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Human Causes versus Natural Events

Crimes typically occur when an offender brings about harm to the significant interests of a victim.[1] Think about the standard felonies of the common law: homicide, assault, rape, mayhem, arson, robbery, larceny, burglary. All of these crimes leave palpable harms in their wake: someone is killed (homicide), attacked (assault), sexually violated (rape), or disfigured (mayhem). A dwelling house is set afire (arson), property is taken violently or with a threat of violence (robbery), something is taken stealthfully (larceny), or a private home is invaded with felonious intentions (burglary). These are harms that unnerve the community as well as leave the victim in a state of irreversible damage.

A special requirement of causation attends a subset of these harms. Murder or more generally homicide does not occur unless a human actor causes the death of another human being. That is, the offender must *kill* the victim. The offender's actions must be the force that brings about the death. Suppose Alice intends to kill Bill and drives to Bill's house ready to commit the crime; just as Alice is about to knock on Bill's door, Bill dies of a heart attack totally unrelated to Alice's criminal plan. Alice does not kill Bill. She does not cause the death. Bill's death is a natural event. It is not caused by human hand.

Of course, if Bill became frightened upon seeing Alice and then had a heart attack, Alice's coming to the door might have been the cause of Bill's death. It all depends, as we shall see, on the likelihood that Bill

would have had a fatal heart attack at that moment without Alice's coming to the door.

This is the distinction between *natural events* and *human causes*. The former are of no interest to the criminal law; the latter—the harmful consequences of human actions—satisfy the minimum condition of criminal liability.

The distinction between *causes* and *events* is central to the structure of the criminal law. The first section of this chapter explains the kinds of offenses that invite an inquiry into causal relationships.

4.1 The Domain of Causation

There are, in fact, two kinds of offenses. In one category, causal questions are relevant; in the other category, they are not relevant. To understand why this cleavage runs through the criminal law, think about the difference between these two sets of relationships between actions and harms:

Crime	*Action*	*Harm*
homicide	shooting	victim dies
arson	setting fire to house	house burns down
rape	forcing intercourse	victim violated
larceny	taking object	victim dispossessed of object

Note that in the first two of these offenses, murder and arson, the harm may occur either as a result of the action or as a distinct event. People die and houses burn down. The occurrence of the event does not implicate a human being. But as to the second two crimes, rape and larceny, the very description of the harm implies that a human being (or some other agent of action) brought about the harm. Women and men cannot be violated without someone's bringing about the relevant harm. Sexual penetration (in the relevant sense) does not occur as a natural event. Similarly, people are not "dispossessed" of their belongings without some agent's effectuating the dispossession.[2] People lose things, and sometimes their belongings are destroyed. Loss and destruction occur as natural events as well as a consequence of human action. But "dispossession" is different: it occurs only when some agent takes away the belongings of another.

The distinction at work in these cases marks a basic cleavage in the criminal law. We may refer to the first group, including murder and arson, as crimes of *harmful consequences*.[3] The second group, including rape and larceny, are characterized by the harm's being bound with action. They may be called crimes of *harmful actions*. The crimes that we have considered so far classify themselves as follows:

Crimes of harmful consequences: homicide, arson, mayhem, assault[4]
Crimes of harmful actions: rape, robbery, larceny, fraud

The problem of distinguishing between human causes and natural events—the topic of this chapter—is limited to crimes of harmful consequences. The reason for this limitation should be obvious. It follows logically from the definitions of "harmful consequences" and "harmful actions." The harm required in the latter category cannot occur as a natural event and therefore the very act of perceiving the harm implies a human being as the causal agent. But the harms of death, physical injury, and destruction of property might occur in nature—without human causation—and therefore we encounter a special problem in determining whether in fact the harm is attributable to human or natural causes. If the former, the harmful consequence becomes the business of the criminal law; if the latter, the natural event is beyond the law's concerns.

Crimes of harmful action—for example, rape, larceny—rest on an immediate connection between the harmful action and the relevant harm. But crimes of harmful consequences are characterized by a causal gap between action and consequence. After the action occurs, one can never be sure that the harm will ensue. This causal gap between action and harm can cover vast stretches of space and time. Pushing a button can result in the death of someone on the other side of the planet. Pulling the trigger now means that someone might die of bullet wounds a year or two years from now. Nothing like these spatial and temporal gaps exists in the crimes of harmful action. Forcing intercourse implies rape here and now. Taking away the belongings of another entails dispossession on the spot. Of course, there might be long-term human consequences of these crimes, but these effects are not essential to saying that a crime has occurred.

