

desire for it to exist. Yet for a *circumstance*, purpose requires only that one is "aware" of the circumstance—the same requirement set out for the lesser culpability of being "knowing" as to a circumstance.¹⁰ In other words, if an element is classified as a circumstance, a requirement of purpose as to the element requires no more proof than a requirement of knowledge. Similarly, special causation rules apply to elements classified as results, but not to conduct or circumstance elements. Thus, if "obstructs" is interpreted to be a pure conduct element, for example, the state need only prove the conduct. It need not also satisfy the special requirements of causation, such as proof that the obstruction would not have occurred even for the actor's conduct. But if "obstructs" is viewed as embodying both a conduct element and a result element, then the state must prove that the actor's conduct was responsible for bringing about a resulting obstruction.¹²

Proposed definition

The following proposed definitions seem consistent with the spirit and intention of the Model Penal Code scheme. Define "conduct" elements narrowly to refer to the actual physical acts of the actor. Define all characteristics of the conduct to be separate "circumstance" elements; similarly, all results caused by the conduct should be defined as separate "result" elements. Define "result" elements to be any change in the surrounding circumstances, brought about by the offender's conduct, that the offense requires to occur. As with conduct, define the characteristics of a result to be separate "circumstance" elements.¹³

Illustration: "obstructing a highway"

Thus, an offense of "obstructing a public highway" would essentially require proof that the actor "engaged in conduct that caused the obstruction of a public highway." "Obstruction" would be a result element; the state would have to prove that the actor's conduct caused the obstruction, which is a change in circumstance required under the offense (prior to the offense conduct the highway was not obstructed, afterward it was). On the other hand, the requirement of a "public highway" would be a circumstance element, as it would involve the context in which the offense occurred rather than a change the actor brought about—the public highway exists both before and after the offense. The "conduct" element here, as in many offenses, requires simply some act by the actor. No particular act is required, other than one that causes the required result (obstruction) in the

¹⁰ That an actor “hopes” or desires that a circumstance exists is not an analogous requirement to a result or conduct being on actor’s “conscious object.” It is adequate to satisfy “purposefully” as to a circumstance, but is not required. For further discussion of this asymmetry, and similar issues — such as the failure to define the contents of recklessness and negligence with respect to conduct elements — see § 4.1.

¹¹ See Model Penal Code § 2.03.

¹² This includes, for example, the requirement that the result be "not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense." For a discussion of the special requirements for establishing an adequate causal connection between an actor's conduct and result, see § 3.2.

¹³ Not everyone would agree that the proper response to the Code's failure to define its categories is to provide such definitions. The English Law Reform Commission found the Model Penal Code's distinctions awkward and conceptually dubious. Law Commission, *Attempt and Impossibility* §§ 2.14-2.17 (Law Comm'n Rep. No. 102, HMSO 1980).

conduct elicits a response of significance beyond satisfying the act requirement.¹⁴ Generally, courts have not addressed the problem of

§ 3.2 Causation: The Requirements for Holding an Actor Accountable for a Result

§ 3.2.1 Requirements of Causation: Factual and Proximate Cause

Factual ("but-for") cause: scientific inquiry

Alternative sufficient-cause test

Proximate (legal) cause: normative inquiry

Proximity examples

Foreseeability as factor in determining proximate cause

Vagueness in the proximate-cause standard

§ 3.2.2 Causing Another Person to Cause a Result

Intervening actor's volitional act breaks chain

Influencing intervening actor's exercise of volition

Continuum of volition

Causing another's crime as form of complicity

§ 3.2.3 Multiple Causes

Imputing co-criminal's causal conduct

"Combined effect" analysis

Dangers of "combined effect"

Serial vs. intersecting causes

Assessing serial dimension with proximate-cause test

Assessing accountability among intersecting causes

Necessary-cause test and simultaneous sufficient causes

Necessary-cause test and intervening sufficient cause

Accountability dependent on sufficiency of other cause

Whenever an offense definition includes a result element—as, for example, homicide requires a resulting death—a causation requirement also is implied. That is, it must not only be shown that the prohibited result occurred, but also that the actor's conduct caused that result. This required relationship between the actor's conduct and the result derives from our notions of causal accountability. A result ought to affect an actor's liability only if the actor is responsible for it, and responsibility demands some

Causation an issue only when offense includes a result element

¹⁴ For a more detailed description of this proposal and the reasons for it, see 1 Paul H. Robinson, *Criminal Law Defenses* § 61(c) (1984); Robinson & Grall, *Element Analysis*, *supra* note 8, at 719-25.

