming without argument that the criminal law lacks a substantial common-law component); Alex Kozinski, *The Case of the Speluncean Explorers: Revisited*, 112 HARV. L. REV. 1876, 1877 (1999) ("[W]e are not common law judges; we are judges in an age of statutes. For us, justice consists of applying the laws passed by the legislature, precisely as written by the legislature. Unlike common law judges, we have no power to bend the law to satisfy our own sense of right and wrong.").

<sup>53</sup> 174 P.3d 1270 (Wyo. 2008).

<sup>54</sup> See *id.* at 1292.

<sup>55</sup> *Id.*

<sup>56</sup> 561 U.S. 358 (2010).

<sup>57</sup> See *id.* at 415 (Scalia, J., dissenting).

<sup>58</sup> *Id.* at 416.

<sup>59</sup> See *id.*

<sup>60</sup> See Peter L. Strauss, *On Interpreting the Ethiopian Penal Code*, 5 J. ETHIOPIAN L. 375, 385 (1968) ("The inability and undesirability of the legislature to perceive and settle every conceivable case in advance, the necessity that it frame its enactments to fit a few clearly seen 'main cases,' also imply that there will be many cases in which the judge must choose what is to be the law.").

<sup>61</sup> See Nelson, *supra* note 51, at 760-61 ("Rather than reading each statute that defines a crime as implicitly incorporating common-law defenses, many state-court opinions are cast as if the common law can directly supply defenses to statutory crimes (unless a particular statute abrogates those defenses).").

concerned, the statute entirely occupies the field, so to speak; the question is only whether the defendant's conduct satisfies the statute.<sup>62</sup> If judges still make law in relation to offenses, then this judge-made law cannot be thought of as "operating outside of the statute."<sup>63</sup> It must be thought of as operating, somehow, under the aegis of the statute. The task of defining this relationship between the common law of offenses and statutes defining specific offenses is among the challenges courts face in cases like *Burrage* and *Rosemond*.

### C. General Part

The third and final defining feature of cases like *Burrage* and *Rosemond* is that the statutory gap falls within the subject matter of the General Part. Not all, or even most, statutory gaps fall within the subject matter of the General Part, of course. Consider, for example, the Sherman Act, which prohibits any contract, combination, and conspiracy "in restraint of trade or commerce."<sup>64</sup> As the Supreme Court has acknowledged, this statute "does not, in clear and categorical terms, precisely identify the conduct which it proscribes."<sup>65</sup> But the big question left unaddressed by the Sherman Act — what qualifies as a "restraint of trade or commerce" — does not fall within the subject matter of the General Part. It does not concern the "basic principles that govern the existence and the scope of liability" in relation to all or many offenses.<sup>66</sup> It just concerns the elements of a Sherman Act violation.

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<sup>62</sup> See *People v. Kohut*, 30 N.Y.2d 183, 187 (1972) ("Essential allegations are generally determined by the statute defining the crime."). The voluntary-act requirement, as codified in statutes like Model Penal Code § 2.01, might seem at first glance to be separate from the requirements imposed by the statutes defining specific offenses. Probably the better view, though, is that the requirement of a voluntary act is embedded (or incorporated) in every offense-defining statute. See 1 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 6.1(b) (2d ed. 2003) ("[A] statute which is worded vaguely on the question of whether an act (or omission), in addition to a state of mind, is required for criminal liability will be construed to require some act (or omission).").

<sup>63</sup> Nelson, *supra* note 51, at 662; see also ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 96 (2012) ("The fact, for example, that a state legislature changes one rule of judge-made tort law does not suggest that the courts' power over the remainder of tort law has been eliminated — and the continued exercise of that power is not filling a gap in the statute.").

<sup>64</sup> 15 U.S.C. § 1 (2012).

<sup>65</sup> *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 438 (1978).

<sup>66</sup> Wechsler, *supra* note 2, at 1429.

By contrast, the questions posed in *Burrage* and *Rosemond* fell squarely within the subject matter of the General Part. The question in *Burrage* was what, exactly, the government was required to prove in order to satisfy the causation element of 21 U.S.C. § 841(b)(1)(C).<sup>67</sup> Causation is a central requirement of a multitude of offenses, including traditional offenses like murder, manslaughter, criminal mischief, arson, and battery,<sup>68</sup> as well as less-traditional offenses like stalking<sup>69</sup> and aggravated drunk-driving.<sup>70</sup> The requirement at issue in *Rosemond* was, if anything, even more fundamental. In *Rosemond*, the principal question was what mental states the government was required to prove in order to hold *Rosemond* liable as an accomplice under 18 U.S.C. § 2 and 18 U.S.C. § 924(c)(1)(a).<sup>71</sup> The accomplice-liability principles of § 2 are, of course, common to all federal offenses.<sup>72</sup> Accordingly, though the Court framed the question in *Rosemond* as how the principles of § 2 “apply in a prosecution for aiding and abetting a § 924(c) offense,” the Court’s decision drew upon, and in its turn contributed to, a body of law that applies to every kind of offense.<sup>73</sup>

Questions about the role of judge-made law take on a different complexion in cases involving the General Part, in part because “judge-made law” just means something different in relation to the General Part. In relation to the General Part, the judge-made law is the rich and enduring body of law that has built-up over time around subjects like causation and accomplice liability. Accordingly, when courts resort to judge-made law in resolving questions that arise under the General Part, they draw upon this enduring body of law and are constrained by it, just as they would be in expounding the common law. By contrast, questions that arise under the Special Part — questions like what qualifies as “carrying” a firearm,<sup>74</sup> and what

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<sup>67</sup> See *Burrage v. United States*, 134 S. Ct. 881, 886-87 (2014).

<sup>68</sup> LAFAVE, *CRIMINAL LAW*, *supra* note 23, § 6.4(a), at 351; see also ANDENAES, *supra* note 1, at 112-27 (treating causation as an aspect of the General Part).

<sup>69</sup> See *Ex parte Reese*, 23 S.W.3d 54, 58 (Tex. App. 2000) (identifying causation as an element of stalking).

<sup>70</sup> See *State v. Robinett*, 106 P.3d 436, 440 (Idaho 2005) (identifying causation as an element of aggravated driving under the influence).

<sup>71</sup> See *Rosemond v. United States*, 134 S. Ct. 1240, 1245 (2014).

<sup>72</sup> See *United States v. Walser*, 3 F.3d 380, 388 (11th Cir. 1993) (“We reject Walser’s contention that § 2(b) may not be applied to perjury claims arising under § 1623. Section 2(b) applies generally to all federal criminal statutes and prohibits one from causing another to do any act that would be illegal if one did it personally.”).

<sup>73</sup> *Rosemond*, 134 S. Ct. at 1245.

<sup>74</sup> See *Muscarello v. United States*, 524 U.S. 125, 126 (1998) (“The question before

qualifies as a “credit card”<sup>75</sup> — usually are not the subjects of rich or enduring bodies of judge-made law. Accordingly, when judges resort to judge-made law in resolving questions that arise under the Special Part, they often make law from the whole cloth, much as an agency would in exercising delegated powers.<sup>76</sup>

Questions from the General Part also play out against a different legislative-historical background. Legislatures often have consciously refrained from legislating on the subjects of the General Part, and in so doing appear consciously to have left these subjects to the courts.<sup>77</sup> The idea of comprehensive legislation on the General Part was an innovation of the Model Penal Code.<sup>78</sup> Before the Model Penal Code was promulgated in 1962, legislatures uniformly refrained from legislating on these topics.<sup>79</sup> Even now, though, the federal criminal code and many state criminal codes continue to leave much of the General Part uncodified. For example, neither the federal criminal code nor most state criminal codes include a definition of causation.<sup>80</sup> In deciding not to legislate on topics like causation, moreover, legislatures appear to have realized that the alternative was for these topics to be “left to judicial development.”<sup>81</sup>

Finally, questions about the role of judge-made law take on greater *importance* in cases involving the General Part. This is true, first, in the obvious sense that decisions about topics like causation and accomplice liability are potentially of wide application, given the multitude of statutes that partake of the same basic requirements. In addition, though, questions about the role of judge-made law in the General Part go to the very existence of criminal law as a distinct body of doctrine. The unity and systematicity of criminal law as a subject

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us is whether the phrase ‘carries a firearm’ is limited to the carrying of firearms on the person.”).

<sup>75</sup> See *State v. Morgan*, 985 P.2d 1022, 1022 (Alaska Ct. App. 1999) (“The question before us is whether Morgan could be convicted . . . of obtaining a credit card by fraudulent means when he only obtained the credit card number and not the physical card.”).

<sup>76</sup> See Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 472 (1996) (arguing that “federal criminal law should be viewed as a system of delegated common law-making” akin to agency delegation).

<sup>77</sup> See *infra* text accompanying notes 149–59.

<sup>78</sup> Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 329-31 (2007) (identifying the creation of a general part as one of “the innovations of the Model Penal Code”).

<sup>79</sup> *Id.* at 330 (“The current federal criminal ‘code’ is typical of what existed in the states before the Model Penal Code. It has essentially no General Part.”).

<sup>80</sup> MODEL PENAL CODE & COMMENTARIES § 2.03 cmt. 5 at 265 (1985).

<sup>81</sup> *Id.*; see also *infra* text accompanying notes 149–59.



depend on the existence of a rich, vital General Part; they depend, that is, on the connections shared by offenses at the level of “basic principles that govern the existence and the scope of liability.”<sup>82</sup> In jurisdictions that lack a comprehensive legislative General Part, then, the existence of a rich, vital General Part depends on judges. In these jurisdictions, questions about the role of judge-made General Part doctrines put the courts to an important choice between: (1) “[m]aking doctrinal systematicity the point of reference for judicial reasoning”; and (2) treating the criminal law merely as a set of unrelated statutory texts for interpretation.<sup>83</sup>

## II. WHAT IS DYNAMIC INCORPORATION?

The question, then, is what role courts should assign to the judge-made law of the General Part in addressing questions left unanswered by the statutes that define offenses. The answer, I will argue, is that courts should treat these statutes as dynamically incorporating the judge-made law of the General Part. In this Part, I will explain what I mean by “dynamic incorporation.”

### A. Incorporation

Dynamic incorporation is a species of incorporation. This means, among other things, that the “incorporated” body of judge-made law does not operate separately from the statute defining the offense; rather, it operates *through* the statute. For comparison’s sake, consider the judge-made law of criminal defenses. The law of criminal defenses usually, though not always, is thought of as “operating outside of the

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<sup>82</sup> Wechsler, *supra* note 2, at 1428-29 (explaining the scope of Part I of the Model Penal Code); *see also* MICHAEL S. MOORE, ACT AND CRIME 1-4 (1993) (arguing that criminal law requires some unitary structure “if its codification is to be possible and if adjudication under such codes is to be non-arbitrary”); Eric A. Johnson, *Does Criminal Law Matter? Thoughts on Dean v. United States and Flores-Figueroa v. United States*, 8 OHIO ST. J. CRIM. L. 123, 151 (2010) [hereinafter *Does Criminal Law Matter?*] (arguing that criminal law is better served by a “doctrine-centered approach to criminal statutory interpretation,” in which doctrines from the General Part — among them the traditional presumption of mens rea — inform the courts’ interpretation of specific offense-defining statutes).

<sup>83</sup> Jeremy Waldron, “*Transcendental Nonsense and System in the Law*,” 100 COLUM. L. REV. 16, 36-37 (2000) (arguing that courts sometimes must choose between: (1) an approach to statutory interpretation that “[makes] doctrinal systematicity the point of reference for judicial reasoning”; and (2) an approach that focuses not on doctrine but on “the text of the latest piece of legislation”).

[offense-defining] statute.”<sup>84</sup> Where defenses are concerned, then, a court might plausibly conclude that the judge-made law continued to operate merely by virtue of having been left unchanged by the statute.<sup>85</sup> This is not true of the judge-made law of, say, causation or accomplice liability. If the judge-made law of causation or accomplice liability applies, it applies by virtue of having been incorporated into the statute.

Nor could this really be otherwise, at least in cases like *Burrage*. The statute at issue in *Burrage*, 21 U.S.C. § 841(b)(1)(C), explicitly required the government to prove that the victim’s death had “result[ed] from” the use of the controlled substance supplied by the defendant.<sup>86</sup> Given the presence of this textual causation requirement in the statute, it would be bizarre to conclude that the judge-made law of causation somehow operated separately from, and parallel to, the statutory requirement. Moreover, even where the statute and the judge-made law aren’t connected by a “textual hook,”<sup>87</sup> treating the judge-made law of the offense as operating separately from the statute would require a radical rethinking of current criminal-law practice. Again, in current practice, the offense-defining statute occupies the field, so to speak; the government is required to prove what the offense-defining statute requires it to prove, and nothing more.<sup>88</sup>

This incorporative feature bears on the nature of the question facing courts when they consider using dynamic incorporation. Specifically, it means that when courts address the threshold question whether to incorporate dynamically a body of judge-made law, they really are deciding *what to make of the offense-defining statute*. This is not to say that dynamic incorporation is all about statutory interpretation; when courts actually apply the dynamically incorporated body of law, they

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<sup>84</sup> Nelson, *supra* note 51, at 662, 760; *see also* ROBINSON, *supra* note 29, at 380 (“[G]eneral defenses’ represent general principles of defense that are not dependent on or related to the definition of any particular offense or group of offenses.”).

<sup>85</sup> *See* *People v. Dupree*, 771 N.W.2d 470, 480 (Mich. Ct. App. 2009) (“Because there is no indication that the Legislature intended to abrogate or modify the application of traditional common-law affirmative defenses . . . I conclude that the defenses of duress and self-defense are still applicable to a charge of being a felon-in-possession.”), *aff’d*, 788 N.W.2d 399 (Mich. 2010); *State v. Johnson*, 399 A.2d 469, 474 n.4 (R.I. 1979) (“Our determination that we can judicially alter the [insanity defense] is buttressed by the Legislature’s conscious inactivity in this area.”); *cf.* SCALIA & GARNER, *supra* note 63, at 318 (discussing substantive canon “that statutes will not be interpreted as changing the common law unless they effect the change with clarity”).

<sup>86</sup> *Burrage v. United States*, 134 S. Ct. 881, 887 (2014).

<sup>87</sup> Nelson, *supra* note 51, at 748 (using the phrase “textual hook”).

<sup>88</sup> *See supra* note 62 and the accompanying text.

aren't really engaged in statutory interpretation, as I will explain.<sup>89</sup> Still, the threshold question whether to dynamically incorporate the judge-made law in the first instance is a question about the meaning of the statute. Accordingly, any defense of dynamic incorporation, including mine, must contend with competing theories of criminal statutory interpretation.

### B. *Dynamic, Not Static*

When criminal-law scholars talk about legislative “incorporation” of judge-made law, what they mean — usually, if not always — is incorporation by the legislature of a particular fixed body of judge-made law as it existed on the date the statute was enacted.<sup>90</sup> That is to say: what they mean is static incorporation, rather than dynamic incorporation.

Static incorporation has long played an important role in the interpretation of criminal statutes.<sup>91</sup> Consider, for example, West Virginia's murder statute, which defines the offenses of first- and second-degree murder in a single paragraph: “Murder by poison, lying in wait, imprisonment, starving, or by any willful, deliberate and premeditated killing, or in the commission of, or attempt to commit [certain specified felonies] is murder of the first degree. All other murder is murder of the second degree.”<sup>92</sup> Though this statute tells the reader what distinguishes first- from second-degree murder, neither this statute nor any other West Virginia statute defines the word “murder.”<sup>93</sup> For the sake of giving statutes like West Virginia's murder

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<sup>89</sup> See *infra* Part II.D.

<sup>90</sup> See, e.g., JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 3.02[B], at 29 (6th ed. 2012) (illustrating the common law's role in statutory interpretation by describing a case where the court, in interpreting a murder statute, “look[ed] to the common law of 1850, the year the murder statute was enacted”); ROBINSON, *supra* note 29, at 67-68 (“[B]ecause some codes are simply codifications of the previously existing common law doctrine, ambiguity in code language that calls for an examination of the drafters' intent may require review of the cases in which the doctrine was developed.”).

<sup>91</sup> See, e.g., *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160 (1820) (Story, J.) (“When the act of 1790 declares, that any person who shall commit the crime of robbery, or murder, on the high seas, shall be deemed a pirate, the crime is not less clearly ascertained than it would be by using the definitions of these terms as they are found in our treatises of the common law. In fact, by such a reference, the definitions are necessarily included, as much as if they stood in the text of the act.”).

<sup>92</sup> W. VA. CODE § 61-2-1 (2014).