The spatial and temporal gap in crimes of harmful consequences opens the field to the problems of causation. "Causation" is the name we give to the complexities that can break the link between action and consequence; when causation is absent, the harmful consequence is but an event, no longer attributable to the suspect.

The distinction between crimes of harmful consequence and crimes of harmful actions yields an important insight about the way harmful results may come about without the actor's being criminally liable for the harm. In both areas the harm may result from the innocent failure of the actor to realize that his actions would bring about the harm. The nature of the innocence, however, differs. In the case of harmful consequences, the actor may cause the harm *by accident*; he or she may not foresee that his or her actions will produce the harm in question. For

example, a hunter might not realize that his well-aimed shot would ricochet in a particular way and hit an innocent bystander. The death of the bystander is due to an accident. Alice might not realize that her coming to Bill's house and knocking on the door would frighten him and cause a fatal heart attack.

By contrast, the crimes of harmful action do not lend themselves to commission by accident. You cannot rape by accident. You cannot steal or rob by accident. You cannot defraud another by accident. What you can do in these latter cases, however, is generate the relevant harm *by mistake.* A man can be mistaken about a woman's consenting to intercourse. A person who takes an object can be mistaken about its ownership (the standard example is taking an umbrella that in fact belongs to another); if he thinks the object belongs to him, he does not take it with the intent to deprive the owner of his property. In other words, his mistake negates his intent to steal. He commits the harm, by mistake, of dispossessing the owner. In these cases of mistake, the actor would probably not be guilty—at least if the mistake is totally without fault on his part. But this problem requires detailed analysis, a task reserved for chapter 10.

The important point to note is that the problems of accident and mistake characterize different kinds of crimes. Accidents are limited to crimes that require causation. Mistakes may technically occur in all crimes but are of greater significance in crimes of harmful action. Why is this? Accidents are instances of causation out of control. Only where causation occurs across time and space can we encounter a problem of accidental consequences.

To summarize the argument of this section, we can formulate the following proposition:

Causation is a problem only where accidental harm is possible.

Accidental harm is possible in crimes of homicide, arson, mayhem, assault (harmful consequences) but not in the crimes of rape, robbery, larceny, fraud (harmful action).

4.2 How to Approach Causation

The prevailing theory of causation in the criminal law, both in Germany[5] and the United States,[6] is the expansive test: an event X causes an event Y if, but for X, Y would not have occurred. This test, conventionally known as the *sine qua non* or "but for" test, poses a counterfactual conditional question: What would have happened if X were absent? Would Y have happened anyway?

Of course, there is no way of knowing for sure whether Bill would have died, even if he had not seen Alice's coming up the stairs and

knocking on the door. There is no way to roll back history and to run the sequence again with one factor changed. Yet this is precisely what we have to imagine in order to apply the "but for" test. We have to imagine the unfolding of events in an imaginary world: the world in which everything is the same, except for one difference. If we are testing whether X is a cause of Y, we have to have imagine the events leading up to Y with X missing: if we can say confidently that without X, Y would not have occurred, then X is a cause of Y.

The "but for" test captures an important truth about causation; if Bill's death would have occurred regardless of Alice's actions, then we cannot say that Alice caused the death. We apply this rule of thumb in cases of failing to avert death as well as affirmative acts leading to death. If a swimmer would have drowned, no matter what measures the lifeguard might have taken, we cannot say that the lifeguard's ignoring the plea contributed to the death. The lifeguard cannot be said to have caused the death unless he could have prevented it.

Problem One: Alternative Sufficient Causes

Yet the "but for" test suffers from three major deficiencies. The first of these strikes at the heart of the maxim: if Y would have occurred without X, then X is not a cause of Y. The best example is the problem of merging fires.[7] Suppose that both Joe and Karl set fires that converge and destroy the plaintiff's house. Either fire alone would have been sufficient to destroy the house. Therefore both Joe and Karl can point the finger at the other and say: He was the cause; I was not the cause because the harm to the plaintiff's house would have happened even without my fire. This is a serious challenge to the "but for" test for in fact if that test is applied, neither Joe nor Karl is responsible for the damage to the plaintiff's house.