For a discussion of the act requirement, see § 3.3.

¹⁵ But see *Cook v. State*, 884 S.W.2d 485, 487 (Tex. Crim. App. 1994) (apparently adopting narrow interpretation of "conduct" element, consistent with suggestions made here); *Lugo-Lugo v. State*, 650 S.W.2d 72, 88-87 (Tex. Crim. App. 1983); *McQueen v. State*, 781 S.W.2d 600, 603 (Tex. Crim. App. 1989).

causal connection. Causation doctrine provides the rules that determine how much of a causal connection is required to hold an actor legally accountable for the occurrence of some harm.

► HYPOTHETICAL ▷ MANNY THE MASTER

An informant in the police department reports that Prosecutor Baylor is being investigated for taking bribes to forgo prosecutions. Kenny "The Hat," the local underworld boss, suspects that if Baylor is arrested he will reveal all to the authorities. Kenny decides to have Baylor killed. To be sure that the job gets done, he gives contracts to both Squeeze and Manny. Squeeze, who is somewhat brighter and more experienced than her competitor Manny, arranges to poison Prosecutor Baylor at the corner hotdog stand where he frequently eats. Manny is tailing Baylor looking for an opportunity. When he sees Squeeze at the hotdog stand, he suspects he has been outdone. Squeeze glides over with a smile. "He ate enough to kill an elephant," she tells Manny. "He'll be dead in 45 minutes. Better luck next time."

Manny is not giving up so easily. He scurries after Baylor, who has finished his hotdog and is headed down to the subway. Manny spots Baylor at the edge of the platform and positions himself several feet behind him in the crowd. As the train approaches, he pushes another waiting passenger into Baylor, so that Baylor will be pushed in front of the train and killed instantly. But as Manny pushes, the crowd surges, and his push sends the wrong person off the platform. His push is also much too early. The fallen passenger scrambles back onto the platform before the train arrives. Manny turns to leave, angry and humiliated. Maybe he should go to computer school, he thinks, recalling an ad he saw on a matchbook cover. Screams from the track make him turn. People are milling about, peering under the train. He learns from others that a man straining to see the fallen passenger leaned out too far and was hit by the oncoming train. He presses forward to see the dead man. Could he be so lucky? They pull Prosecutor Baylor from under the train. Manny turns and heads for the exit, full of himself. Squeeze won't be making fun of him today.

Manny (and Squeeze, and Kenny "The Hat") intended that Prosecutor Baylor be killed and acted on that intention. Liability for at least attempted murder, then, seems clear. But is Manny criminally liable for causing the death, thus liable for murder? Is Squeeze? Is Kenny "The Hat"? ◀

§ 3.2.1 Requirements of Causation: Factual and Proximate Cause

Current doctrine typically contains two independent requirements to establish a causal connection between an actor's conduct and a result. First, the conduct must be a *factual*, or *but-for*, cause of the result, meaning that if the actor's conduct had not occurred, the result in question

also would not have occurred. Second, the conduct must be a *legal*, or *proximate*, cause of the result, meaning that it must relate to the result in a sufficiently strong way: as a common formulation puts it, the resulting harm must not be "too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense."¹ Some states also add to this the requirement that the resulting harm "not be too . . . dependent on another's volitional act."²

Conduct is a factual cause of a result if the result would not have occurred but for the conduct (hence the term "but-for causation"). In other words, the conduct is a factual cause if it was necessary for the result to occur. The factual-cause inquiry is essentially scientific, though also hypothetical. It asks what the world would have been like if the actor had not performed his conduct. Specifically, would the result still have occurred when it did? If not, then the actor's conduct was necessary for the result—it was a *but-for* cause. In the "Manny the Master" hypothetical above, Manny's conduct is a necessary cause of Baylor's death. Because Baylor died from the fall and would have died then whether he had been poisoned or not, Squeeze's poisoning is *not* a but-for cause of Baylor's death (unless the poisoning, or her telling Manny about it, induced Manny to formulate his platform-push plan in an effort to kill Baylor right away, in which case it would be a but-for cause).