<sup>93</sup> Unelaborated prohibitions like these are commonplace. See LAFAVE, CRIMINAL LAW, *supra* note 23, § 14.1(b), at 767. What is more, this basic approach to the Special Part — of incorporating common-law definitions of offenses wholesale, without any

statute a “determinate meaning,”<sup>94</sup> courts often have read them to incorporate the common-law definition of the offense exactly as it existed on the date of the statute’s enactment<sup>95</sup> — as if the words of the then-prevailing common-law definition “stood in the text of the act.”<sup>96</sup>

Though static incorporation probably is more familiar to scholars of criminal law, the idea of dynamic incorporation is not new.<sup>97</sup> For example, dynamic incorporation usually is at work when one statute explicitly incorporates another by reference. In the words of one court: “Statutes referencing other statutes include any amendments to the referenced statute, absent a clear expression of a contrary intent.”<sup>98</sup> The incorporating statute doesn’t incorporate a fixed version of the referenced statute, then; it incorporates a dynamic version. Dynamic incorporation of *judge-made* law is not new, either. The federal evidence rules, for example, dynamically incorporate the judge-made law of privileges. Under Federal Evidence Rule 501, claims of privilege are governed by “[t]he common law — as interpreted by the United States courts in light of reason and experience.”<sup>99</sup>

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effort to describe the offense’s requirement — developed early. Criminal statutes adopted by the First Congress in 1790 included several unelaborated prohibitions. *See* An Act For the Punishment of Certain Crimes Against the United States, ch. 9, 1 Stat. 112 (1790). The Act’s murder statute, for example, said only: “And be it . . . enacted, [t]hat if any person or persons shall, within any fort, arsenal, dock-yard, magazine, or in any other place or district of country, under the sole and exclusive jurisdiction of the United States, commit the crime of willful murder, such person or persons on being thereof convicted shall suffer death.” *Id.* § 3, 1 Stat. at 113.

<sup>94</sup> *See Smith*, 18 U.S. at 159-60.

<sup>95</sup> *See Keeler v. Superior Court*, 470 P.2d 617, 624-27 (Cal. 1970) (concluding that California’s 1850 murder statute incorporates the common-law definition of murder exactly as it existed in 1850, and that the court’s task therefore was to determine what counted as murder in 1850).

<sup>96</sup> *Smith*, 18 U.S. at 160; *see also Keeler*, 470 P.2d at 625 (“It will be presumed, of course, that in enacting a statute the Legislature was familiar with the relevant rules of the common law, and, when it couches its enactment in common law language, that its intent was to continue those rules in statutory form.”).

<sup>97</sup> Nor even is the term “dynamic incorporation.” The U.S. Court of Appeals for the Third Circuit used this term in *Krolick Contracting Corp. v. Benefits Review Board*, to describe a “rule of construction” under which a statute is interpreted to incorporate “the law as it might develop,” rather than the law of a particular historical moment. *Krolick Contracting Corp. v. Benefits Review Bd.*, 558 F.2d 685, 688 (3d Cir. 1977). David Achtenberg used the phrase to the same effect in a 1992 law review article on 42 U.S.C. § 1983. *See Achtenberg, supra* note 31, at 524.

<sup>98</sup> *State v. Blilie*, 939 P.2d 691, 694 (Wash. 1997). Some state legislatures have adopted this rule by statute. *See, e.g.,* LA. REV. STAT. ANN. § 1:14 (2014) (“Whenever any reference is made to any portion of the Revised Statutes or to any other law, the reference applies to all amendments thereto hereafter made.”).

<sup>99</sup> FED. R. EVID. 501; *see also Dixon v. United States*, 548 U.S. 1, 20 (2006) (Alito,

This phrase from Evidence Rule 501 — “as interpreted by the . . . courts in light of reason and experience” — captures what is distinctive about dynamic incorporation of judge-made law. Where statutes dynamically incorporate judge-made law, courts are responsible for “fashioning and refining” this judge-made law “in [the] light of reason and experience.”<sup>100</sup> They are responsible, in other words, for “reevaluating and refining [the doctrines] as may be necessary to bring the common law into conformity with logic and common sense.”<sup>101</sup> The incorporated body of law is not frozen in time, then, as if it “stood in the text of the act.” What stands in the text of the statute is, rather, something akin to a computer hyperlink, which connects the reader to “the common law itself, . . . not merely the static content that the common law [once] had assigned to the term.”<sup>102</sup>

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J., concurring) (acknowledging that Rule 501 explicitly delegates to the federal courts the task of resolving privilege questions “in the manner of a common-law court”). Other statutes include similar delegations. *See, e.g.*, 42 U.S.C. § 6928(f)(4) (2012) (“All general defenses, affirmative defenses, and bars to prosecution that may apply with respect to other Federal criminal offenses may apply under subsection (e) of this section and shall be determined by the courts of the United States according to the principles of common law as they may be interpreted in the light of reason and experience. Concepts of justification and excuse applicable under this section may be developed in the light of reason and experience.”); COLO. REV. STAT. § 25-7-122.1(4) (2014) (“All general defenses, affirmative defenses, and bars to prosecution that may apply with respect to other criminal offenses may apply under this section and shall be determined by the courts of this state according to the principles of common law as they may be interpreted in the light of reason and experience.”); MICH. COMP. LAWS § 324.5531(10) (2014) (“All general defenses, affirmative defenses, and bars to prosecution that may apply with respect to other criminal offenses may apply under this section and shall be determined by the courts of this state according to the principles of common law as they may be interpreted in the light of reason and experience.”); N.C. GEN. STAT. § 130A-26.1(e) (2014) (“All general defenses, affirmative defenses, and bars to prosecution that may apply with respect to other criminal offenses under State criminal offenses may apply to prosecutions brought under this section or other criminal statutes that refer to this section and shall be determined by the courts of this State according to the principles of common law as they may be applied in the light of reason and experience.”); *see also* S. 1437, 95th Cong. § 501, at 36-37 (1978) (proposing that general criminal defenses “be determined by the courts of the United States according to the principles of the common law as they may be interpreted in the light of reason and experience”).

<sup>100</sup> *Rogers v. Tennessee*, 532 U.S. 451, 461-62 (2001) (describing the process by which courts “engage in the daily task of . . . interpreting such doctrines as causation and intent”).

<sup>101</sup> *Id.*

<sup>102</sup> *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 888 (2007) (quoting and reaffirming *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988)).

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C. *Open-ended Delegations Compared*

If dynamic incorporation gives courts more leeway to “refine” the law than does, say, static incorporation, it gives them less than would an open-ended delegation of law-making authority. Scholars and judges have argued that some terms in criminal statutes function as statute-specific delegations of lawmaking authority to courts.<sup>103</sup> Professor Dan Kahan, for example, has argued that the federal mail-fraud statute effectively delegates to courts the responsibility for “devising a cluster of special rules on the nexus between the scheme to defraud and the mailing.”<sup>104</sup> Likewise, he has argued that the Racketeer Influenced Corrupt Organizations Act, or RICO, delegates to courts the responsibility for deciding both what qualifies as an “enterprise” and what qualifies as a “pattern of racketeering activity.”<sup>105</sup>

The kind of delegated lawmaking ostensibly at work in RICO and the federal mail-fraud statute differs, though, from dynamic incorporation, at least in the usual case. As the very word “incorporation” suggests, dynamic incorporation contemplates the uniting of two separate and independently existing bodies of law, not the creation of a wholly *new* body of law under authority conferred by the incorporating statute itself.<sup>106</sup> Dynamic incorporation presupposes a kind of continuity between the pre-existing body of judge-made law and the courts’ application of that body of law in relation to a

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<sup>103</sup> See *United States v. Santos*, 553 U.S. 507, 524 (2008) (Stevens, J., concurring in the judgment) (“When Congress fails to define potentially ambiguous statutory terms, it effectively delegates to federal judges the task of filling gaps in a statute.”); Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 370-381 (1995) [hereinafter *Lenity*] (using the Crimes Act of 1790, the mail-fraud statute, and RICO to “show just how pervasive delegated lawmaking has been and continues to be in federal criminal jurisprudence”); Leval, *supra* note 34, at 197 (arguing that a legislature sometimes “enacts a new policy but does so in vague, imprecise terms” and that enactments like these have the effect of “delegat[ing] to the courts the task of answering [innumerable] questions in the light of experience and the legislative objective for which the statute was passed”).

<sup>104</sup> Kahan, *Lenity*, *supra* note 103, at 376.

<sup>105</sup> *Id.* at 379-80.

<sup>106</sup> See AMERICAN HERITAGE DICTIONARY 702 (4th ed. 2002) (defining “incorporate” partly as “[t]o unite (one thing) with something else already in existence”); MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 589 (10th ed. 1997) (defining “incorporate” partly as “to unite or work into something already existent so as to form an indistinguishable whole”); SHORTER OXFORD ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 984 (1959) (defining “incorporate” partly as “[t]o put [something] into . . . the body or substance of something else”).

particular offense-defining statute.<sup>107</sup> When courts implement specific statutory causation requirements, for example, they do not remake the law of causation anew for each statute.<sup>108</sup> They simply turn to a pre-existing, albeit still evolving, body of judge-made law.<sup>109</sup>

This continuity is important, first, because it affects what judges *do* when they resolve cases under dynamic incorporation. Under dynamic incorporation, courts are constrained by the existing judge-made law of, say, aiding and abetting, or causation. This judge-made law constrains courts despite their power to refine or even to abandon existing principles. As H.L.A. Hart has said: “A rule that ends with the word ‘unless . . .’ is still a rule.”<sup>110</sup> If we think of judge-made rules as carrying “gravitational force,” in Dworkin’s phrase — as we must if we are to think of the common law as “law” at all — then there is a genuine difference between: (1) applying a longstanding but still-

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<sup>107</sup> See Leval, *supra* note 34, at 198 (“As to delegating statutes of the type adopting common law, the legislature delegates to the courts the continued exercise of the function they always performed: the continued development of the common law doctrine in the light of the policies that always drove its development, without regard for the particular words chosen by the legislature to summarize the development.”). Dynamic incorporation both is and is not a delegation, then, as the Washington Court of Appeals has said. See *State v. Chavez*, 142 P.3d 1110, 1116 (Wash. Ct. App. 2006), *affd*, 180 P.3d 1250 (Wash. 2008). On the one hand, said the court, “the legislature has not delegated to the judiciary the task of defining ‘assault,’ but rather has instructed the judiciary to define assault according to the common law.” *Id.* On the other hand, the “common law” invoked by the legislature is not static but evolving, and so the statute’s invocation of the common law has the effect of “delegating to the judiciary how statutes will be specifically applied.” *Id.*

<sup>108</sup> Of course, sometimes a particular statute, though it makes use of the traditional common-law definition of causation, also will communicate the legislature’s intent to depart from traditional standards of causation. See, e.g., *Coray v. S. Pac. Co.*, 335 U.S. 520, 523-24 (1949) (holding that a federal statute governing railroads’ liability for employee deaths, 45 U.S.C. § 51, signaled by its use of the phrase “resulting in whole or in part” that Congress had meant to depart from traditional proximate-cause standards).

<sup>109</sup> See, e.g., *State v. Jackson*, 697 S.E.2d 757, 761 (Ga. 2010) (“As an original matter . . . we would decide this [felony murder] case simply by applying the customary legal meaning of ‘cause’ . . .”); *State v. McFadden*, 320 N.W.2d 608, 613 (Iowa 1982) (“[W]e hold that [the] trial court did not err in applying ordinary proximate cause principles to determine whether the causation element of [Iowa Code] section 707.5(1) [defining misdemeanor-manslaughter] had been met . . .”); *State v. David*, 141 P.3d 646, 651 (Wash. Ct. App. 2006) (holding that reference to “proximate causation” in Washington state’s vehicular homicide statute should be interpreted in keeping with generally applicable judge-made law on the subject of proximate cause).

<sup>110</sup> H.L.A. HART, *THE CONCEPT OF LAW* 139 (3d ed. 2012); see also FREDERICK SCHAUER, *THINKING LIKE A LAWYER* 117 (2009) (arguing that “there are common-law rules”).

evolving judge-made rule; and (2) creating new law from the whole cloth, as courts were required to do under RICO.<sup>111</sup>

This continuity feature is important, too, because it bears on the plausibility of dynamic incorporation as an interpretive methodology. For one thing, the proposition that the legislature meant to “delegate” lawmaking authority to courts is more plausible empirically “where the statute deals with a traditional field of common-law jurisprudence,”<sup>112</sup> as Justice Scalia and co-author Bryan Garner have suggested. That the legislature meant to delegate power to the courts is more plausible, in other words, where the power delegated merely is the power to apply, refine, and develop an existing body of judge-made law. The continuity feature of dynamic incorporation also is the source of many of its practical advantages, among them the predictability that dynamic incorporation lends even to offense-defining statutes that have not themselves been interpreted yet.

#### D. Lawmaking, Not Statutory Interpretation

In exercising the powers conferred on them through dynamic incorporation, then, judges are subject to constraints of the kind traditionally associated with the development of common law. They are not, however, subject to constraints of the kind associated with statutory interpretation. They are not, in other words, concerned with rooting out what the enacting legislature, or any other legislature, wanted.<sup>113</sup>

The threshold question whether the statutes defining an offense really incorporate an evolving body of judge-made law is, of course, a question of statutory interpretation. Once this threshold question is resolved in favor of dynamic incorporation, however, the court’s role changes. In resolving specific cases under dynamic incorporation — in deciding what the dynamically incorporated body of law actually

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<sup>111</sup> See Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1090 (1975) (“[J]udges seem agreed that earlier decisions do contribute to the formulation of new and controversial rules in some way other than by interpretation; they are agreed that earlier decisions have gravitational force even when they disagree about what that force is.”).

<sup>112</sup> SCALIA & GARNER, *supra* note 63, at 96.

<sup>113</sup> See Leval, *supra* note 34, at 196-97; *cf.* Richard Posner, *Statutory Interpretation — In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 818 (1983) [hereinafter *Statutory Interpretation*] (“If the legislature enacts into statute law a common law concept, as Congress did when it forbade agreements in ‘restraint of trade’ in the Sherman Act, that is a clue that the courts are to interpret the statute with the freedom with which they would construe and apply a common law principle — in which event the values of the framers may not be controlling after all.”).



requires — courts do not “conscientiously endeavor[] to carry out the intent of Congress.”<sup>114</sup> Their responsibility, rather, is just “the continued development of the common-law doctrine in the light of the policies that always drove its development.”<sup>115</sup> Indeed, if courts were to try to ascertain how the legislature might have wanted them to resolve a particular issue, they would — paradoxically — betray the responsibility assigned to them by the statute. Under dynamic incorporation, the statute’s command to the courts is not “try to figure out what we would have done in your place” but, rather, “decide for yourself.”<sup>116</sup>

This means, among other things, that the words used by the statute to accomplish the dynamic incorporation do not matter in the end. They do not inform the court’s development of the dynamically incorporated body of law. If the Supreme Court had concluded in *Burrage*, for example, that 21 U.S.C. § 841(b)(1)(C) dynamically incorporated the judge-made law of causation, the Court would not then — in applying this judge-made law — have paused to explore the “ordinary meaning” of the phrase “results from.”<sup>117</sup> Under dynamic incorporation, the words “results from” in § 841(b)(1)(C) would function, again, roughly as a computer hyperlink does. Just as the content of a hyperlinked website does not depend on the words or symbols in which the hyperlink is embedded, the content of the dynamically incorporated body of judge-made law does not depend on

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<sup>114</sup> *United States v. Santos*, 553 U.S. 507, 525 (2008) (Stevens, J., concurring in the judgment) (arguing that judges are permitted to “fill[] the gap” left by Congress when it failed to define the term “proceeds” in the federal money-laundering statute, 18 U.S.C. § 1956(a)(1), “as long as they are conscientiously endeavoring to carry out the intent of Congress”).

<sup>115</sup> Leval, *supra* note 34, at 198.

<sup>116</sup> This feature of dynamic incorporation distinguishes it from so-called dynamic theories of statutory interpretation. See *Hayden v. Pataki*, 449 F.3d 305, 367 (2d Cir. 2006) (Calabresi, J., dissenting) (“[S]ome scholars, myself included, have suggested that it might be a good idea if, as a starting point, in certain circumstances, courts were permitted to read the law according to what they perceived to be the will of the current Congress, rather than that of a long-gone-by one.”); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1483 (1987) (developing a model of dynamic statutory interpretation under which interpreter strives to reconcile three different perspectives, relating to: (1) the “statutory text”; (2) “the original legislative expectations surrounding the statute’s creation”; and (3) “the subsequent evolution of the statute and its present context, especially the ways in which the societal and legal environment of the statute has materially changed over time”).

<sup>117</sup> In *Burrage* itself, of course, the Court relied in part on the supposed “ordinary meaning” of the words “results from.” See *Burrage v. United States*, 134 S. Ct. 881, 887-88 (2014).

the words by which the incorporation is accomplished. As Judge Leval has said:

As new questions arise [under a statute that incorporates judge-made law dynamically], the courts' answers to these questions should be derived from the same considerations that governed the development of the doctrine, rather than from the words chosen by the legislature to summarize or represent that doctrine. Those words were not intended as exercises of the legislature's power to create law.<sup>118</sup>

This is not to say that the courts, in exercising the power conferred on them through dynamic incorporation, do not (or should not) attend to the statutes in which body of law is incorporated. It is only to say, rather, that the courts' attention to the statutes is not the attention of a "faithful agent" trying to decipher a specific command from his principal.<sup>119</sup> The court's attention to the statutes is instead grounded in a broader concern for the coherence and efficacy of the criminal law as a whole, statutes included.<sup>120</sup> In developing judge-made law, as in interpreting statutes, the court's concern is partly to arrive at a result that will "fit into the legal system of which it is a part."<sup>121</sup> To extend an analogy of Judge Posner's: A platoon commander whose superior tells him to exercise his best judgment in formulating a plan of attack nevertheless will, in formulating this plan, consider what he knows about the positions and movements of other units and about the army's overall battle strategy.<sup>122</sup> This is different, though, from trying to decide what his superior would have done in his place.<sup>123</sup>

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<sup>118</sup> Leval, *supra* note 34, at 197.