This *necessary-cause* test is not the only possible formulation of the factual-cause requirement. Criticisms of some results of the necessary-cause test—such as Squeeze's escape from causal accountability for Baylor's death—may lead one to examine whether other formulations, such as a *sufficient-cause* test, might be preferable. A sufficient-cause test similarly presents a scientific and hypothetical inquiry, but a different inquiry: Would the actor's conduct have been enough, by itself, to cause the result?

In contrast to the scientific inquiry of the factual-cause requirement, the proximate (legal) cause requirement presents an essentially normative inquiry. Deciding whether a result is "too remote or accidental in its occurrence" or "too dependent on another's volitional act" calls for an exercise of evaluative judgment. The inquiry cannot be resolved by examining the facts more closely or having a more advanced understanding of the science of cause and effect. To hold that an act proximately caused a harm is to say that it seems fair, or just, to hold the actor responsible for that harm, and the fairness of imposing accountability cannot be measured scientifically.

Some examples may help illustrate the concept. Consider a common hypothetical used to illustrate a failure to satisfy the proximate-cause test: the actor who shoots at, but misses, his intended victim, who flees to escape the attack and four blocks later is struck and killed by a falling piano that has broken loose from its rope as it is being hoisted to a third-floor apartment. The actor's shot is a but-for cause of the death; the deceased would

Factual ("but-for")
cause: scientific inquiry

Alternative sufficient-
cause test

Proximate (legal) cause:
normative inquiry

Proximity examples

¹ Model Penal Code § 2.03(2)(b), (3)(b).

² See, e.g., N.J. Stat. Ann. § 2C:2-3.

³ For a discussion of how this simple question hides many difficult issues, see Leo Katz, *Bad Acts and Guilty Minds* 224-27 (1987).

not have been under the piano at the moment it fell *but for* the shot that caused him to flee. But many people would judge the actor's missed shot to be too remote from the ultimate cause (the falling piano) for the shooter to be held accountable as the legal cause of death.

Compare this, however, to *People v. Acosta*, in which the jury concluded, and a majority of the appellate court agreed, that the defendant's conduct in trying to elude chasing police proximately caused the collision of two police helicopters.⁴ Acosta was convicted of murder for the death of three officers in the crash, even though it appeared that the unusual crash occurred because one of the pilots flew recklessly and in violation of FAA regulations. Consider also *People v. Arzon*, in which the defendant's murder conviction was upheld on a finding that his setting fire to a couch proximately caused the death of a firefighter, who, while trying to escape the fire set by the defendant, was enveloped in dense smoke from another arson fire of independent origin.⁵

Foreseeability as factor in determining proximate cause

Though the proximate-cause inquiry involves case-by-case evaluation, it is possible to offer some generalizations about what is likely to be held to constitute a proximate cause. For example, the foreseeability of the result following from the actor's conduct is a highly influential factor in determinations of proximate cause.⁶ Considering the "Manny the Master" hypothetical again, if Baylor had died from Squeeze's poisoning, there would be little dispute that the poisoning proximately caused the death—even if the death had not occurred until a week, or a month, after the act—because the tendency of poison to cause death is quite obvious. But jurors also look to other factors aside from foreseeability. Did Manny foresee Baylor's death when he did his pushing? Yes, but not quite in the way that Baylor's death came about. The foreseeability of the general manner in which the result came about is relevant to jurors, but not every aspect of the way in which the result occurs need be foreseen. Imagine that Squeeze expects (and most doctors would expect) that her poison will kill Baylor by slowly interfering with his respiratory system. She is not likely to be judged less causally accountable if, instead, her poison induces uncontrollable vomiting and Baylor dies of extreme dehydration.

Vagueness in the proximate-cause standard

As is apparent from the usual statutory language, the standard for proximate cause is somewhat vague, in part because the judgment called for is complex and case-specific. One might try to provide additional guidance by giving a decision maker particular examples of what the law holds to be, or not be, "too remote" and "too dependent on another's volitional act" for liability to be proper. But it seems likely that "remoteness" and "dependence" are not judgments that can be conceived of as part of a single continuum, along which a single point marks the boundary of "too remote" or "too dependent." Instead, the judgments appear to depend

⁴ 284 Cal. Rptr. 117 (Cal. App. 1991).

⁵ 92 Misc. 2d 739, 401 N.Y.S.2d 156 (N.Y. Sup. 1978).

⁶ See, e.g., *People v. Warner-Lambert Co.*, 414 N.E.2d 660 (N.Y. 1980) (workers killed by explosion at defendant's plant; convictions for second-degree manslaughter and criminally negligent homicide reversed because, while general risk present, deaths at issue not foreseeable).

on the interaction of complex factors.⁷ Perhaps criminal law theorists will someday be able to articulate a standard with some greater guidance than is now available, but the project is an ambitious one.⁸ At present, the best we can do is to identify certain general factors that seem highly relevant: the degree of "remoteness," the extent to which the result seems "accidental," the degree of dependence on "another's volitional act." We also can help the decision maker by making explicit, as the Model Penal Code does, that the inquiry is a normative one, and that the decision maker should not look for a scientific solution, but rather ought to rely on his or her own intuitive judgment of what should and should not "have a [just] bearing on the actor's liability or on the gravity of his offense."⁹

§ 3.2.2 Causing Another Person to Cause a Result

A special yet common case of causation arises when one actor causes another to cause the prohibited result, as with the informant and Kenny and Manny in the hypothetical above. Establishing causal accountability in the first of two serial causes (that is, the cause of something that, in turn, causes the result) frequently is troublesome. The potential for a remoteness problem appears in part because the presence of the second actor seems to move the first actor further from the result. That is, an additional link exists in the causal chain between the first actor and the result. The remoteness problem is further exacerbated by the fact that the intermediate link is a

⁷ See Paul H. Robinson, *Legality and Discretion in the Distribution of Criminal Sanctions*, 25 Harv. J. Legis. 395 (1988).

⁸ See generally Michael S. Moore, *Causation and Responsibility* (2009); H.L.A. Hart & Anthony M. Honore, *Causation in the Law* (2d ed. 1985).

⁹ Model Penal Code § 2.03(2)(b) & (3)(b). The Model Penal Code drafters unfortunately confuse the drafting of the Code's proximate-cause provision. They clearly see the importance of the requirements: § 2.03(2)(b) & (3)(b) contain the "too remote or accidental . . . to have a [just] bearing" language of the requirement. But under the structure of the section as drafted, the language has application only where culpability as to a result is being imputed to a defendant; it is not available as a "remoteness" defense!

One can speculate that the confusion comes from the apparent belief of the drafters that, in result element offenses, the prosecution must prove not only that the defendant had the required culpability as to causing the prohibited result but the prosecution also must prove that the defendant had the required culpability as to the manner in which the result came about. But there is nothing in any of the Code's language to suggest such a demanding requirement.

But having assumed (incorrectly) that culpability as to manner of occurrence was required, one can see that the drafters were much concerned that this was a difficult and perhaps unnecessary burden for the prosecution to carry and therefore created § 2.03(2)(b) & (3)(b) to help them. It imputes to the defendant culpability as to manner of occurrence of the result in most instances, as long as the defendant was culpable as to the result itself. Of course, having done that, they also needed to except from the imputation those cases of inadequate proximate cause—such as the falling-piano hypothetical—and therefore added the proximate-cause language that we see in § 2.03(2)(b) & (3)(b).