<sup>119</sup> See John F. Manning, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1648-53 (2001) (discussing "the faithful agent theory of statutory interpretation").

<sup>120</sup> See Melvin A. Eisenberg, *The Duty to Rescue in Contract Law*, 71 FORDHAM L. REV. 647, 676 (2002) ("[U]nder two ideals for the law, the whole body of law should be coherent. . . . The second ideal is that all the rules that make up the body of the law should be consistent with one another. Attainment of this ideal promotes predictability and evenhandedness, and furthers the legitimacy of the law by demonstrating its rationality. Call this the ideal of systemic consistency.").

<sup>121</sup> Pound, *supra* note 30, at 400 ("In other words, [the common law] should be construed so as to fit into the legal system of which it is a part. Statute and common law should be construed together, just as statute and statute must be.").

<sup>122</sup> See Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 189-90 (1987) (developing platoon-commander hypothetical).

<sup>123</sup> Cf. Strauss, *supra* note 60, at 424-25 (describing civil-law interpretive method of

## III. AN EMPIRICAL INTERLUDE

The threshold question posed by cases like *Burrage* and *Rosemond* — whether courts should rely on dynamic incorporation or some alternative — ultimately is a question about how to interpret the statutes defining offenses.<sup>124</sup> Accordingly, the rule I am proposing is a rule for the interpretation of criminal statutes. As with other general rules for the interpretation of statutes, this rule might be defended in either of two ways. First, it might be defended empirically.<sup>125</sup> One might argue that dynamic incorporation is what legislatures usually expect courts to do when offense-defining criminal statutes leave critical questions from the General Part unanswered.<sup>126</sup> Second, the rule might be defended pragmatically. One might argue that, quite apart from what the legislature expects, dynamic incorporation best promotes the values that usually inform the interpretation of statutes — values like fairness, predictability, and coherence.<sup>127</sup>

My defense of dynamic incorporation will be predominantly pragmatic. On the empirical question, I will limit myself to the very modest claim that dynamic incorporation is at least as empirically defensible as any alternative. The objective of this unambitious strategy is just to “clear the field” for the pragmatic argument: If dynamic incorporation is at least as empirically defensible as any alternative, then it would be impossible to preempt the pragmatic argument with a convincing empirical defense of one of the alternatives.

The best evidence that legislatures expect courts to incorporate dynamically the judge-made law of the General Part is that courts

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“free scientific research,” under which judges fill gaps “by considering whether, in light of the existing practical consequences, the legislature would have been likely to have extended one or another purpose to that case, had it considered the issue”).

<sup>124</sup> See *supra* text accompanying notes 84–89.

<sup>125</sup> See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside — An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 905 (2013) (acknowledging that canons of statutory construction might be grounded in empirical suppositions: “[j]udges might believe that the canons reflect how Congress actually drafts, and therefore that applying them effectuates legislative supremacy”).

<sup>126</sup> See *id.*

<sup>127</sup> *Id.* (acknowledging that canons of construction alternatively “might be understood to effectuate judicial responsibilities that are essentially external to the legislative process — such as advancing constitutional values or furthering the ‘rule of law’ by coordinating systemic behavior or imposing coherence on the [statutes]”); *id.* at 908–09 (acknowledging that canons might be justified on the ground that “judges should interpret statutes in ways that are predictable for systemic actors or in ways that impose coherence on the corpus juris”).

usually do, in fact, incorporate dynamically the judge-made law of the General Part. Admittedly, few cases address the subject of dynamic incorporation directly. Worse, those that do sometimes leave the impression that dynamic incorporation is — as Justice Scalia has said — a “rare” creature.<sup>128</sup> Take *Leegin Creative Leather Products v. PSKS, Inc.*,<sup>129</sup> where the Supreme Court treated the Sherman Act’s use of the phrase “restraint of trade” as effectively authorizing the federal courts to continue to develop the judge-made law of restraint of trade.<sup>130</sup> “[T]he Sherman Act’s use of ‘restraint of trade’ ‘invokes the common law itself . . . not merely the static content that the common law had assigned to the term in 1890,’” said Justice Kennedy in his opinion for the Court.<sup>131</sup> Nothing in Justice Kennedy’s opinion, though, suggests that the phenomenon he describes is a common one. The Sherman Act is, after all, hardly a typical criminal statute.

Where typical criminal statutes are concerned, by contrast, courts more often adapt and develop the judge-made law of the General Part without bothering to explain themselves. *Rosemond* is typical. In *Rosemond*, the Court first summarized the existing judge-made law of accomplice liability, then proceeded unselfconsciously to adapt this law to the distinctive class of offenses represented by 18 U.S.C. § 924(c) — “combination crimes,” as the Court called them.<sup>132</sup> Combination crimes, as the Court explained, “punish[] the temporal and relational conjunction of two separate acts.”<sup>133</sup> Ordinary crimes, by contrast, require only a single act, albeit sometimes in combination with specified “attendant circumstances.”<sup>134</sup> The existing law of accomplice liability is, not surprisingly, adapted to ordinary crimes.<sup>135</sup>

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<sup>128</sup> SCALIA & GARNER, *supra* note 63, at 96 (“[I]t is . . . rare[] for a statute to leave a matter to future common-law development by the courts . . .”).

<sup>129</sup> *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877 (2007).

<sup>130</sup> *See id.* at 888; *see also* SCALIA & GARNER, *supra* 63, at 96.

<sup>131</sup> *Leegin*, 551 U.S. at 888 (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988)); *see also* *Bus. Elecs. Corp.*, 485 U.S. at 732 (“The Sherman Act adopted the term ‘restraint of trade’ along with its dynamic potential.”).

<sup>132</sup> *Rosemond v. United States*, 134 S. Ct. 1240, 1248-51 (2014).

<sup>133</sup> *Id.* at 1248.

<sup>134</sup> *See* MODEL PENAL CODE & COMMENTARIES § 1.13(9), at 209 (1985) (defining “element of an offense” to encompass any “attendant circumstance” included in the offense definition); Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts III & IV*, 87 COLUM. L. REV. 920, 932-33 (1987) (“Synthesizers of the common-law tradition tell us that the core of any definition of crime is a particular act or omission. That act or omission is conceived as taking place in an instant of time so precise that it can be associated with a particular mental state of intention, awareness of risk, or neglect of due care.”).

<sup>135</sup> The drafters of the Model Penal Code struggled with (but ultimately were

Accordingly, the Court in *Rosemond* was forced to adapt this existing law — and to make new law — when it concluded that “[a]n active participant in a drug transaction has the intent needed to aid and abet a § 924(c) violation when he knows that one of his confederates will carry a gun.”<sup>136</sup> Still more clearly did the Court make law when it concluded — in a six-paragraph analysis bereft of citation to authority — that the “defendant’s knowledge of a firearm must be advance knowledge.”<sup>137</sup>

What the Court did in *Rosemond* really could only be explained on the theory that 18 U.S.C. § 2 dynamically incorporated the judge-made law of the General Part. That the Court did not feel compelled to invoke dynamic incorporation — as it had in *Leegin Creative Leather Products*, say — is itself very telling. What it suggests, specifically, is that judges view their reliance upon and development of General Part doctrines as so routine as to require no explanation. The relative ordinariness of this sort of lawmaking was nicely captured in a 2004

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unable to resolve) the question of what culpable mental state is required of accomplices with respect to “attendant circumstance” elements. See MODEL PENAL CODE & COMMENTARIES § 2.06 cmt. 6(b) & n.37 at 310-11 (“There is deliberate ambiguity as to whether the purpose requirement extends to circumstance elements of the contemplated offense . . .”). The drafters appear not even to have considered, though, what would be required of accomplices with respect to crimes designed to “punish the temporal and relational conjunction of two separate acts.” See *Rosemond*, 134 S. Ct. at 1248.

<sup>136</sup> *Rosemond*, 134 S. Ct. at 1249. In reaching this conclusion, the Court relied, for example, on *Pereira v. United States*, 347 U.S. 1 (1954), where the Court had developed the principles of accomplice liability in relation to the offense of mail fraud. See *id.* Mail fraud is not a “combination crime,” however. Mail fraud requires simply that the defendant “having devised or intending to devise any scheme or artifice to defraud, use[] the mail ‘for the purpose of executing such scheme or artifice or attempting so to do.’” See *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 647 (2008) (quoting 18 U.S.C. § 1341 (2006)).

<sup>137</sup> *Rosemond*, 134 S. Ct. at 1249-51. In resorting to dynamic judge-made law on the subject of culpable mental states, the Court participated in a rich tradition whose origin often is traced to *Morrisette v. United States*. See *Morrisette v. United States*, 342 U.S. 246 (1952); see also Eric A. Johnson, *Rethinking the Presumption of Mens Rea*, 47 WAKE FOREST L. REV. 769, 770 (2012). In *Morrisette*, the Court said the judge-made law governing the assignment of culpable mental states to offense elements was not “static or settled” but evolving:

Neither this Court nor, so far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not. We attempt no closed definition, for the law on the subject is neither settled nor static.

*Morrisette*, 342 U.S. at 260.

article by Judge Leval, where he explained the basics of statutory interpretation before turning to his real subject, trademark.<sup>138</sup> Statutes, he said, are of two kinds: “micromanager statutes” and “delegating statutes.”<sup>139</sup> The class of delegating statutes includes “statutes adopting common law.”<sup>140</sup> Among these, said Judge Leval, are many criminal statutes, in which a single word “may stand for the full complexity of the doctrine’s development.”<sup>141</sup> The incorporation of these common-law terms in the statute does not foreclose their development by judges. Rather, according to Judge Leval, the “statute preserves in the court the function by which it developed the body of rules newly given statutory recognition.”<sup>142</sup>

The routineness of judicial gap-filling in relation to the General Part also is nicely captured by the Supreme Court’s opinion in *Rogers v. Tennessee*.<sup>143</sup> In *Rogers*, the question facing the Court was whether the Due Process Clause foreclosed the retroactive application to petitioner Rogers himself of a new holding by the Tennessee state courts on the subject of causation.<sup>144</sup> In addressing this due process question, the Supreme Court explained how state courts make law in relation to General-Part issues like “causation and intent.”<sup>145</sup> It said that the state courts’ efforts to resolve the causation question in *Rogers* “involve[d] not the interpretation of a statute but an act of common law

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<sup>138</sup> Leval, *supra* note 34, at 195-96.

<sup>139</sup> *Id.* at 196.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 197. What Judge Leval had in mind, specifically, was statutes that use words like “murder, larceny, embezzlement” to stand in for a detailed definition of the offense. *Id.* Probably the better view, though, is that terms like these accomplish a “static incorporation,” rather than a dynamic one. See *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160 (1820) (Story, J.). Judge Leval’s observation nevertheless is true of “single words” like “caused,” “intended,” and “knew.”

<sup>142</sup> Leval, *supra* note 34, at 197; see also Julie R. O’Sullivan, *The Federal Criminal “Code” Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 667 (2006) (“Given the complete lack of definition in some important federal statutes, courts are in fact engaging in lawmaking in determining that such statutes in fact apply to varied fact situations when the statutes themselves do not in any intelligible terms speak to those situations.”).

<sup>143</sup> See *Rogers v. Tennessee*, 532 U.S. 451, 461-62 (2001).

<sup>144</sup> The Tennessee courts had abrogated the so-called “year-and-a-day rule,” under which the actor’s conduct will not be treated as a proximate cause of the victim’s death if the death occurred more than a year and a day after the conduct. See *id.* at 453-54; see also LAFAYE, CRIMINAL LAW, *supra* note 23, § 6.4(i), at 378 (identifying the year-and-a-day rule as an aspect of the law of causation, and observing that “[t]he great majority of states . . . have abrogated the rule, judicially or legislatively”).

<sup>145</sup> *Rogers*, 532 U.S. at 461.

judging.”<sup>146</sup> Moreover, this common-law judging, the Court said, involves “fashioning and refining the law . . . in light of reason and experience.”<sup>147</sup> Accordingly, in addressing the due process question, the Court emphasized the importance of extending to state courts “the substantial leeway they must enjoy as they engage in the daily task of formulating and passing upon criminal defenses and interpreting such doctrines as causation and intent, reevaluating and refining them as may be necessary to bring the common law into conformity with logic and common sense.”<sup>148</sup>

Not only do courts routinely make law in relation to General-Part subjects like causation and intent, legislatures also appear to expect them to do so. Records from state and federal recodification efforts of the 1960s and 1970s reflect the drafters’ recognition that the alternative to codification of General-Part doctrine was the continued development of judge-made law. For example, when the drafters of the New Jersey Penal Code explained their decision to codify much of the General Part, they acknowledged that the courts traditionally had been responsible for development of the General Part — and had “done well to keep the common law alive and fluid in these areas.”<sup>149</sup> The drafters concluded, though, that “a more adequate job can be done by moving them into the area of legislative responsibility.”<sup>150</sup> The Brown Commission’s 1970 study draft for a revised federal criminal code likewise acknowledged that the alternative to comprehensive legislation on the subjects of the General Part was to leave these subjects for “disposition by judges.”<sup>151</sup>

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 462.

<sup>148</sup> *Id.* at 461-62.

<sup>149</sup> See N.J. CRIMINAL LAW REVISION COMM’N, VOLUME I: REPORT AND PENAL CODE — FINAL REPORT OF THE NEW JERSEY CRIMINAL LAW REVISION COMMISSION, at ix (1971).

<sup>150</sup> *Id.*

<sup>151</sup> See NAT’L COMM’N ON REFORM OF FED. CRIMINAL LAWS, STUDY DRAFT OF A NEW FEDERAL CRIMINAL CODE, at xxi (1970) (statement of Edmund G. Brown, Chairman). Professor Peter Strauss also addressed this subject in his written comments to the Senate Judiciary Committee on the proposed federal criminal code. See *Reform of the Federal Criminal Laws: Hearing Before the Subcomm. on Criminal Laws and Procedures of the S. Comm. on the Judiciary*, 92d Cong. 1924-25 (1972) [hereinafter *Reform Hearing*] (statement of Peter L. Strauss, Associate Professor of Law, Columbia University). Strauss told the committee that the absence from the draft code of a comprehensive definition of causation suggested “that the drafters meant to leave to judges the definition of [some] circumstances in which causation is present.” *Id.* at 1924. “To leave this or other similar matters partially in judicial hands is in a significant way to give up the [codification] enterprise.” *Id.*

Some legislatures, including Congress, ultimately abandoned in whole or in part their efforts to codify the principles of the General Part.<sup>152</sup> In abandoning these efforts, though, as in initiating these efforts, the legislatures appear to have been aware that the alternative to codification was continued judicial development of General-Part doctrine.<sup>153</sup> In 1980, for example, when the House Judiciary Committee explained its decision not to pursue further the codification of principles governing causation, it said: “The Committee . . . intends that issues involving causation continue to be resolved according to the principles developed through the common law. *See generally* R. Perkins, *Criminal Law* 685-738 (2d ed. 1969); W. LaFare & A. Scott, *Criminal Law* 246-67 (1972).”<sup>154</sup>

Probably the best evidence of how legislatures think about these issues is supplied by the Model Penal Code’s commentaries, which often have served as a starting point for the adoption and revision of criminal codes.<sup>155</sup> As Paul Robinson has said, the Model Penal Code’s commentaries “provide what is sometimes the only source of legislative history for many state code provisions.”<sup>156</sup> It is significant, then, that the Model Penal Code’s commentaries unambiguously reveal the drafters’ assumption that General-Part questions left unaddressed by legislatures would be resolved by judges. For example, according to the Model Penal Code’s commentaries, the effect of an incomplete legislative definition of causation is that the law of causation is “left to judicial development.”<sup>157</sup> Likewise, the effect of indeterminacy in the Model Penal Code’s own definitions of

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<sup>152</sup> *See* MODEL PENAL CODE & COMMENTARIES § 2.03 cmt. 5 at 265 (1985) (“In the majority of the jurisdictions that have adopted or considered revised codes, no explicit provision on causation has been included . . .”); Robinson, *supra* note 41, at 228 (“The current federal criminal ‘code’ . . . has essentially no General Part.”).

<sup>153</sup> *See* MODEL PENAL CODE & COMMENTARIES § 2.03 cmt. 5 at 265 (explaining that some state legislatures, in deciding not to adopt a general definition of causation, had made an “explicit . . . judgment that statutory treatment would not significantly aid judges and juries in resolving issues treated as questions of causation under the common law”).

<sup>154</sup> H.R. REP. NO. 96-1396, at 12 (1980).