They were attempting to solve a problem that did not in fact exist. Section 2.02(2) requires only proof of culpability as to the result element contained in the offense definition. The drafters could have and should have simply added a positive cause requirement to § 2.03(1), as does the proposed provision set out in the questions following the "Manny the Master" hypothetical.

human agent, capable of independent volitional conduct. Typically, one person's action cannot determine another's action in the same way that acting on a physical object might determine a subsequent event. Where an engineer pushes the accelerator, causing the train to hit a person on the tracks, we can reliably predict the physical chain of events that necessarily follow from the act of pushing the accelerator. Kenny, in contrast, can only provide motivation to Manny. The issue is not just one of foreseeability or predictability. While Manny might in this instance be as predictable as the effect of pushing the accelerator, the fact remains that it is within Manny's ability to choose not to follow Kenny's wishes. Obviously, no such possibility of volitional choice exists with the accelerator. And this possibility for independent action has a significant effect on the assessment of causal accountability under the proximate-cause test.

Intervening actor's
volitional act breaks
chain

In *Commonwealth v. Root*, the defendant was drag racing with another, who was killed when his car hit an oncoming truck as he was trying to pass the defendant.¹⁰ The court found that while the defendant's conduct may have been a factual (necessary) cause of the death—the deceased would not have crashed but for the defendant's drag racing with him—defendant's conduct was not a proximate, legal cause because the deceased had voluntarily chosen to engage in the conduct that caused his own death. In *People v. Campbell*, the defendant was drinking with another man with whom he was angry. He encouraged the man to kill himself. When the man responded that he had no weapon, defendant offered to sell him his weapon, and subsequently gave the man his gun. The man shot himself. The defendant's conviction for murder was reversed for lack of proximate cause.¹¹

Influencing intervening
actor's exercise of
volition

An intervening actor's potential to act independently does not itself insulate the first actor from causal accountability for the result. The potential for independence must be sufficiently realized. In *State v. Lassiter*, for example, the defendant pimp was brutally beating one of his prostitutes when she jumped from an eleventh-floor window to escape his attack.¹² While she chose to jump, the prostitute's choice was so highly influenced (coerced) by the defendant that it was close to no choice. Similarly, in *Stephenson v. State*, the defendant abducted and repeatedly performed sexual perversions, including inflicting bite wounds, on a woman who then secretly took poison because she was "distracted with the pain and shame so inflicted on her." The woman eventually received medical treatment but died of an infection. Defendant was held liable for second-degree murder.¹³

¹⁰ 170 A.2d 310, 310-11 (Pa. 1961). But see *Commonwealth v. Atencio*, 189 N.E.2d 223 (Mass. 1963), in which two defendants were held liable for manslaughter for the death of a co-participant in a game of "Russian Roulette" in which each pointed a revolver with one cartridge at his own head and pulled the trigger. Compare to *Root* the case of *State v. McFadden*, 320 N.W.2d 608 (Iowa 1982), in which the defendant drag racer was held liable for involuntary manslaughter in the death of a six-year-old passenger in a car with which his competitor collided.

¹¹ 335 N.W.2d 27 (Mich. App. 1983).

¹² 484 A.2d 13, 15-16 (N.J. Super. App. Div. 1984).

¹³ 179 N.E. 633 (Ind. 1932).

In some cases, the intervening actor's potential for volitional conduct is altogether illusory. In *People v. Kibbe*, for example, the defendants robbed the victim and left him drunk and partially undressed on a dark, snowy rural road. Approximately 20-30 minutes later, a motorist struck and killed the victim.¹⁴ Under the circumstances, one might conclude that the motorist was exercising little or no independent choice when he hit the victim. The court concluded that the defendants' conduct had caused the death despite the presence of a human agent in the causal chain. In *Lassiter*, noted above, the prostitute's decision to jump may be more akin to the lack of choice by the motorist in *Kibbe* than to the free choice exercised by the deceased drag racer in *Root*.¹⁵ Root's drag racing may have tempted his opponent, but it did not compel the lethal conduct in the way that Lassiter's beating compelled the prostitute to jump. The point is that there is a continuum of voluntariness, and in each case the decision maker must determine whether the intervening actor's choice reaches that point on the continuum that extinguishes the primary actor's causal accountability for the result.

Continuum of volition

To avoid such causation difficulties of the intervening actor where one actor induces another to commit an offense, most jurisdictions treat such conduct either as a form of complicity or as a special form of liability for causing crime by an innocent, depending on the status of the person induced to commit the offense.¹⁶ The issue is taken up in § 6.2.

Causing another's crime
as form of complicity

§ 3.2.3 Multiple Causes

We may tend to think that the number of possible causes depends on the facts of the case. Where the actor shoots the victim in the head, we say the gunshot is the cause of death. In the more complicated case of Baylor's death in the "Manny the Master" hypothetical, we may say that the cause is either Manny's push or Baylor's curiosity or possibly both. Thus, more complicated cases like Baylor's seem to raise the issue of multiple causes. In fact, every result is necessarily the product of many causes, some acting immediately on and some acting long before the present result. The train was as necessary as Baylor's curiosity to bring about the death. If the local bar had not closed early, there would not have been as many people on the platform at the time, so Baylor would not have had to lean out as he did to see, so he would not have been hit. By closing early, then, the bar owner caused the death, in the but-for sense. Technically, every causation case is a multiple-cause case. It is accordingly crucial for the law to design rules to determine the causal accountability of one particular cause among multiple causes of a result. The proximate-cause requirement is highly useful in this

¹⁴ 321 N.E.2d 773 (N.Y. 1974).

¹⁵ The *Lassiter* court seems to suggest that the chain is less likely to be broken if the deceased's conduct was "reasonable." By "reasonable" the court may mean "understandable in light of the highly coercive circumstances" rather than instinctive (and less calculated). The more "understandable" the deceased's action, the more likely the subsequent actor's "choice" is likely to be judged not a break in the causal chain. 484 A.2d at 17-19.

¹⁶ See, e.g., Model Penal Code § 2.06(2)(a) & (3)(a)(ii).

effort. The bar owner's conduct in closing early is clearly so remote from Baylor's death that it ought not be seen as a proximate cause. Importantly, the causation issue is distinct from the question of the bar owner's culpability: even if the bar owner's conduct were a proximate cause, he does not have the required culpability. If he did have the required culpability—if he hoped that closing early somehow might cause Baylor's death—then he still cannot be liable for murder if his conduct is held not to be a proximate cause.¹⁷

Imputing co-criminal's
causal conduct

Legal doctrine sometimes avoids the problem of determining which of multiple causes is accountable for a result by treating the multiple causes as a single cause. This occurs most often where the two causes spring from accomplices or co-conspirators who are legally accountable for each other's conduct, as noted previously. In *Henderson v. State*, for example, the defendant father stabbed the deceased during a struggle. The son then shot and killed the victim.¹⁸ The father might argue that, even if the stab wound was lethal, his conduct was not a but-for cause of the resulting death, because the victim would have died when he did from the gunshot even without the father's stab wound. However, if the father and son were accomplices, the court observes, the father is legally accountable for the conduct of the son, and it does not matter whether the father's conduct alone was a necessary cause.

"Combined effect"
analysis

Some jurisdictions recognize a second kind of situation in which the conduct of two actors may be combined and treated as one. In *Henderson*, for example, the court concluded that, even if the father and son were not accomplices, their independent conduct ought to be treated as one causal force if the two forces combined in their effect. Thus, the father was to be held liable for the death if the stab wound that he inflicted had combined in effect with the gunshot by his son. If this doctrine were simply an application of the but-for test, it would be unobjectionable. That is, if the two causes were said to combine and were to be treated as one whenever neither alone would have been lethal, then each in fact is necessary for the result and therefore is a but-for cause.