<sup>155</sup> *See* DRESSLER & GARVEY, *supra* note 29, at 5 (“[T]he Commentaries to the specific provisions of the Model Penal Code have shaped the reform debate in many state legislatures.”). Interestingly, Justice Scalia’s opinion for the Court in *Burrage* relied on the “legislative history” of the Model Penal Code in concluding that the causation element in 21 U.S.C. § 841(b)(1)(C) is not satisfied by proof of contribution. *See Burrage v. United States*, 134 S. Ct. 881, 890 (2014).

<sup>156</sup> ROBINSON, *supra* note 29, at 92.

<sup>157</sup> MODEL PENAL CODE & COMMENTARIES § 2.03 cmt. 5 at 265 (describing the effect of an incompletely specified definition of causation).



“negligence” and “recklessness” is “to leave the [undetermined] issue to the courts.”<sup>158</sup> The same is true, finally, of a “deliberate ambiguity” in the Model Penal Code’s own accomplice-liability and conspiracy provisions: The unresolved issue is “to be left to resolution by the courts.”<sup>159</sup>

In summary, the evidence suggests both: (1) that courts routinely make law in relation to General-Part subjects, albeit without explicitly invoking the idea of dynamic incorporation; and (2) that drafters of criminal codes probably expect the courts to make law on these subjects, at least when the code itself fails exhaustively to treat the subjects. This evidence probably would not suffice to sustain a purely empirical argument for the proposed dynamic-incorporation default rule.<sup>160</sup> But it does suffice, I think, to show that no one is likely to mount a convincing empirical defense of the alternative approaches.

#### IV. WHY THE ALTERNATIVES TO DYNAMIC INCORPORATION AREN’T WORKABLE

When faced with a statutory gap of the kind present in *Burrage* or *Rosemond*, the judge has to do *something*, needless to say. The choice facing the judge can usefully be thought of as a choice between dynamic incorporation and several alternatives. In what follows, I will compare dynamic incorporation to the available alternatives. None of these alternatives, I will argue, really is workable.

##### A. Refusing to Elaborate on the Statute’s Elements

One alternative to dynamic incorporation would be for judges to pass along to juries the questions left unanswered by the legislature. Under this alternative, judges would instruct juries using only the terms of the statute, without defining or elaborating on those terms. If the trial court had taken this approach in the *Burrage* case, for example, it would have instructed the jury only that the prosecution

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<sup>158</sup> *Id.* § 2.02 cmt. 4 at 240-42.

<sup>159</sup> *Id.* § 2.06 cmt. 6(b) & n.37 at 310-11; see also *id.* § 2.06 cmt. 9(b) at 325 (“To seek a systematic legislative resolution of these issues [i.e., what counts as conduct inevitably incidental to a substantive offense] seems a hopeless effort; the problem must be faced and weighed as it arises in each situation.”); *id.* § 5.03 cmt. 2(c)(iii) at 415-18.

<sup>160</sup> Gluck and Bressman’s recent two-part empirical study of congressional drafting shows what a truly convincing empirical defense of an interpretive canon would look like, and how far short defenses like mine really fall. See Gluck & Bressman, *supra* note 125; Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside — An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 *STAN. L. REV.* 725 (2014).

was required to prove that the victim's death had "result[ed] from" his ingestion of the heroin supplied by Burrage.<sup>161</sup> This alternative probably is more appealing in relation to causation than in relation to most other offense requirements. As H.L.A. Hart and Tony Honoré have said, causation elements are designed — at least in some measure — to capture "the plain man's notions of causation."<sup>162</sup> If causation elements really are designed to capture "the plain man's notions of causation," then perhaps the legislature's design would best be achieved by permitting jurors to bring their own notions of causation to bear in deciding whether the defendant "caused" the result.

This appears to be roughly the view taken by Judge Posner in *United States v. Hatfield*.<sup>163</sup> In *Hatfield*, the question for the U.S. Court of Appeals for the Seventh Circuit was whether the trial judge had misinstructed the jury on the "results from" element of 21 U.S.C. § 841(b)(1)(C)<sup>164</sup> — the very causation requirement that would later be addressed by the Supreme Court in *Burrage*.<sup>165</sup> Writing for the Seventh Circuit panel, Judge Posner said that the defendant's objection to the trial judge's instructions "was well taken."<sup>166</sup> But he also said that the judge probably would have been justified in instructing the jury merely to decide whether the victim's death had resulted from the drugs supplied by the defendant.<sup>167</sup> The trouble with the trial judge's jury instructions, said Judge Posner, lay in what the trial judge had added to the phrase "result[ed] from."<sup>168</sup> The statute's language itself, he said, was "a good deal clearer than the addition and probably clear enough."<sup>169</sup>

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<sup>161</sup> The statute applied in *Burrage*, 21 U.S.C. § 841(b)(1)(C), imposes an enhanced sentence where the victim's death "results from" his or her use of the drugs supplied by the defendant. *Burrage v. United States*, 134 S. Ct. 881, 887 (2014).

<sup>162</sup> H.L.A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* 1 (2d ed. 1985) ("[I]t is the plain man's notions of causation (and not the philosopher's or the scientist's) with which the law is concerned . . .").

<sup>163</sup> See *United States v. Hatfield*, 591 F.3d 945 (7th Cir. 2010). Interestingly, during oral argument in *Burrage*, government attorney Benjamin Horwich said, in response to a question by Chief Justice Roberts: "[W]e don't disagree that a court could just use the unadorned statutory language." Transcript of Oral Argument at 46, *Burrage*, 134 S. Ct. 881 (No. 12-7515), 2013 WL 6908198.

<sup>164</sup> *Hatfield*, 591 F.3d at 947.

<sup>165</sup> See *Burrage*, 134 S. Ct. at 887.

<sup>166</sup> *Hatfield*, 591 F.3d at 949.

<sup>167</sup> See *id.*

<sup>168</sup> *Id.* at 949-50.

<sup>169</sup> *Id.* at 949. In a later decision, a different Seventh Circuit panel suggested, somewhat oddly, that Judge Posner's simplification proposal was directed only to the question of proximate cause, not to the question of factual cause: "In a recent opinion,

In arriving at this conclusion, Judge Posner didn't suggest that the notion of causation is so easily grasped as to require no definition. To the contrary, Judge Posner acknowledged that the requirement of causation, despite having played an important part in the law "for centuries," nevertheless "continues to confuse lawyers."<sup>170</sup> He attributed much of the blame for this confusion to judges' past efforts to define the term.<sup>171</sup> But he argued, finally, that the cure for these difficulties was not a renewed effort by courts to define causation aright but, rather, abandonment of the definitional enterprise altogether:

Elaborating on a term often makes it less rather than more clear (try defining the word "time" in a noncircular way); it is on this ground that some courts, including our own, tell district judges not to try to explain to a jury the meaning of "beyond a reasonable doubt." Probably the same is true of "results from."<sup>172</sup>

Judge Posner's proposal has two serious shortcomings, both of which bear on the general viability of refusing-to-elaborate as an alternative to dynamic incorporation. First, Judge Posner's proposal would violate the reasonable-doubt standard. The reasonable-doubt standard requires, of course, that the judge instruct the jury on every offense requirement,<sup>173</sup> including those that are difficult to articulate. Accordingly, if causation elements require something in particular — if they require but-for causation, for example, or causal "proximity" — then that particular requirement must be communicated to the jury. As it happens, even Judge Posner concedes that causation elements require something in particular. In *Hatfield*, for example, Judge Posner

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this court has stated that in determining whether 'death results from' distribution of a drug under 21 U.S.C. § 841(b)(1)(C), the government must prove at a minimum 'but for' causation — that is, that the death or injury would not have occurred had the drugs not been ingested. Beyond that minimum causation, the court said, it is not clear what 'results from' might mean. Elaborating on the term in a jury instruction, the court concluded, most likely makes it more rather than less clear." *United States v. Krieger*, 628 F.3d 857, 870 (7th Cir. 2010) (citations omitted).

<sup>170</sup> *Hatfield*, 591 F.3d at 947.

<sup>171</sup> *See id.*

<sup>172</sup> *Id.* at 949-50 (citations omitted). Justice Traynor took a somewhat more optimistic view of the difficulties associated with defining causation: "In all probability the general expectation is the reasonable one that in time the courts will dispel the mists that have settled on the doctrine of proximate cause in the field of negligence." *Mosley v. Arden Farms Co.*, 157 P.2d 372, 377 (Cal. 1945) (Traynor, J., concurring).

<sup>173</sup> *See Appendi v. New Jersey*, 530 U.S. 466, 476-77 (2000).

said that causation requires by way of “legal cause” that the charged conduct “increase the risk that *this* sort of mishap would occur.”<sup>174</sup> He also said that causation requires at least but-for causation. The but-for test, he said, defines “the minimum concept of cause.”<sup>175</sup>

The jury instructions endorsed by Judge Posner in *Hatfield* — using just the words “resulted from” or “caused” — would not reliably communicate to jurors the requirement of but-for causation, or any other particular requirement, for that matter.<sup>176</sup> There is strong evidence, both in the cases and in the psychology literature, that the but-for test doesn’t “reflect[] what people actually do” in making causation judgments.<sup>177</sup> For example, participants in a 1998 study by Erich Greene and John Darley sometimes assigned causal responsibility even in cases of “preempted causation,” where the actor’s conduct, though it would have been sufficient to cause the result, was entirely preempted by some other event.<sup>178</sup> Other studies have shown, as has the case law,<sup>179</sup> that laypeople and even judges often assign causal responsibility in cases of “causal overdetermination,” where the actor’s conduct contributes to the causal mechanism underlying the result but his contribution was, or might have been, unnecessary.<sup>180</sup>

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<sup>174</sup> *Hatfield*, 591 F.3d at 948-49.

<sup>175</sup> *Id.* at 948.

<sup>176</sup> They would not convey, for example, the rules governing “accelerated harm.” See David J. Karp, *Causation in the Model Penal Code*, 78 COLUM. L. REV. 1249, 1262-63 (1978) (describing the “problem of accelerated harm”). Nor would they convey the traditional requirement of “proximate cause.” See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 263-64 (5th ed. 1984) (exploring difficulties associated with the definition of proximate cause).

<sup>177</sup> Barbara A. Spellman & Alexandra Kincannon, *The Relation Between Counterfactual (“but for”) and Causal Reasoning: Experimental Findings and Implications for Juror’s Decisions*, 64 LAW & CONTEMP. PROBS. 241, 254 (2001).

<sup>178</sup> Erich J. Greene & John M. Darley, *Effects of Necessary, Sufficient, and Indirect Causation on Judgments of Criminal Liability*, 22 LAW & HUM. BEHAV. 429, 445 (1998) (“[A]s predicted, our respondents assign liability above attempted murder liability for actions on the part of the perpetrator which were sufficient to bring about the death of the victim. This was true even when the actions of the perpetrator, due to circumstances that caused the chain of events to deviate from its normal course, did not actually bring about the victim’s death.”).

<sup>179</sup> See Eric A. Johnson, *Criminal Liability for Loss of a Chance*, 91 IOWA L. REV. 59, 61 (2005) (showing that appellate courts often uphold convictions in cases of “causal overdetermination,” where the government’s evidence shows only that “the victim *might* not have died but for the defendant’s conduct,” not that “the victim *would* not have died”).

<sup>180</sup> See Spellman & Kincannon, *supra* note 177, at 254 (“Our conclusion is that subjects are not using ‘but for’ reasoning to attribute causality to these cases [of multiple sufficient causation].”); see also Greene & Darley, *supra* note 178, at 446

Judge Posner's proposed instruction would fail, then, to convey to jurors what even he concedes are critical components of the causation requirement. And so it would violate the reasonable-doubt standard.<sup>181</sup> The same concern often will undercut refusal-to-elaborate as an alternative to dynamic-incorporation, moreover. A court is justified in refusing to elaborate on a fuzzy general requirement like causation only if the court is willing to relinquish, as Judge Posner was not, any substantive commitments concerning the requirement's content.

Even if Judge Posner were prepared to abandon the idea that causation elements require something in particular — but-for causation, for example, or proximate cause — his approach still would be profoundly problematic. The trouble is that application of the causation requirement would vary widely, and randomly, from jury to jury, case to case. Some jurors would require, as Judge Posner would, both but-for factual causation and a separate showing that the actor's conduct increased the risk of just this sort of mishap. Other jurors would be satisfied by even the slightest, most attenuated causal contribution. This kind of variation from case to case is dangerous, as Justice Thurgood Marshall has said.<sup>182</sup> Vague or indeterminate offense-definitions “impermissibly delegate[] basic policy matters to . . . juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”<sup>183</sup> As Justice

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(concluding that experimental subjects assigned more weight to causal “contribution” than to “necessity,” and in any event did not view necessity as “dichotomous”).

<sup>181</sup> Other courts overwhelmingly have rejected Judge Posner's approach. See, e.g., *Kibbe v. Henderson*, 534 F.2d 493, 498 n.6 (2d Cir. 1976) (“The complexity of the definition of legal causation . . . demonstrates that an explanation of the concept of intervening and supervening cause would have been not merely helpful . . . but essential to the jury's determination here.”), *rev'd on other grounds*, 431 U.S. 145 (1977); *People v. Bland*, 48 P.3d 1107, 1121 (Cal. 2002) (“The Attorney General argues the trial court had no sua sponte duty to define proximate causation. We disagree.”); *People v. Schaefer*, 703 N.W.2d 774, 788 (Mich. 2005) (“[W]e conclude that the trial court erred [in failing to define ‘cause’] because the word ‘cause’ . . . is a legal term of art normally not within the common understanding of jurors, and thus, simply reading the statute to the jury was insufficient. The jury could not be expected to understand that the statute required the prosecutor to prove *both* factual causation and proximate causation.”); *State v. Nelson*, 806 N.W.2d 558, 565 (Minn. Ct. App. 2011) (“The district court abused its discretion . . . by refusing to include in the jury instructions a definition of causation that referenced the substantial factor test, which requires appellant's conduct to have played a substantial part in bringing about Carlson's death.”).

<sup>182</sup> See *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972).

<sup>183</sup> *Id.*; see also *United States v. Kozminski*, 487 U.S. 931, 950 (1988) (observing that the effect of a broad definition of “involuntary servitude” would be to “delegate to prosecutors and juries the task of determining what working conditions are so

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Marshall's statement implies, the trouble with indeterminate offense-requirements isn't just that the outcomes will be random; it's that outcomes will be influenced by extraneous factors.

As it happens, the causation issue nicely illustrates Justice Marshall's point: Strong empirical evidence shows that people's judgments about causation often are influenced by factors that don't bear on causation at all — factors that have nothing to do with “necessity, sufficiency, or proximity,” that is.<sup>184</sup> Psychologist Mark Alicke conducted an experiment designed to test whether factfinders' “causal judgments are conflated with ascriptions of blameworthiness.”<sup>185</sup> Participants in the study considered a hypothetical scenario in which the main character, John, hit another car at an intersection, resulting in injuries to the other driver.<sup>186</sup> The principal variable in the experiment was John's motive.<sup>187</sup> Participants were told either: (1) that John was speeding so that he would arrive home in time to hide an anniversary present from his parents; or (2) that John was speeding so that he would arrive in time to hide a vial of cocaine from his parents.<sup>188</sup>

As it turned out, this variable had a large effect on the participants' causal ascriptions: “John was more frequently cited as a cause of the accident when his motive was to hide a vial of cocaine than [he] was when his motive was to hide an anniversary gift from his parents.”<sup>189</sup> From a legal perspective, this result is doubly troubling. Not only does John's motive for speeding have nothing to do with causation; it also has nothing to do, really, with legal culpability. After all, neither hiding a present nor hiding cocaine would justify the risks associated with speeding.<sup>190</sup> So John's legal culpability is the same in both scenarios. The difference between the two scenarios really is more about John's character than about his blameworthiness. And indeed other empirical evidence supports the view that a factfinder's “perceptions of a transgressor's moral character can influence

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oppressive as to amount to involuntary servitude”).

<sup>184</sup> Mark D. Alicke, *Culpable Causation*, 63 J. PERSONALITY & SOC. PSYCHOL. 368, 369 (1992).

<sup>185</sup> *Id.*

<sup>186</sup> *See id.*

<sup>187</sup> *See id.*

<sup>188</sup> *See id.*

<sup>189</sup> *Id.* at 370.

<sup>190</sup> *See* MODEL PENAL CODE & COMMENTARIES § 2.02 cmts. 3, 4 at 236-44 (explaining that the Code's influential definitions of recklessness and criminal negligence both require the fact finder to balance the risk posed by the conduct against the countervailing benefits).

judgments of . . . causation.”<sup>191</sup> Not only will causal ascriptions vary widely from case to case, then, they’ll vary on the basis of factors — past criminal history, for example — that ought not to bear on the jury’s judgment at all.