Dangers of "combined
effect"

Unfortunately, by thinking in terms of "combined effect," courts sometimes apply the doctrine too broadly. In *Henderson*, for example, if the father's stabbing of the victim were *not* necessary for the resulting death, then the father's conduct should not be taken to be a factual cause of the death even if its effect combined in some way with that of the son's shooting of the victim. Taking the "Manny the Master" hypothetical as an example,

¹⁷ Or consider the actor who shoots at but misses his intended victim, who flees to escape the attack and four blocks later is struck and killed by a falling piano that breaks loose from its rope as it is being hoisted to a third-floor apartment. The actor's shot is a "but for" cause of the death; the deceased would not have been under the piano at the moment it fell *but for* the shot that caused him to flee. But the actor's missed shot would be judged by most people to be too remote and accidental a cause to have a just bearing on the actor's liability for the death caused by the piano. The actor's shot in the falling-piano hypothetical creates no injury that by itself would cause death. Rather, the effect of the actor's shot in the piano hypothetical is to trigger another action (flight of the intended victim), which in turn leads to the death. It is this serial effect of the causes that creates the potential proximate-cause remoteness issues.

¹⁸ 65 So. 721, 722-23 (Ala. App. 1914).

assume that Squeeze's poison had caused Baylor to become dizzy and thus made it even more likely that Manny would be successful in pushing Baylor in front of the train. If Baylor would have been killed at the same time even without the dizziness from Squeeze's poison, then Squeeze's conduct is not a but-for cause, even though a court might say that its effect combined with Manny's push. "Combined effect" analysis tends to be used by courts when it is unclear whether the defendant's cause was necessary for the result or was just a contributing but non-necessary factor. Would the son have successfully shot the victim even without the father's stabbing? Would Manny's push have made Baylor fall even without the dizziness from Squeeze's poison? These may be difficult factual questions for a jury to resolve. But if a necessary cause really is a requirement for establishing causation, then the state should have to prove this element beyond a reasonable doubt, as the state must prove every other offense element. To resort to "combined effect" analysis is to release the state from this burden and to substitute a lesser requirement of showing merely that the defendant's conduct contributed in some way to the result. On the other hand, in many cases, application of a combined-effect analysis seems entirely appropriate, as when two fires combine before causing the prohibited harm.

Serial vs. intersecting
causes

Multiple causes may interact with one another in any number of ways. The train, Manny's push, Baylor's curiosity, the early closing of the local bar, and many other circumstances came together at the moment before Baylor's death. Each represents an independent chain of events that intersects at that moment. And each of these intersecting chains of events has many links, a serial dimension in which each link has a causal connection with the links before and after. Kenny "The Hat" is a cause of Baylor's death, it might be said, by motivating Manny to do his pushing. Kenny's contract is not a cause independent of Manny's push in the same way that the train and Manny's push are independent. The contract stands in serial relation to Manny's push; the train intersects with the push. (There is nothing in the legal doctrine that requires this conceptualization of causation problems, but many people find it useful to think about the problem in this way.) In sorting out which causes will come within the realm of legal causal accountability, the doctrine must address two distinguishable questions. Which of the intersecting causal chains are eligible for causal accountability? And how far back along a causal chain, the serial dimension, should accountability extend?

The proximate-cause test is the law's device for assessing the reach of accountability along the serial dimension. If Manny had successfully pushed Baylor in front of the train, his push clearly would be judged a proximate cause of the death. Kenny's contract, which motivated Manny, probably would be considered a sufficiently proximate cause as well. But the informant's report of the investigation, which motivated Kenny's contract, might be judged too remote to be a proximate cause, even if it were given with the intention that it would cause Kenny to have Baylor killed. The problem of serial causes is particularly troublesome when one of the links in the causal chain is another person. *Root* and *Lassiter*, discussed in § 3.2.2, illustrate the difficulties.

Assessing serial dimension
with proximate-cause test

Assessing accountability
among intersecting causes

In addition to the issue of how far causal accountability travels down the chain of serial causes, the law must identify which among the many intersecting causal chains are eligible for being held accountable for the result. The law does this through the factual cause requirement, most commonly by using the necessary-cause test. Only those conditions that are necessary for the result are judged to be a factual cause of the result. The necessary-cause test is as clear and precise in application as the proximate-cause test is judgmental and vague. Yet, it generates a different sort of difficulty, as it tends to exclude from causal accountability at least two kinds of cases that some people think ought to be included: simultaneous sufficient causes (such as in *Jones*, below) and intervening sufficient causes (such as in *Wood*, below).