It probably isn’t possible to eliminate entirely the danger that jurors’ causal ascriptions will be influenced by extraneous factors. Under dynamic incorporation, though, the danger can be addressed as other similar dangers are addressed in criminal law: by requiring jurors to apply not their own inarticulate intuitions but, rather, specific descriptive rule-like tests.<sup>192</sup> The predictability and structure provided by these tests outweigh even the possibility that they capture less-than-perfectly our shared intuitions about the metaphysics of causation. Justice Scalia said in *Burrage* that the government’s contribution test, for all its metaphysical accuracy, nevertheless would have left judges and jurors “to guess” about the element of causation.<sup>193</sup> And he said that “[u]ncertainty of that kind cannot be squared with the beyond-a-reasonable-doubt standard applicable in criminal trials or with the need to express criminal laws in terms ordinary persons can comprehend.”<sup>194</sup> Whether this was true of the test proposed by the government in *Burrage* is, I think, open to question. But it is certainly true of the non-test proposed by Judge Posner in *Hatfield*.

### B. Static Incorporation

Another alternative to dynamic incorporation is static incorporation. Static incorporation is what occurs when a statute is interpreted as incorporating a particular body of judge-made law just as it existed on the date the legislature enacted the statute.<sup>195</sup> The theory behind static incorporation is that the enacting legislature “kn[ew] and adopt[ed] the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken” and, therefore, can only have meant to convey the same meaning to judges.<sup>196</sup> The enacting

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<sup>191</sup> Janice Nadler & Mary-Hunter McDonnell, *Moral Character, Motive, and the Psychology of Blame*, 97 CORNELL L. REV. 255, 300 (2012).

<sup>192</sup> *Id.* at 259 (explaining that the criminal law usually “attempts to purge character from its blaming process” by “break[ing] the blaming process into discrete, component parts — such as act, mental state, attendant circumstances, and result — and leav[ing] little room for juror judgments about the defendant’s moral character”).

<sup>193</sup> *Burrage v. United States*, 134 S. Ct. 881, 892 (2014).

<sup>194</sup> *Id.*

<sup>195</sup> See *supra* text accompanying notes 90–96.

<sup>196</sup> *Morissette v. United States*, 342 U.S. 246, 263 (1952); see also SCALIA & GARNER,

legislature “could not have known about future developments in the common law,”<sup>197</sup> of course, unless it was “clairvoyant” or was endowed with “extraordinary foresight.”<sup>198</sup> And so, according to this theory, it wouldn’t make sense to ascribe to the legislature an intent to incorporate a future version of the common law.<sup>199</sup>

Static incorporation has long played an important role in the interpretation of statutes from the criminal law’s Special Part. Congress and state legislatures sometimes have defined specific criminal offenses by using, without elaboration, the name of a particular common-law offense: “murder,” say, or “larceny.”<sup>200</sup> These “single-word” statutes, unlike statutes that use general terms like “cause” and “intent” without elaboration, don’t just fail to define exhaustively the elements of the offense; they fail even to *identify* the elements of the offense.<sup>201</sup> Accordingly, for the sake of giving these single-word statutes a determinate meaning, courts sometimes have read the statutes as if the words of the then-prevailing common-law definition “stood in the text of the act.”<sup>202</sup>

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*supra* note 63, at 78 (explaining the “fixed-meaning canon,” under which “[w]ords must be given the meaning they had when the text was adopted”). Static incorporation played at least a small role in *Burrage*, where Justice Scalia said that the common law’s supposed requirement of but-for causation was “one of the traditional background principles ‘against which Congress legislate[s].’” *Burrage*, 134 S. Ct. at 889.

<sup>197</sup> Achtenberg, *supra* note 31, at 525-26 & n.213.

<sup>198</sup> *Id.* at 526 n.213; *see also* *Briscoe v. LaHue*, 460 U.S. 325, 355 n.15 (1983) (Marshall, J., dissenting) (remarking that Congress would have needed to be “clairvoyant” to have anticipated post-enactment developments in the common law); *Smith v. Wade*, 461 U.S. 30, 66 (1981) (Rehnquist, J., dissenting) (remarking that Congress would have needed “extraordinary foresight” to have anticipated post-enactment developments in the common law).

<sup>199</sup> *See* Nelson, *supra* note 51, at 663 (“[I]f the unwritten law matters only because a statute has incorporated it (as in the federal model), courts may well assume that the incorporation was ‘static’ rather than ‘dynamic’ — with the result that cases arising under the statute will be decided according to the background doctrines of unwritten law that existed *when the statute was enacted*.”).

<sup>200</sup> *See* LAFAVE, CRIMINAL LAW, *supra* note 23, § 14.1(b), at 767 (“Several states have statutes that punish murder but do not undertake to define murder and thus adopt the common law definition of murder, including its various types.”).

<sup>201</sup> *See* Leval, *supra* note 34, at 197.

<sup>202</sup> *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160 (1820) (Story, J.). It is doubtful whether courts would be justified in treating even offense-defining words like “murder” and “larceny” as effecting a dynamic incorporation. *Contra* Leval, *supra* note 34, at 197 (“A single word . . . may stand for the full complexity of the doctrine’s development.”). Use of dynamic incorporation in this context would not be justified for the sake of preserving the criminal law’s doctrinal systematicity. *See infra* text accompanying notes 204–23. Moreover, delegating to judges of the very task of identifying the elements of a criminal offense is different, and more problematic, than



Whatever its virtues as a methodology of the Special Part, however, static incorporation isn't workable as a methodology of the General Part. If static incorporation were consistently applied to the doctrines of the General Part, the whole idea of a General Part would collapse, since every offense-defining statute would incorporate a slightly different version of the complex doctrines that compose the General Part. The common law evolves over time, as everyone agrees.<sup>203</sup> Because the common law evolves over time, the "common-law background" for a statute enacted in, say, 1912, is different from the "common-law background" for a statute enacted in 1948. Both, in turn, are different from the "common-law background" for a statute enacted in 1985. Under a static-incorporation theory, the content of General-Part doctrines — causation, for example, or the voluntary act requirement — would vary depending on exactly when Congress had enacted the particular offense-defining statute being applied.

The proliferation of different versions of, say, the causation requirement would make the criminal law harder for courts to apply — and harder too for citizens to understand and predict. Causation, like most other General-Part subjects, is extremely complex. Part of what makes the criminal law relatively manageable is that causation and other General-Part subjects, if complex, at least are the same for every offense in the relevant code.<sup>204</sup> If, for example, you understand how to apply the causation element of criminal mischief, then you also

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delegating to them the task of fine-tuning those elements. See *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring) ("It is the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people."); Kahan, *Lenity*, *supra* note 103, at 419 ("Even when it enacts incompletely specified criminal statutes, Congress ordinarily addresses matters of substantial political importance."); Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 416 (2008) ("Congress itself must resolve the critical, constitutive questions, though it may leave the details of implementation to its delegate."); Strauss, *supra* note 60, at 428 ("[Criminal] statutes must be definite enough to make the citizen aware that his conduct is of questionable legality, but they may also be general enough to permit judges to adjust them to changing circumstances in accordance with their purpose.").

<sup>203</sup> See *Rogers v. Tennessee*, 532 U.S. 451, 461 (2001) ("Strict application of *ex post facto* principles [to judge-made criminal law] would . . . impair the incremental and reasoned development of precedent that is the foundation of the common law system. The common law, in short, presupposes a measure of evolution that is incompatible with stringent application of *ex post facto* principles.").

<sup>204</sup> See MOORE, *supra* note 82, at 4 ("The criminal law . . . needs some structure if its codification is to be possible and if adjudication under such codes is to be non-arbitrary. More specifically, it needs some general doctrines — doctrines applying to all types of action prohibited by a criminal code — in order to avoid an ungodly redundancy and a woeful incompleteness.").

understand how to apply the causation element of vehicular manslaughter. Consistent application of static incorporation would change this. For every hard question about causation, or about the voluntary act requirement, judges would be required to formulate “7,000 distinct answers” — one for every offense in the code.<sup>205</sup>

This isn’t an entirely novel point. In *Dixon v. United States*,<sup>206</sup> three Supreme Court Justices wrote separate opinions rejecting static incorporation (or at least the traditional date-of-enactment version of static incorporation<sup>207</sup>) as a methodology of the General Part. The petitioner in *Dixon* was Keshia Dixon, who had raised a duress defense at her trial on firearms charges under 18 U.S.C. § 922.<sup>208</sup> The question that eventually reached the Supreme Court was which party should have borne the burden of persuasion in connection with the duress defense.<sup>209</sup> In addressing this question, Justice Stevens’s majority opinion focused mostly on the state of the common law in 1968, when Congress enacted § 922.<sup>210</sup> Justice Stevens appeared to assume that Congress, when it enacted § 922, had meant to incorporate whatever version of the duress defense then was current.<sup>211</sup> The Court was required, he said, to “determine what that defense would look like as Congress ‘may have contemplated’ it.”<sup>212</sup>

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<sup>205</sup> See *id.* (“[U]nstructured codes require judges to develop 7,000 distinct answers to what is commonly called the ‘unit of offence’ problem.”); see also ROBINSON, *supra* note 29, at 70 (“To understand fully each offense definition in the Special Part, several General Part provisions must be consulted.”).

<sup>206</sup> *Dixon v. United States*, 548 U.S. 1 (2006).

<sup>207</sup> In his concurring opinion in *Dixon*, Justice Alito rejected the usual date-specific version of static incorporation but offered his own innovative version of static incorporation. He argued, without any real support (or even any citation), that “the burdens should remain where they were when Congress began enacting federal criminal statutes,” namely, in 1790. *Id.* at 19; see *An Act for the Punishment of Certain Crimes Against the United States*, ch. 9, 1 Stat. 112, 112-19 (1790). Justice Alito’s version of static incorporation lacks the commonsense appeal of the date-specific version. See *supra* text accompanying notes 195–99. There is no good reason to believe that legislatures usually mean to incorporate the common law of 1790 when they adopt criminal statutes. And there is good reason to think they do not. Cf. Oliver Wendell Holmes Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897) (“It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.”).

<sup>208</sup> See *Dixon*, 548 U.S. at 3-4.

<sup>209</sup> See *id.* at 5.

<sup>210</sup> See *id.* at 12-14; see also *id.* at 16 (“[N]o such consensus existed when Congress passed the Safe Streets Act in 1968.”).

<sup>211</sup> See *id.* at 12-14.

<sup>212</sup> *Id.* at 13 (quoting *United States v. Oakland Cannabis Buyers Coop.*, 532 U.S. 483, 491 n.3 (2001)).

Three Justices wrote separately, and all three rejected Justice Stevens's date-of-enactment version of static incorporation. In his concurring opinion, Justice Kennedy criticized as "altogether a fiction" the presumption at work in the majority opinion — that Congress always means to incorporate the version of the criminal common law that is in effect when it adopts a particular offense-defining statute.<sup>213</sup> The trouble with this presumption, he said, is that its effect would be to make the duress defense vary from statute to statute: "It seems unlikely . . . that Congress would have wanted the burden of proof for duress to vary from statute to statute depending upon the date of enactment."<sup>214</sup> In place of Justice Stevens's theory of static incorporation, Justice Kennedy articulated, albeit very briefly, something like a theory of dynamic incorporation.<sup>215</sup>

Justice Breyer took roughly the same tack in his dissenting opinion, which was joined by Justice Souter. Like Justice Kennedy, Justice Breyer argued that it was unrealistic to suppose that Congress meant the duress defense to vary from statute to statute depending on when the statute was enacted: "To believe that Congress intended the placement of such burdens to vary from statute to statute and time to time is both unrealistic and risks unnecessary complexity, jury confusion, and unfairness."<sup>216</sup> The better approach, he said, was to "assume instead that Congress' silence typically means that Congress expected the courts to develop burden rules governing affirmative defenses as they have done in the past, by beginning with the common law and taking full account of the subsequent need for that law to evolve through judicial practice . . ."<sup>217</sup>

In his own concurring opinion, Justice Alito — who was joined by Justice Scalia — rejected the dynamic theories of Justices Kennedy and Breyer.<sup>218</sup> But he joined Justices Kennedy and Breyer in criticizing the date-of-enactment version of static incorporation.<sup>219</sup> Justice Alito particularly emphasized the practical difficulties that would arise if the

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<sup>213</sup> *See id.* at 18 (Kennedy, J., concurring).

<sup>214</sup> *Id.*

<sup>215</sup> *See id.* ("Absent some contrary indication in the statute, we can assume that Congress would not want to foreclose the courts from consulting these newer [post-enactment common-law] sources and considering innovative arguments in resolving issues not confronted in the statute and not within the likely purview of Congress when it enacted the criminal prohibition applicable in the particular case.")

<sup>216</sup> *Id.* at 21 (Breyer, J., dissenting).

<sup>217</sup> *Id.* at 22.

<sup>218</sup> *See id.* at 19-20 (Alito, J., concurring).

<sup>219</sup> *See id.*

law of duress were tied to the state of the common law on the date when Congress enacted a particular offense-defining statute. “Such a methodology would,” he said, “create serious problems for the district courts and the courts of appeals when they are required to decide where the burden of persuasion should be allocated for federal crimes enacted on different dates.”<sup>220</sup> Imagine the confusion that would arise, he said, if a defendant were charged under two statutes enacted on different dates; the jury might well be required to allocate the burden of proof on duress differently for each offense.<sup>221</sup>

In *Dixon*, of course, the Justices were addressing the narrow question of who bears the burden of proof on the duress defense. But the concerns articulated by the Justices about static incorporation are, if anything, more compelling in relation to questions like causation and aiding and abetting than they are in relation to burden-of-proof issues. The question of who bears the burden of persuasion on the duress defense has just two possible answers. In contrast, the question what the law requires by way of, say, proximate or legal cause has a multitude of answers, each extraordinarily complex.<sup>222</sup> In a case where a defendant was charged with first-degree murder and the jury also was instructed on the lesser included offenses of second-degree murder and manslaughter, a judge who applied the static-incorporation methodology might conceivably be required to instruct the jury on three different versions of the proximate-cause requirement.<sup>223</sup>

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<sup>220</sup> *Id.* at 20.

<sup>221</sup> *See id.*

<sup>222</sup> KEETON ET AL., *supra* note 176, § 41, at 263-64 (5th ed. 1984) (saying of proximate cause: “There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion. Nor, despite the manifold attempts which have been made to clarify the subject, is there yet any general agreement as to the best approach. Much of this confusion is due to the fact that no one problem is involved, but a number of different problems, which are not distinguished clearly, and that language appropriate to a discussion of one is carried over to cast a shadow upon the other.”); Lloyd L. Weinreb, Comment on Basis of Criminal Liability; Culpability; Causation: Chapter 3; Section 610 (Mar. 29, 1968), in 1 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 105, 144 (1970) [hereinafter WORKING PAPERS] (remarking that the causation inquiry “reflects a highly complex, albeit usually inexplicit, understanding of how events occur and what about them ought to (and does) interest us practically and ethically”).

<sup>223</sup> Things would be even worse in the law of attempts. The federal criminal code has no general statute defining attempt. *In re Extradition of Batchelder*, 494 F. Supp. 2d 1302, 1308 (N.D. Fla. 2007). Instead, Congress has tacked on attempt provisions to particular offense-defining statutes. *See, e.g.*, 18 U.S.C. § 1201(d) (2012) (kidnapping); *id.* § 1341 (2012) (mail fraud); *id.* § 1344 (2012) (bank fraud); *id.*

Complexity is only part of the problem, moreover. Another part is that static incorporation would require courts to cultivate the fiction that they were “discovering” the answer to every new question in the judge-made law as it existed at some earlier (perhaps much earlier) moment in time.<sup>224</sup> *Rosemond* illustrates this difficulty. Again, *Rosemond* required the Supreme Court to decide how the principles of accomplice liability apply to so-called “combination crimes” — crimes that “punish[] the temporal and relational conjunction of two separate acts.”<sup>225</sup> Combination crimes probably did not exist when Congress adopted the accomplice-liability statute, 18 U.S.C. § 2, in 1948.<sup>226</sup> The Court probably would have been pretending, then, if it had claimed to “discover” a definitive answer in the judge-made law of accomplice liability as it existed in 1948. Worse, in endeavoring to maintain this pretense, the Court likely would have refrained from articulating specific new criteria of liability. It surely would have refrained from holding, as it ultimately did, that liability as an accomplice under 21 U.S.C. § 924(c) requires “advance knowledge” that a confederate is carrying a gun.<sup>227</sup>

These shortcomings of static incorporation are not shared by dynamic incorporation, of course. Unlike static incorporation, dynamic incorporation would require courts to develop a unitary set of fundamental principles that would apply alike to every offense. Better still, in developing these fundamental principles, courts would not be required to cultivate the fiction that they were engaged merely in reconstructing a common-law principle as it existed at a particular

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§ 1513 (2012) (retaliation against a witness, victim, or informant). If static incorporation is the right methodology of the General Part, then the courts — in applying each of these separate attempts provisions — ought really to determine for each statute which of the many different tests of “attempt” actually was prevalent when the statute was enacted. See MODEL PENAL CODE & COMMENTARIES § 5.01 cmt. 5 at 321-29 (1985) (identifying and describing six different texts (in addition to the Code’s own “substantial step” formula) for distinguishing attempt from “mere preparation”); Richard A. Green & Daniel J. Pachoda, Comment on Criminal Attempt and Criminal Solicitation: Sections 1001 and 1003 (Apr. 10, 1968), in 1 WORKING PAPERS, *supra* note 222, at 351, 354 (acknowledging that current federal law on the subject of what constitutes an attempt, rather than preparation, “is chaotic”).

<sup>224</sup> See *Rogers v. Tennessee*, 532 U.S. 451, 462 (2001) (“Common law courts at the time of the framing undoubtedly believed they were finding rather than making law. But, however one characterizes their actions, the fact of the matter is that common law courts then, as now, were deciding cases, and in doing so were fashioning and refining the law as it then existed in light of reason and experience.”).

<sup>225</sup> *Rosemond v. United States*, 134 S. Ct. 1240, 1248 (2014).

<sup>226</sup> Act of June 25, 1948, ch. 645, 62 Stat. 683, 684.

<sup>227</sup> See *Rosemond*, 134 S. Ct. at 1249.

historical moment. As a result, they would be emboldened to articulate specific criteria of liability, which would impart both predictability and needed inflexibility to the law. Because these criteria would apply alike to every offense, moreover, they would impart predictability and inflexibility even to offense-defining statutes that had not yet been interpreted by the courts.

### C. Rule of Lenity

The rule of lenity sometimes is cast as a self-sufficient alternative to judicial lawmaking.<sup>228</sup> This view of lenity appears to find support in *United States v. Wiltberger*.<sup>229</sup> Writing for the Court in *Wiltberger*, Chief Justice John Marshall said that the rule of lenity — “the rule that penal laws are to be construed strictly” — was grounded at least in part “on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.”<sup>230</sup> From this view of lenity as grounded in part on nondelegation concerns, it is but a short step to the somewhat different conclusion that lenity and judicial-lawmaking are alternatives — that thoroughgoing application of the rule of lenity would eliminate any need for judicial lawmaking, even in the form of dynamic incorporation.<sup>231</sup> In this very expansive incarnation, lenity provides not just an important constraint on judicial lawmaking but a comprehensive criminal-law methodology.

This view of the rule of lenity overlooks the critical distinction between two kinds of statutory indeterminacy: ambiguity and vagueness. In its traditional formulation, the rule of lenity requires only that “ambiguities” be resolved in favor of defendants.<sup>232</sup> Not all,

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<sup>228</sup> See *United States v. Santos*, 553 U.S. 507, 514 (2008) (asserting that the rule of lenity “keeps courts from making criminal law in Congress’s stead”); Kahan, *Lenity*, *supra* note 103, at 347 (“Delegated criminal lawmaking and lenity cannot peacefully coexist.”); see also Posner, *Statutory Interpretation*, *supra* note 113, at 817 (treating reliance on substantive canons of construction as an alternative to judicial lawmaking).

<sup>229</sup> 18 U.S. (5 Wheat.) 76, 95 (1820).

<sup>230</sup> *Id.*

<sup>231</sup> See Kahan, *Lenity*, *supra* note 103, at 367 (treating lenity as “in competition with” and in danger of being “eclipsed by” delegated lawmaking); John F. Manning, *Lessons from a Nondelegation Canon*, 83 NOTRE DAME L. REV. 1541, 1556 n.48 (2008) (characterizing the rule of lenity as a “famous nondelegation canon”).

<sup>232</sup> *Moskal v. United States*, 498 U.S. 103, 107-08 (1990) (“We have repeatedly emphasized that the touchstone of the rule of lenity is statutory ambiguity.” (quoting *Bifulco v. United States*, 447 U.S. 381, 387 (1980) (internal quotation marks

or even most, statutory indeterminacy takes the form of ambiguity, however.<sup>233</sup> A word or phrase is “ambiguous” when it has more than one possible meaning.<sup>234</sup> Suppose, for example, that a statute makes it a felony to “knowingly possess, manufacture, or distribute more than 14 grams of cocaine.”<sup>235</sup> This statute is ambiguous, at least on its face. The statute might require the government merely to prove that the defendant knew, when he acted, that he was possessing, manufacturing, or distributing cocaine. Or it might require the government to prove, in addition, that the defendant knew that the cocaine weighed more than fourteen grams. (As it happens, the

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omitted)); *United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 649 (2d Cir. 1993) (“In criminal prosecutions the rule of lenity requires that ambiguities in the statute be resolved in the defendant’s favor.”).

<sup>233</sup> John F. Decker, *Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws*, 80 DENV. U. L. REV. 241, 260-61 (2002) (“Scholars have, of course, managed to see a difference by pointing out that while a vague statute does not satisfactorily define the proscribed conduct, one that does define prohibited conduct with some precision, but is subject to two or more different interpretations, is ambiguous.”); E. Allan Farnsworth, “*Dmeaning*” in *the Law of Contracts*, 76 YALE L.J. 939, 953 (1967) (“Ambiguity, properly defined, is an entirely distinct concept from that of vagueness. A word that may or may not be applicable to marginal objects is vague. But a word may also have two entirely different connotations so that it may be applied to an object and be at the same time both clearly appropriate and inappropriate, as the word ‘light’ may be when applied to dark feathers. Such a word is ambiguous.”); Dru Stevenson, *Toward a New Theory of Notice and Deterrence*, 26 CARDOZO L. REV. 1535, 1585 n.205 (2005) (“There is, of course, a difference between ‘vagueness’ and ‘ambiguity,’ in statutes; the former means the terms could describe an almost infinite range of activities (no clear lines at all), while the latter describes (typically a single term or phrase) that could have two meanings, and a court must decide which to use. The two are treated differently by the judiciary: vagueness can become a constitutional issue (depriving citizens of due process), which makes a statute void, while ambiguity is simply resolved with a tilt in favor of the defendant (the ‘rule of lenity’).”).

<sup>234</sup> See Michael S. Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 181 (1981) (“A serviceable paraphrase for ‘ambiguity’ in linguistic theory is ‘multivocality’ — having more than one sense.”).

<sup>235</sup> This statute is loosely based on chapter 94C, section 32E(b)(4) of the General Laws of Massachusetts, which provides:

Any person who trafficks in [cocaine] by knowingly or intentionally manufacturing, distributing or dispensing or possessing with intent to manufacture, distribute or dispense or by bringing into the commonwealth a net weight of fourteen grams or more of [cocaine] . . . shall [be punished by a term of imprisonment in state prison].

MASS. GEN. LAWS ch. 94C, § 32E(b)(4) (1992).

Massachusetts Supreme Judicial Court adopted the first interpretation when forced to resolve this ambiguity.<sup>236</sup>)

Some statutory indeterminacy takes the form not of ambiguity but of vagueness, or generality. A statutory expression is “vague” in this sense when it “refers to a range with fuzzy borders, so that its application to particular circumstances requires lines to be drawn in places whose specific location is not dictated by the expression itself.”<sup>237</sup> Take, for example, the word “involuntary,” as used in 18 U.S.C. § 1584, which prohibits holding another person in a condition of “involuntary servitude.” The Supreme Court struggled with the meaning of this prohibition in *United States v. Kozminski*,<sup>238</sup> but not because the word “involuntary” as used in § 1584 is ambiguous.<sup>239</sup> The trouble, rather, was that the word has notoriously fuzzy boundaries.<sup>240</sup> It is unclear, for example, just what sorts of coercion — physical coercion, legal coercion, fraud, emotional blackmail — will suffice to make a worker’s service “involuntary.”<sup>241</sup> Interpretation of this statute, then, required the Court to draw a line somewhere.

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<sup>236</sup> *Commonwealth v. Rodriguez*, 614 N.E.2d 649, 652 (Mass. 1993) (“We note that possession of a quantity of at least fourteen grams of cocaine is an element in the crime of trafficking. Nonetheless, the Commonwealth need not prove that the defendant had actual knowledge of the quantity.” (citations omitted)).

<sup>237</sup> CALEB NELSON, *STATUTORY INTERPRETATION* 78 (2010); see also Jill C. Anderson, *Just Semantics: The Lost Readings of the Americans with Disabilities Act*, 117 *YALE L.J.* 992, 997 & n.25 (2008) (referring to vagueness as “the notion that the . . . language is blurry at its conceptual edges”); cf. *Caminetti v. United States*, 242 U.S. 470, 496 (1917) (McKenna, J., dissenting) (“The words of a statute may be uncertain in their signification or in their application. If the words be ambiguous, the problem they present is to be resolved by their definition; the subject matter and the lexicons become our guides. . . . If the words be clear in meaning, but the objects to which they are addressed be uncertain, the problem then is to determine the uncertainty.”).

<sup>238</sup> *United States v. Kozminski*, 487 U.S. 931 (1988).

<sup>239</sup> The word “involuntary” does, in fact, have multiple senses. It means something different in the involuntary-servitude statute than it does in, say, a statute prohibiting “involuntary manslaughter.” In *Kozminski*, though, it was evident which of these senses was in play. See *id.* at 959.

<sup>240</sup> See *Schneckloth v. Bustamonte*, 412 U.S. 218, 224 (1973) (“It is thus evident that neither linguistics nor epistemology will provide a ready definition of the meaning of ‘voluntariness.’”).

<sup>241</sup> See *Kozminski*, 487 U.S. at 959 (Brennan, J., concurring in the judgment) (“It is of course not easy to articulate when a person’s actions are ‘involuntary.’ In some minimalist sense the laborer always has a choice no matter what the threat: the laborer can choose to work, or take a beating; work, or go to jail. We can all agree that these choices are so illegitimate that any decision to work is ‘involuntary.’ But other coercive choices, even if physical or legal in nature, might present closer questions.”).



It would be going too far to say, as some scholars have, that the rule of lenity doesn't apply at all to statutory vagueness problems.<sup>242</sup> It is more accurate to say: Whereas the rule of lenity can function as a self-sufficient rule of decision in cases of ambiguity, it can at most play a small role in resolving cases of vagueness. This limitation is not a prudential or normative one, but rather inheres in the very nature of the rule of lenity. The rule of lenity merely is a rule for *choosing* between two already-identified alternatives. It tells the court, roughly, to "select[] the most defense-favorable" alternative.<sup>243</sup> In cases of ambiguity, then, where the court faces a choice between two or more discrete "meanings" of a word or phrase, the rule of lenity can supply a complete rule of decision.<sup>244</sup> Where vagueness issues are concerned, however, courts are required to do more than choose among alternatives. They are required, again, to draw a boundary.<sup>245</sup>

To illustrate: Suppose a statute prohibits moose-hunting "within Rainbow Valley." Unfortunately, the statute's reference to "Rainbow Valley" is doubly indeterminate. First, on local maps the phrase "Rainbow Valley" is used to refer both to a town and to the broad valley in which that town is located. Second, neither of these two "Rainbow Valleys" has an official, state-recognized boundary. Among the questions that might arise in a prosecution under this statute are: (1) which of the two "Rainbow Valleys" really is the subject of the statute?; and (2) where exactly are the boundaries of *that* Rainbow Valley located? The first of these questions involves an ambiguity: the court must choose between one of two discrete senses of the phrase "Rainbow Valley." The second is a vagueness question: the court must decide where to draw the boundary.

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<sup>242</sup> See, e.g., Julie R. O'Sullivan, *Honest-Services Fraud: A (Vague) Threat to Millions of Blissfully Unaware (and Non-Culpable) American Workers*, 63 VAND. L. REV. EN BANC 23, 25-26 (2010) (arguing that the rule of lenity has no role where "ambiguity is not at issue").

<sup>243</sup> See *id.* at 25 (arguing that the rule of lenity requires the Court to "select[] the most defense-favorable" of "two competing applications or connotations").

<sup>244</sup> See generally WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 839 (1988) ("Ambiguity creates an 'either/or' situation, while vagueness creates a variety of possible meanings.").

<sup>245</sup> See NELSON, *supra* note 237, at 80 ("By contrast [to ambiguity], 'vagueness' cannot be eliminated through further interpretation. In a sense, indeed, vagueness is not really an *interpretive* problem at all. . . . The hard questions are less about *interpreting* the directive. . . . than about *applying* the directive to particular circumstances. The judgment calls that go into answering those questions, moreover, often require a very different type of analysis than the interpretive techniques that courts and agencies use to resolve ambiguity.").

The rule of lenity supplies a self-sufficient rule for choosing between the two distinct meanings of “Rainbow Valley,” though of course a court faced with this question might resort to other interpretive methods as well.<sup>246</sup> The rule of lenity does not, however, supply a rule for fixing Rainbow Valley’s boundary. A court faced with the boundary question would be required to do more than *choose*. It would be required first to construct, or at least to identify, viable alternative boundaries from among which to choose.<sup>247</sup> For the task of constructing or identifying these alternative boundaries, the court would be forced to rely on some interpretive or lawmaking methodology other than the rule of lenity.<sup>248</sup>

What is true for the geographical boundary of Rainbow Valley also is true for indeterminate conceptual boundaries. Take, for example, the question facing the Supreme Court in *Kozminski*: namely, what

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<sup>246</sup> See *People v. Thoro Prods. Co.*, 70 P.3d 1188, 1198 (Colo. 2003) (“The rule of lenity is a rule of last resort, to be invoked only after traditional means of interpreting the statute have been exhausted.” (quoting *United States v. Wilson*, 10 F.3d 734, 736 (10th Cir. 1993)) (internal quotation marks omitted)).

<sup>247</sup> Some scholars, including Lawrence Solum and Randy Barnett, have distinguished this sort of statutory “construction” from “interpretation.” See Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J. L. & PUB. POL’Y 65, 65-66 (2011); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 100 (2010). For these scholars, the terms “interpretation” and “construction” are used to refer to different “activities” or “stages” in the process by which courts make sense of legal texts. Barnett, *supra*, at 65-67; Solum, *supra*, at 95-96. “Interpretation” is “the process (or activity) that recognizes or discovers the linguistic meaning or semantic content of a legal text.” Solum, *supra*, at 96. By contrast, “construction” is “the process that gives a text legal effect (either [b]y translating the linguistic meaning into legal doctrine or by applying or implementing the text).” *Id.* According to both Barnett and Solum, problems of vagueness require construction. Barnett, *supra*, at 68-69; Solum, *supra*, at 98. Ambiguities, by contrast, usually can be resolved through interpretation. Barnett, *supra*, at 68; Solum, *supra*, at 98.

<sup>248</sup> Lawrence Solan hints at, but does not appear to endorse, a possible variant of the rule of lenity under which courts, in reviewing convictions for vaguely worded offenses, would not choose among specific judicially constructed criteria of liability but, rather, would bring to bear an inarticulate conceptual “prototype.” See Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 66-68 (1998). In reviewing convictions under the statute at issue in *Burrage*, for example, the courts would not articulate specific criteria for causation but, rather, would apply their own inarticulate “prototype” of causation. *Cf. id.* at 66, 82 (providing useful illustrations of “prototypes”). The trouble with this approach is that reliance by judges on offense-criteria that cannot be communicated to jurors would violate the reasonable-doubt standard. See *Apprendi v. New Jersey*, 530 U.S. 466, 476-77 (2000) (holding that the constitutional rights to due process and to a jury trial “together . . . indisputably entitle a criminal defendant to ‘a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt’” (alteration in original) (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995))).

qualifies as “involuntary” under the federal criminal statute that prohibits holding another person in “involuntary servitude”?<sup>249</sup> The Court’s answer was that servitude is “involuntary” only when it is compelled “by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process.”<sup>250</sup> In arriving at this answer, the Court invoked the rule of lenity.<sup>251</sup> But, as Justice Stevens shrewdly pointed out in his concurring opinion, the Court had done more than *choose* in arriving at this very specific rule.<sup>252</sup> It had constructed a rule in the manner of a legislature. “My colleagues’ opinions attempting to formulate an all-encompassing definition of the term ‘involuntary servitude,’” he said, “demonstrate that this *legislative* task is not an easy one.”<sup>253</sup>

The problems to which criminal law’s General Part is addressed are, of course, vagueness problems, not ambiguity problems. The phrase “resulted from” is not ambiguous. Nor for that matter are words and phrases like “recklessly,” “intentionally,” “attempt,” and “aid or abet.” Each of these words and phrases has a single meaning with an indeterminate boundary, and so requires more than a choice among alternatives.<sup>254</sup> Accordingly, the rule of lenity can play only a very limited role in cases like *Burrage*: namely, to break “ties” among rules constructed by means of some quite different methodology.<sup>255</sup> The

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<sup>249</sup> *United States v. Kozminski*, 487 U.S. 931, 934 (1988) (quoting 18 U.S.C. § 1584).

<sup>250</sup> *Id.* at 952.

<sup>251</sup> *See id.*

<sup>252</sup> *See id.* at 965 (Stevens, J., concurring in the judgment).

<sup>253</sup> *Id.* (emphasis added).

<sup>254</sup> This is nicely illustrated by *State v. Jackson*, where defendant Jackson urged the Georgia Supreme Court to hold that the word “causes,” as used in the state’s felony-murder statute, “requires not proximate causation, but that the death be ‘caused directly’ by one of the parties to the underlying felony.” *State v. Jackson*, 697 S.E.2d 757, 758 (Ga. 2010). In Jackson’s own case, one of Jackson’s accomplices was shot and killed by the felony’s intended victim. *See id.* The court mentioned the rule of lenity, but ultimately rejected the view that the problem was susceptible to resolution under the rule of lenity. *See id.* at 762-63. The question facing the court was not, it said, a binary one: “the binary reading of the causation element proposed by [the Georgia Supreme Court in another case] finds no foundation in our legal tradition or our case law.” *Id.* at 763. “[W]e have found not a single instance in our extensive causation case law where the Court has suggested that the word ‘causes’ can mean only ‘directly causes’ or ‘indirectly causes.’” *Id.* The construction of plausible alternative meanings for the word “causes” had to precede application of the rule of lenity, then.