Necessary-cause test and
simultaneous sufficient
causes

In *Jones v. Commonwealth*, two actors simultaneously shot the deceased and inflicted similar chest wounds.¹⁹ Either shot was itself sufficient to cause death; thus, each actor can (correctly) claim that his conduct was not a necessary cause of the death. That is, each can claim that his shot did not satisfy the "but for" requirement, as the deceased would have died when he did (from the other actor's shot) even if that actor had not shot. Under a necessary-cause test, then, both actors would escape liability for murder; as in most failure-of-causation situations, each may be liable for attempted murder. Most people find this result to be unacceptable. The court in *Jones* imposed liability despite the failure of the necessary-cause test. Most courts and legislatures appear to agree with this view. The escape from accountability permitted by the simultaneous-sufficient-cause flaw in the necessary-cause test sometimes is avoided through enactment of a special statutory provision.²⁰

Necessary-cause test and
intervening sufficient
cause

There is less agreement, however, as to the impropriety of a second peculiarity in application of the necessary-cause test. In intervening sufficient-cause cases, an actor's conduct may be sufficient to cause the prohibited result, yet the actor may nonetheless escape liability if a subsequent sufficient cause intervenes to cause the result earlier than the would otherwise have occurred. Recall from the "Manny the Master" hypothetical that this is the situation with Squeeze's poisoning of Baylor. While Baylor would have died from the poison within 45 minutes, he was killed by earlier events. Because Squeeze's poisoning was not necessary for the death by train, she will escape liability for the death. (Thus, if the death is judged too remote or accidental in relation to Manny's push, one will be liable for Baylor's death.) Similarly, in *State v. Wood*, the defendant shot the deceased, inflicting a lethal wound. Before the deceased could die from the defendant's shot, however, he was killed by a subsequent lethal shot by another actor.²¹ Because the defendant's earlier conduct was not necessary to cause the death, it did not satisfy the "but for" test, and the *Wood* court reversed the defendant's conviction on this ground.

¹⁹ 281 S.W.2d 920 (Ky. 1955).

²⁰ See, e.g., Illinois Proposed Criminal Code § 203(2).

²¹ 53 Vt. 558 (1881).

Accountability dependent
on sufficiency of other
cause

The result in *Wood* is criticized by some, but is for the most part a popular view and one that most criminal codes would reflect. The criticism comes from the result's illustration of an effect of the necessary-cause test that in broad outline may seem unsettling: an actor's liability depends not on the sufficiency of his own conduct to cause the result, but rather on the sufficiency of the other cause(s). Indeed, it is this same effect that leads to the troubling result in *Jones*, the simultaneous-sufficient-cause case. Tables 3-1 and 3-2 in the footnote illustrate the application of the necessary-cause test for homicide in these two kinds of cases.²² Note that in each instance an actor's conduct will be accountable for the death if the other cause is non-lethal, and the actor will not be accountable if the other cause is lethal. This is true without regard to whether the actor's conduct is itself lethal or non-lethal. This effect—having an actor's accountability depend on the nature of another's conduct, not on his own conduct—may seem contrary to basic notions of accountability. On the other hand, to the extent that it reflects people's shared intuitions of justice, at least in the intervening-cause situation, there is good reason to adhere to it (as most jurisdictions do) if one seeks to promote the criminal law's moral credibility with the community it governs.

Table 3-1. Causal Accountability of Actors A and B Under Necessary-Cause Test Where Simultaneous Causes Result in Homicide

	Cause B	
	Lethal	Non-Lethal
Cause A	Lethal A: no causation B: no causation (the situation in <i>Jones</i>)	Non-Lethal A: causation B: no causation
	Non-Lethal A: no causation B: causation	Non-Lethal A: causation* B: causation*

*For a death to occur in this situation, there must have been a combined effect of the two non-lethal causes.

Table 3-2. Causal Accountability of Actor Under Necessary-Cause Test Where a Sufficient Cause Results in Homicide

		Intervening Cause	
		Lethal	Non-Lethal
Actor's (Prior) Cause	Lethal	no causation (the situation in <i>Wood</i>)	causation
	Non-Lethal	no causation	causation