<sup>255</sup> *See United States v. Santos*, 553 U.S. 507, 514 (2008) (“Under a long line of our decisions, the tie must go to the defendant.”). It is wrong to suggest, then, as Ben Rosenberg does, that, “broad interpretations mean that the judiciary, rather than the

availability of the rule of lenity cannot, then, obviate resort to other methodologies. The rule of lenity is not a genuine alternative to dynamic incorporation.

#### D. *Imaginative Reconstruction*

Another alternative to dynamic incorporation is for the court to use statute-specific clues to reconstruct imaginatively the statute-specific intent of the enacting legislature.<sup>256</sup> Reconstructing the legislature's intent isn't always an imaginative enterprise, of course. Sometimes the text or context of the offense-defining statute speaks clearly. Where it does, though, the question whether to employ dynamic incorporation doesn't arise. Even with respect to questions that fall within the subject matter of the General Part, nobody would argue that courts are permitted to disregard the statute's clear meaning in favor of applying judge-made law.<sup>257</sup> To illustrate: Some offense-defining statutes clearly mean to modify, or dispense with entirely, the usual judge-made rules of causation.<sup>258</sup> Likewise, some offense-defining statutes clearly mean to dispense with the usual judge-made rules for deciding when a culpable omission will trigger liability.<sup>259</sup> In neither case would the

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Congress, is effectively making criminal law." See Ben Rosenberg, *The Growth of Federal Criminal Common Law*, 29 AM. J. CRIM. L. 193, 212 (2002). Even narrow interpretations of vaguely worded statutes require judicial lawmaking, as indeed Justice Scalia recognized in his *Skilling* concurrence. See *Skilling v. United States*, 561 U.S. 358, 415 (2010) (Scalia, J., concurring in part and concurring in the judgment).

<sup>256</sup> See Posner, *Statutory Interpretation*, *supra* note 113, at 817-22.

<sup>257</sup> See Adam Cohen, *Securing Trade Secrets in the Information Age: Upgrading the Economic Espionage Act After United States v. Aleynikov*, 30 YALE J. ON REG. 189, 214-15 (2013) ("The text of a criminal law forms a 'linguistic wall,' and it 'will not be interpreted more broadly than the[] language reasonably permits, even if the legislature may have intended to criminalize additional conduct.'" (alteration in original) (quoting LAWRENCE M. SOLAN, *THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION* 42 (2010))).

<sup>258</sup> See, e.g., *People v. Schaefer*, 703 N.W.2d 774, 784 (Mich. 2005) (relying on wording of Michigan's drunk-driving homicide statute, section 257.625(4) of the Michigan Compiled Laws, in concluding that the statute does not require proof of a causal connection between the wrongful aspect of the defendant's conduct (that is, his intoxication) and the fatal accident). See generally Eric A. Johnson, *Wrongful-Aspect Overdetermination: The Scope-of-the-Risk Requirement in Drunk-Driving Homicide*, 46 CONN. L. REV. 601, 627-28 (2013) (explaining that some state courts have interpreted drunk-driving homicide statutes as dispensing with the traditional scope-of-the-risk requirement).

<sup>259</sup> See *King v. State*, 784 P.2d 942, 944 (Nev. 1989) (interpreting Nevada's child abuse statute, section 200.508 of the Nevada Revised Statutes, to encompass broad class of omissions).

courts be justified in doing anything other than applying the statute according to its terms.

The cases that concern us, by contrast, are cases where, as in *Rosemond* and *Burrage*, neither the statute's text nor its context speaks clearly to the question facing the court.<sup>260</sup> Even in these cases, however, it would be possible to argue that the courts ought to try to reconstruct, albeit imaginatively, the intent of the legislature. It would be possible to argue, in Judge Richard Posner's words, that the judge ought "to think his way as best he can into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar."<sup>261</sup> In trying to think his way into the minds of the legislators, the judge will rely, of course, on "the language and apparent purpose of the statute, its background and structure, its legislative history . . . and the bearing of related statutes."<sup>262</sup> But he also will consider, at least under Judge Posner's version of imaginative reconstruction, the "values and attitudes, so far as they are known today, of the period in which the legislation was enacted."<sup>263</sup>

Something like this alternative to dynamic incorporation was at work in the government's brief to the Supreme Court in *Burrage*, for example. Not surprisingly, the government in *Burrage* drew on the judge-made law of causation in articulating its "contribution" theory.<sup>264</sup> But the government also relied on statute-specific clues in arguing that Congress, when it enacted 21 U.S.C. § 841(b)(1)(C), must have intended to adopt a contribution test. It pointed out that, as a factual matter, "most overdose deaths involving heroin also involved

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<sup>260</sup> See *supra* text accompanying notes 36–48.

<sup>261</sup> Posner, *Statutory Interpretation*, *supra* note 113, at 817. Judge Posner appears now to have departed from this imaginative reconstruction approach in favor of a more pragmatic approach. See John F. Manning, *Statutory Pragmatism and Constitutional Structure*, 120 HARV. L. REV. 1161, 1167–68 (2007) [hereinafter *Statutory Pragmatism*] (arguing that Judge Posner has abandoned imaginative reconstruction in favor of a pragmatic approach, under which judges take responsibility for filling the gap themselves, rather than ascribing a particular intent to the legislature).

<sup>262</sup> Posner, *Statutory Interpretation*, *supra* note 113, at 818.

<sup>263</sup> *Id.* Judge Posner distinguished his version of imaginative reconstruction from the version advocated by Hart and Sacks. *Id.* at 819–20 (discussing 2 HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS* 1413–17 (tent. ed. 1958)). According to Judge Posner, the difference lies in how the court conceives of the legislator whose will is being imaginatively reconstructed. See *id.* at 819. Hart and Sacks presupposed an ideal "reasonable" legislator, whose view of the public interest matched the judge's own. *Id.* at 819. By contrast, Posner thought that courts should reconstruct the will of the legislators who actually enacted the statute. See *id.* at 817.

<sup>264</sup> Brief for the United States at 18–22, *United States v. Burrage*, 134 S. Ct. 881 (2014) (No. 12-7515), 2013 WL 5461835.

at least one other drug, and 1 in 4 deaths involving heroin also involved at least two other drugs.”<sup>265</sup> And it argued that, in light of these facts, legislators would have wanted courts to apply a contribution test, rather than a strict but-for test: “The context in which the ‘death results’ provision is applied — typically, death by drug overdose — gives particular reason to think Congress intended a contributing-cause test.”<sup>266</sup>

As it happens, lower courts have relied on the same approach in addressing a question raised but left unresolved in *Burrage*, namely, whether 21 U.S.C. § 841(b)(1)(C) requires not only cause-in-fact but also “proximate cause.” In *United States v. Robinson*,<sup>267</sup> for example, the U.S. Court of Appeals for the Third Circuit relied on textual and contextual clues — the statute’s use of the phrase “results from,” the nature of the problem targeted by the statute — in concluding, with striking confidence, that Congress specifically had intended to dispense with the requirement of proximate cause: “It is obvious Congress intended in such a case that the 20-year mandatory minimum would apply if death or serious bodily injury resulted from the use of the substance without regard for common-law proximate-cause concepts.”<sup>268</sup>

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<sup>265</sup> *Id.* at 29; *see also id.* at 30 (arguing that the contribution test is supported by the fact that in 21 U.S.C. § 841(b)(1)(C) causation is not an element that separates innocent conduct from criminal conduct: “The causation questions here concern petitioner’s criminal responsibility for harm resulting from his ‘antecedently . . . unlawful’ drug trafficking.”).

<sup>266</sup> *Id.* at 28; *see also* Petitioner’s Opening Brief at 22, *Burrage*, 134 S. Ct. 881 (No. 12-7515), 2013 WL 3830502 (“Because such a result [elimination of the proximate-cause requirement] cannot be what Congress intended, proximate cause should limit the criminal liability under the statute.”).

<sup>267</sup> 167 F.3d 824 (3d Cir. 1999).

<sup>268</sup> *Id.* at 831; *see also* *United States v. McIntosh*, 236 F.3d 968, 972-73 (8th Cir. 2001) (holding that the language of U.S.C. § 841(b)(1)(A) prohibits the court from superimposing a requirement of foreseeability or proximate cause); *United States v. Patterson*, 38 F.3d 139, 145 n.7 (4th Cir. 1994) (holding that reasonable foreseeability under 21 U.S.C. § 841(b)(1)(C) is not required based on Congress’s decision to exclude foreseeability language). The Justices expressed strong doubts about this view during the oral argument in *Burrage*. *See* Transcript of Oral Argument, *supra* note 163, at 51-52. Justice Kennedy asked the government’s attorney, for example: “What result if a heroin dealer persuades a first time user to please try heroin, it’s wonderful. He does. Three days later the addict, the new addict, the new user buys heroin from a different dealer and overdoses and dies?” *Id.* at 51. Chief Justice Roberts asked: “What about you give the guy . . . heroin and he drives away, but as a result of using it he’s driving under the influence, has an accident and is killed? Is that — does his death result from the heroin in that case?” *Id.* at 52.

The kind of imaginative reconstruction at work in the government's *Burrage* brief, and in the Third Circuit's *Robinson* decision, isn't really a workable alternative to dynamic incorporation, at least where questions from the General Part are concerned. For one thing, this approach, like the static-incorporation approach, would undercut the coherence of criminal-law doctrine.<sup>269</sup> Even the most fundamental requirements of criminal liability — causation, for example, and intent — would vary in content from offense to offense, since the courts would have to reimagine these requirements anew for each offense on the basis of statute-specific clues. After all, as Judge Posner has said, what is reconstructed under this approach is the intent of the legislature that enacted the statute.<sup>270</sup> “One cannot assume a continuity of view over successive Congresses,” or over successive state legislatures.<sup>271</sup> And so traditional General-Part doctrines would vary from legislature to legislature, offense to offense.

Imaginative reconstruction also is problematic quite generally, as countless commentators have argued. The basic trouble, as Justice Scalia and co-author Bryan Garner have said, is that “[t]he search for what the legislature ‘would have wanted’ is invariably either a deception or a delusion.”<sup>272</sup> Judges aren't very good at imaginatively entering the minds of legislators. In Judge Easterbrook's words: “The number of judges living at any time who can, with plausible claim to accuracy, ‘think [themselves] . . . into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar,’ may be counted on one hand.”<sup>273</sup> What judges do instead, either consciously or unconsciously, is substitute

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<sup>269</sup> See *supra* text accompanying notes 203–27.

<sup>270</sup> Posner, *Statutory Interpretation*, *supra* note 113, at 817.

<sup>271</sup> *Id.* at 810.

<sup>272</sup> SCALIA & GARNER, *supra* note 63, at 95; see also Samuel W. Buell, *The Upside of Overbreadth*, 83 N.Y.U. L. REV. 1491, 1519 (2008) (“[I]t is an illusion to treat this judicial activity [interpretation of federal criminal statutes by lower court judges] as anything other than criminal lawmaking.”); Frank Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 550-51 (1983) (“The number of judges living at any time who can, with plausible claim to accuracy, ‘think [themselves] . . . into the minds of the enacting legislators and imagine how they would have wanted the statute applied to the case at bar,’ may be counted on one hand.” (quoting Posner, *Statutory Interpretation*, *supra* note 113, at 817)); Strauss, *supra* note 60, at 387 (arguing that the question of what the legislature really intended by the statute is a “dubious” question used by judges to conceal the fact that they are actually making law).

<sup>273</sup> Easterbrook, *supra* note 272, at 550-51 (quoting Posner, *Statutory Interpretation*, *supra* note 113, at 817).

their own conception of good for the legislature's, while still assigning responsibility for the outcome to the legislature.<sup>274</sup>

This sort of deception, or self-deception, has direct practical consequences for cases like *Burrage* and *Rosemond*. Judges who are permitted to hide behind the fiction that they merely are channeling the legislature's desires will be less likely to reckon honestly with the advantages and disadvantages of the rules they, the judges, adopt.<sup>275</sup> They will be more likely to do what Justice Scalia did in his opinion for the Court in *Burrage*, namely, shrug off the "policy discussions" as "fascinating" but "beside the point."<sup>276</sup> Worse, the need to maintain the fiction that they have "discovered" the legislature's intent will discourage judges from articulating specific criteria of liability, even when those specific criteria would impart predictability and needed inflexibility to the law. After all, a judge's claim of having discovered a specific, clear-cut rule in a sparse, indeterminate legislative history usually will be less plausible than a claim of having discovered an amorphous one there. The Supreme Court in *Rosemond*, for example, could not plausibly have ascribed its specific "advance knowledge" requirement to Congress.<sup>277</sup> And it didn't try.

As compared to imaginative reconstruction, dynamic incorporation has the somewhat abstract "virtue of candor," of course.<sup>278</sup> But it also

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<sup>274</sup> *Id.* at 551 ("When [imaginative reconstruction] fails, even the best intentioned will find that the imagined dialogues of departed legislators have much in common with their own conceptions of the good."); see also ANDENAES, *supra* note 1, at 103-04 ("Uncertainty as to the correct interpretation [of a criminal statute] can become so great that it would be pure fiction to hold out a certain result as the law. . . . Everything which the judge believes reasonable and suitable, he will politely ascribe to the actual or hypothetical will of the legislature." (internal quotation marks omitted)); Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1293 (2001) ("[I]maginative reconstruction collapses into substantive decisionmaking, because the best way to figure out what . . . legislators . . . would do is to figure out what the best answer is.").

<sup>275</sup> See, e.g., Manning, *Statutory Pragmatism*, *supra* note 261, at 1167 (explaining the difference between imaginative reconstruction and judicial pragmatism: under the first, the judge "attribute[s] his or her decisions to real or imputed legislative preferences," while under the second the judge "[takes] responsibility for making a policy decision"); Posner, *Statutory Interpretation*, *supra* note 113, at 820 ("[I]t is not healthy for the judge to conceal from himself that he is being creative when he is, as sometimes he has to be even when applying statutes.").

<sup>276</sup> *Burrage v. United States*, 134 S. Ct. 881, 892 (2014) ("[I]n the last analysis, these always-fascinating policy discussions are beside the point. The role of this Court is to apply the statute as it is written — even if we think some other approach might 'accor[d] with good policy.'" (quoting *Comm'r v. Lundy*, 516 U.S. 235, 252 (1996))).

<sup>277</sup> *Rosemond v. United States*, 134 S. Ct. 1240, 1249 (2014).

<sup>278</sup> Rosenberg, *supra* note 255, at 219.



has the tangible virtues associated with candor. Under dynamic incorporation, judges won't be able to evade their responsibility for refining and adapting the judge-made law of the General Part. And so they won't be able to avoid a forthright analysis of the advantages and disadvantages of the proposed rules. Nor, as they refine and adapt the judge-made law of the General Part, will they be able to avoid reckoning with the accumulated body of insight represented by the criminal-law "canon," as it were: with Bentham and Holmes, Wechsler, and Hand.<sup>279</sup> Finally, under dynamic incorporation courts would be emboldened to articulate specific criteria of liability, which both promote enforcement of the reasonable-doubt standard and impart predictability and inflexibility to the criminal law.

#### E. Constitutional Invalidation

A final alternative — to dynamic incorporation and to other methods of filling statutory "gaps" — would be to treat gaps in criminal statutes as a basis for the statutes' invalidation.<sup>280</sup> Justice Scalia suggested something like this in *Skilling*,<sup>281</sup> where he argued in a concurring opinion that criminal statutes requiring judicial gap-filling are unconstitutionally vague.<sup>282</sup> An otherwise vague statute, he said, "cannot be saved . . . by judicial construction that writes in specific criteria that its text does not contain."<sup>283</sup> The theory behind Justice Scalia's version of the vagueness doctrine, presumably, is that invalidation would force legislatures to be exhaustive in articulating the "specific criteria" on which criminal liability depends, and that

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<sup>279</sup> See MOORE, *supra* note 82, at 1 ("From the beginnings Bentham himself made in this field, through the Livingston, Field, and Macaulay codes of the nineteenth century, to the Model Penal Code in America today, criminal law has been favoured by systematic thought about its structure . . ."); Johnson, *Does Criminal Law Matter?*, *supra* note 82, at 151 (arguing that a "doctrine-centered approach to [criminal] statutory interpretation . . . foster[s] an encounter with a vast body of accumulated wisdom — from Bentham through Herbert Wechsler, and encompassing finally even the [Supreme] Court's own decisions"); cf. *United States v. Figueroa*, 165 F.3d 111, 119 (2d Cir. 1998) (Sotomayor, J.) ("The principles of construction underlying the criminal law serve as much better signposts to congressional intent in these kinds of circumstances than a statute's sparse and inconsistent legislative history.").

<sup>280</sup> See, e.g., Robinson, *supra* note 41, at 228 (arguing that a failure by the legislature to adopt "a comprehensive description of [the] General Part defenses and liability rules violates the legality principle. It causes unfairness because of the absence of adequate notice.").

<sup>281</sup> 561 U.S. 358, 415-16 (2010) (Scalia, J., concurring).

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

exhaustive legislative articulation of these criteria would promote the twofold objective of the void-for-vagueness doctrine. The twofold objective of the void-for-vagueness doctrine is, of course, to make the criminal law: (1) *predictable*, “so that even [a] ‘bad man’ can look ahead with some ability to know what the stakes are in choosing one course of action or another”;<sup>284</sup> and (2) relatively *inflexible*, so as to promote “the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice.”<sup>285</sup>

In practice, though, the invalidation alternative would make the criminal law less predictable and less inflexible. The trouble with the invalidation alternative is, first, that legislatures really could not exhaustively articulate the specific criteria of criminal liability, even if they tried. As Peter Strauss has said: “There is substantial agreement in modern thought . . . that some legislative imprecision is unavoidable.”<sup>286</sup> Even the but-for test, which seemed to the *Burrage* Court a model of legislative clarity,<sup>287</sup> leaves lots of questions unanswered. For example, it leaves unanswered the question whether conduct that merely accelerates the result will count as a but-for cause.<sup>288</sup> It also leaves unanswered the question whether — as Herbert Wechsler thought — “the result in question should be viewed as including the precise way in which the forbidden consequence occurs.”<sup>289</sup> (In *Burrage*, for example, Wechsler would have framed the but-for question not as “whether the victim would not have died but for his ingestion of Burrage’s heroin” but as “whether the victim would not have died of *mixed-drug intoxication* but for his ingestion of Burrage’s heroin.”). If the legislature were to be truly exhaustive, then, it would have to adopt not just the but-for test but a set of

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<sup>284</sup> *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 502 (2008) (citing Holmes, *supra* note 207, at 459); *see also* *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (“Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.”).

<sup>285</sup> *Koon v. United States*, 518 U.S. 81, 113 (1996).

<sup>286</sup> Strauss, *supra* note 60, at 385; *see also* John Calvin Jeffries Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 204 (1985) (arguing that “interstitial judicial lawmaking” in criminal cases is “inevitable”).

<sup>287</sup> *See Burrage v. United States*, 134 S. Ct. 881, 887, 892 (2014) (explaining that the statute was “written to require but-for cause”).

<sup>288</sup> *See Karp*, *supra* note 176, at 1262-63.

<sup>289</sup> MODEL PENAL CODE & COMMENTARIES § 2.03 cmt. 2 at 259 (1985). For a nice illustration of the extraordinary difficulties associated with defining the events that are the subject of causation inquiry, *see* L.A. Paul, *Aspect Causation*, 97 J. PHIL. 235, 235-42 (2000).

supplemental rules for applying the but-for test. Nor does the process stop there. “Can we not now imagine further rules to explain [*these rules*]?”<sup>290</sup>

This kind of regress doesn’t usually occur in practice, of course. The reason, though, is that the responsibility for fine-tuning legal rules usually is left with the courts, who need only address misunderstandings that actually arise in the cases before them. If, by contrast, this responsibility were shifted to the legislature, the legislature would be forced to try to anticipate, and to address in advance, every possible source of misunderstanding.<sup>291</sup> At best, the legislature’s efforts would result in something like the Model Penal Code’s General Part, which addresses some questions while — by its drafters’ own concession — leaving many others unaddressed.<sup>292</sup> (Even the Model Penal Code leaves unresolved the question that arose in *Rosemond*, for example.<sup>293</sup>) At worst, the legislature’s efforts to be exhaustive would only create more uncertainty. As Judge Raymond Randolph has said, legislative efforts to be “precise” — to answer every question in advance, that is — do not always lead to great clarity; rather, they “can lead to longer and longer statutes, and less clarity.”<sup>294</sup>

Under the invalidation alternative, then, courts would continue to face unresolved questions, just as they do now. What would change is that courts would be required to *leave* these questions unresolved. Faced with an apparent gap in the criminal code, a court applying the invalidation alternative would have just two options: (1) invalidating

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<sup>290</sup> LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* pt. I, § 86 (G.E.M. Anscombe trans., 1958); see also A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 *HARV. J.L. & PUB. POL’Y* 71, 78 (1994) (“If one had to define one’s terms before speaking, no one would be able to talk about anything important. The reason has been explained by the philosopher of science, Sir Karl Popper. Requiring terms to be defined, like requiring all premises to be proven, leads to infinite regression. It replaces a short story with an infinitely long one.”).

<sup>291</sup> Posner, *Statutory Interpretation*, *supra* note 113, at 811 (“The basic reason why statutes are so . . . ambiguous in application is not that they are poorly drafted . . . and not that the legislators failed to agree on just what they wanted to accomplish in the statute . . . but that a statute necessarily is drafted in advance of, and with imperfect appreciation for the problems that will be encountered in, its application.”); Strauss, *supra* note 60, at 385 (“[A] legislature necessarily works in the abstract. It does not have the advantage of the concrete cases which come before the judge, but deals with the general problems of society that are called to its attention.”).

<sup>292</sup> See *supra* text accompanying notes 155–59.

<sup>293</sup> See *supra* note 135 and text accompanying notes 132–37.

<sup>294</sup> Randolph, *supra* note 290, at 78 (“[G]reater precision in the use of language may not lead to greater clarity. It can lead to longer and longer statutes, and less clarity.”).

the offense-defining statute; or (2) requiring the jury to resolve the critical question without the help of specific legal criteria.<sup>295</sup> Given the obvious social costs of the first alternative — the social costs, for example, of permitting known wrongdoers to escape punishment altogether — courts often would choose the second. In other words, they often would hold that what appeared to be a gap in the statute was not really a gap after all; that the question left unresolved by the statute's text really was for the jury to resolve.

Consider, for example, how the invalidation alternative might have played out in *Rosemond*. Among the questions raised in *Rosemond* was whether, in a prosecution under 18 U.S.C. § 924(c), the defendant's knowledge that a confederate was carrying a firearm "must be advance knowledge."<sup>296</sup> Neither the text of § 924(c) nor the text of the accomplice liability statute, 18 U.S.C. § 2, addresses this question, of course. Under the invalidation alternative, then, the Court could not have done what it ultimately did, namely, adopt a specific legal rule requiring that the defendant's knowledge of the firearm be acquired "at a time [he] can do something with [the knowledge] — most notably, opt to walk away."<sup>297</sup> Rather, the Court would have been required either: (1) to invalidate the statute as unconstitutionally vague; or (2) to leave the advance-knowledge question to the jury. If, as seems likely, the Court had chosen the second alternative, the result would have been less predictability, not more.

The invalidation alternative also would create an incentive for the legislature itself to be less specific in articulating the criteria for criminal liability. From the legislature's perspective, the best strategy for eliminating gaps in the criminal code — and thus for avoiding invalidation of criminal statutes — would be to substitute broad *standards* for specific *rules*.<sup>298</sup> In relation to cause-in-fact, for example, the legislature's best strategy for eliminating gaps would be to forego finely calibrated rules of causal contribution — the but-for test, for example, and the "independently sufficient" test — in favor of, say, a

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<sup>295</sup> *Skilling v. United States*, 561 U.S. 358, 415-16 (2010) (Scalia, J., concurring in part and concurring in the judgment).

<sup>296</sup> *Rosemond v. United States*, 134 S. Ct. 1240, 1249 (2014).

<sup>297</sup> *Id.* at 1249-50.

<sup>298</sup> See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559-60 (1992) (explaining the difference between "rules," which embody "an advance determination of what conduct is permissible," and "standards," which require the factfinder to decide after the fact whether the conduct was wrong); see also Eric A. Johnson, *Mens Rea for Sexual Abuse: The Case for Defining the Acceptable Risk*, 99 J. CRIM. L. & CRIMINOLOGY 1, 19-20 (2009) (observing that legislatures traditionally have used both rules and standards in defining criminal prohibitions).

broad “substantial factor” standard.<sup>299</sup> Likewise, in relation to proximate cause, the legislature could eliminate most potential gaps by adopting only the broadest, most standard-like formulation of the requirement, as the Model Penal Code does.<sup>300</sup> Of course, standards like these, because they fail to “specify how important or how substantial a cause must be to qualify,” work against the very values that underlie the vagueness rule, as Justice Scalia himself said in *Burrage*.<sup>301</sup>

The practical shortcomings of Justice Scalia’s due-process-on-steroids approach wouldn’t come as any surprise to the courts, which never have required — under the vagueness rubric or any other — that every specific criterion of criminal liability be articulated in the code’s text.<sup>302</sup> *Burrage* and *Rosemond* illustrate this point, if only indirectly. In neither case, apparently, did it occur to the attorneys to argue that the statutes at issue were vague, though it was readily apparent that the answers to the questions posed by the cases would not come from the statutes’ texts.<sup>303</sup> The lawyers seem to have understood intuitively, as Justice Scalia in *Skilling* did not, that the “specific criteria” of criminal liability — the criteria by which criminal statutes survive Due Process vagueness review — often are derived not

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<sup>299</sup> Interestingly, this is just the approach taken by the recently adopted Australian criminal code, which has been praised for its exhaustiveness. See Ian Leader-Elliott, *Benthamite Reflections on Codification of the General Principles of Criminal Liability: Towards the Panopticon*, 9 BUFF. CRIM. L. REV. 391, 391 (2006) (praising the Australian code’s General Part as “a more completely articulated statement of the elements of liability than either of its predecessors [the General Parts of the Model Penal Code and the UK Draft Criminal Code]”). The code includes no general definition of causation. But the causation elements of the Special-Part statutes require that the defendant’s conduct “substantially contribute to th[e] result.” *Id.* at 417.

<sup>300</sup> See MODEL PENAL CODE & COMMENTARIES § 2.03(2)(b) at 253 (1985) (requiring, in cases where the actual result was not within the purpose or contemplation of the actor, that the actual result be “not too remote or accidental in its occurrence to have a [just] bearing on the actor’s liability” (alteration in original)). This standard has been upheld against a vagueness challenge. See *State v. Maldonado*, 645 A.2d 1165, 1178 (N.J. 1994) (“We hold on the basis of sound policy that the ‘not too remote’ element survives the facial vagueness challenge here and all vague as-applied claims in this case.”).

<sup>301</sup> *Burrage v. United States*, 134 S. Ct. 881, 892 (2014) (“Uncertainty of that kind cannot be squared with the beyond-a-reasonable-doubt standard applicable in criminal trials or with the need to express criminal laws in terms ordinary persons can comprehend.”).

<sup>302</sup> Courts often have upheld statutes against vagueness challenges after concluding that a criterion of liability was afforded either by the common law or by “the subjects with which they dealt.” *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391-92 (1926).

<sup>303</sup> See Brief for the Petitioner, *Rosemond v. United States*, 134 S. Ct. 1240 (No. 12-895), 2013 WL 4011049; Petitioner’s Opening Brief, *supra* note 266.

from the texts of the statutes but “from . . . the subjects with which they deal[.]”<sup>304</sup>

#### CONCLUSION: WHY DYNAMIC INCORPORATION?

This isn't to say, of course, that legislatures shouldn't pursue efforts to codify the basic principles of the General Part. They should. The inevitability of unanswered questions, of “interstitial issues of judgment,” should not deter legislatures from “build[ing] a strong, complete and readily understandable skeleton within which those interstices will appear.”<sup>305</sup> Congress, for example, should adopt both a general definition of causation and a more fully articulated definition of aiding and abetting, as it considered doing in the 1970s.<sup>306</sup>

In cases like *Burrage* and *Rosemond*, though, the question isn't what the legislature should do. The question is only what the courts should do. The legislature “has put down its pen,” and the courts cannot “call it back” to answer the questions left unanswered by the statutes.<sup>307</sup> Rather, the courts must give effect, as best they can, to what the legislature already has said.<sup>308</sup> In giving effect to what the legislature has said, the courts must choose among several alternatives: (1) passing along to the jury the question left unanswered by the legislature; (2) applying static incorporation; (3) applying the rule of lenity; (4) trying imaginatively to reconstruct what the legislature would have wanted; (5) invalidating the statute as unconstitutionally vague; and (6) applying dynamic incorporation.

Where, as in *Burrage* and *Rosemond*, the question left unanswered by the legislature concerns the definition of the offense, rather than matters of defense, and falls within the subject matter of the General Part, the best of these alternatives is dynamic incorporation, for several reasons:

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<sup>304</sup> *United States v. L. Cohen Grocery Co.*, 255 U. S. 81, 92 (1921).

<sup>305</sup> *Reform Hearing*, *supra* note 151, at 1924 (statement of Peter L. Strauss, Associate Professor of Law, Columbia University); *cf.* Dan M. Kahan, *Three Conceptions of Federal Criminal-Lawmaking*, 1 *BUFF. CRIM. L. REV.* 5, 6-7 (1997) (“[F]ederal criminal law consists of a muscular corpus of judge-made doctrine stretched out over a skeletal statutory frame.”).

<sup>306</sup> See NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS, FINAL REPORT, *supra* note 46, §§ 305, 401.

<sup>307</sup> See *Dir., Office of Workers' Comp. Programs v. Rasmussen*, 440 U.S. 29, 47 (1979) (“Congress has put down its pen, and we can neither rewrite Congress' words nor call it back 'to cancel half a Line.' Our task is to interpret what Congress has said . . .”).

<sup>308</sup> See *id.*

First, dynamic incorporation preserves the criminal law's doctrinal systematicity. Under static incorporation or imaginative reconstruction, even the most fundamental questions — about causation, for example, or intent — always would be posed exclusively in relation to a specific offense. And so the answers to these questions often would vary from offense to offense.<sup>309</sup> Under dynamic incorporation, by contrast, courts would develop a unitary set of fundamental principles that would apply alike to every offense.

Second, under dynamic incorporation, courts would not be required to cultivate the fiction that they were engaged merely in rooting out the legislature's undisclosed intentions.<sup>310</sup> Nor would courts be required to cultivate the fiction that they merely were engaged in reconstructing a judge-made principle as it existed at a particular historical moment.<sup>311</sup> Accordingly, the courts would be emboldened — as the Supreme Court was in *Rosemond* — to articulate specific criteria of liability.<sup>312</sup> These specific criteria of liability would impart both predictability and needed inflexibility to the law. Moreover, because these criteria would apply alike to every criminal offense, they would impart predictability and inflexibility even to offense-defining statutes that had not yet been interpreted by the courts.

Third, by emboldening the courts to articulate specific criteria of liability, dynamic incorporation will promote the interests underlying the reasonable-doubt standard as well. Where fuzzy-bordered general concepts like causation are concerned, the articulation of specific criteria is the only form of “strict construction” that satisfies the reasonable-doubt standard. The alternative is for judges to demand on review that the defendant's case fall near the concept's core; that the defendant's case satisfy the judges' own inarticulate sense of proto-typicality.<sup>313</sup> Unfortunately, the application by judges of standards that cannot effectively be conveyed to jurors violates the reasonable-doubt standard.

Fourth, not only would dynamic incorporation enable the courts to articulate specific criteria of liability, it also would enable them to articulate the *right* criteria. It would enable them, in Justice O'Connor's words, to do what is “necessary to bring the common law into conformity with logic and common sense.”<sup>314</sup> Not all “specific criteria” are of equal merit, of course. Some criteria promote better

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<sup>309</sup> See *supra* text accompanying notes 203–23, 269–71.

<sup>310</sup> See *supra* text accompanying notes 260–68.

<sup>311</sup> See *supra* text accompanying notes 224–27.

<sup>312</sup> See *supra* text accompanying notes 224–27.

<sup>313</sup> See *supra* note 248.

<sup>314</sup> *Rogers v. Tennessee*, 532 U.S. 451, 461–62 (2001).

than others do the citizen's interest in "fair warning of the nature of the conduct declared to [be] an offense."<sup>315</sup> Some criteria better "safeguard conduct that is without fault from condemnation as criminal."<sup>316</sup> And some criteria better resist evasion by innovative wrongdoers. Dynamic incorporation would permit the courts to choose the best criteria on the basis of these and other considerations.

Fifth, dynamic incorporation forces the courts into a fruitful dialogue with the criminal-law "canon," if you will — with Wechsler and Holmes, Hand and Posner. Criminal law's General Part is the subject of an extraordinarily rich body of case law and commentary.<sup>317</sup> When courts address questions from the General Part as if they were questions about the "ordinary meaning" of General-Part terminology — as the Supreme Court did in *Burrage*, for example — they evade their responsibility to build upon, or at least to reckon with, the insights of this criminal-law canon.

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<sup>315</sup> MODEL PENAL CODE & COMMENTARIES § 1.02(1)(d) (1985); see also Jeffries, *supra* note 286, at 220-21 (arguing that a judge faced with interpreting a criminal statute of indeterminate scope "might usefully ask whether a proposed resolution makes the law more or less certain").

<sup>316</sup> MODEL PENAL CODE & COMMENTARIES § 1.02(1)(c).

<sup>317</sup> See Johnson, *Does Criminal Law Matter?*, *supra* note 82, at 151.