A tantalizing version of the same puzzle is posed in the following story. Joe wants to kill Paul and therefore on the eve of Paul's setting forth on a hike across the desert, Joe sneaks into Paul's room and replaces the water in his canteen with scentless and colorless poison. Karl also wants to kill Paul and therefore later the same evening he sneaks into Paul's room and drills a small hole in the bottom of Paul's canteen. Paul leaves the next morning without noticing the hole in his canteen. After two hours in the desert he decides that it is time to drink but by now the canteen is empty. Without other sources of water he dies of dehydration in the desert. Who is responsible for the death? Karl can claim that if he had not drilled the hole in the canteen, Paul would have died of poison. But Joe can maintain that in view of Karl's subsequent action, replacing the water with poison was an irrelevant act.

These scenarios illustrate the limitations of counterfactual thinking in assessing causation. In these cases, where there are alternative suf-

ficient conditions, the question should be not what would have happened, but what in fact did happen. Can one perceive causal power operative in the narrative as it is told? In the story of Joe's and Karl's combined fire, the answer seems to be clearly yes. Together they generate a single fire that in fact destroys the house. Their roles with regard to Paul's death are more nuanced. Their actions do not converge to create a single source of danger; rather their efforts succeed and displace each other. Karl creates the state of affairs of Paul's trying to drink from an empty canteen—even though this is hardly more dangerous than the canteen full of poison would have been. Yet in fact Paul dies as a result of his canteen's being empty, and Karl brought about that condition. Whether Joe is also a cause is more dubious, and indeed it is only by reintroducing counterfactual thinking (if Karl had not intervened, Paul would have drunk the poison) that Joe becomes a candidate for causal responsibility. In these cases of independently sufficient causes, the better approach seems to be to avoid counterfactual questions. In place of this logical and scientific account of causation we fall back on the simpler question whether ordinary observers would perceive causal power operative in the facts.[8]

Problem Two: Proximate Cause

The second objection to the "but for" test is that it sweeps up so many causal factors that some additional factor is required to eliminate far-flung effects from the range of liability. It may be true that for want of a nail, the kingdom might be lost. The blacksmith who fails to nail in the horseshoe unleashes a crescendo of consequences: the horse falls, the rider is killed, the battle is lost, and the kingdom is conquered.[9] Should the blacksmith be blamed for it all? The question is whether we should limit the responsibility of the blacksmith by holding that he did not cause the fall of the kingdom or, alternatively, that he could not have foreseen the fall and therefore, though he caused it, he was not at fault or culpable for the unfortunate consequences of his actions.

The tendency in modern legal thinking is to cut off responsibility at the level of causation. To cope with the far-flung effects of a cause that satisfies the "but for" test, common lawyers have introduced the term "proximate cause." Therefore, as it is commonly said, the analysis of causation comes in two stages: first, whether the factor in question satisfied the "but for" test of causation and second, whether it satisfied the requirement of "proximate causation."

Some lawyers rely on the metaphor of the stream to explain the concept of "proximate cause."[10] There are two ways that a stream can dissipate its force. It can lose its flow in the sands. Or, it can be overwhelmed and submerged in an intersecting tributary. So it is with causation. As the streams dissipates into the sand, causal energy loses its

power and merges with background forces. The blacksmith's oversight remains technically a cause of the empire's fall, but the want of a nail would hardly stand out among the multitude of economic and political factors that spell military defeat.

As the stream can be overwhelmed by a larger flow, causal forces are sometimes superseded by new causes. Defense lawyers often try to mount the argument that their clients seemingly fatal blow to the victim did not cause the victim's death because after being shot or stabbed, the victim received negligent medical care. The defense tried this argument in the trial of Bernhard Goetz: Darrell Cabey was supposedly paralyzed for life not because of the gunshot wound that Goetz delivered to Cabey but because of the subsequent negligent care in the hospital.[11] The same argument came forward in the trial of Lemrick Nelson for having allegedly stabbed and killed Yankel Rosenbaum.[12] Rosenbaum was taken to the hospital and as the argument goes, if he had received proper care for his wounds he would have survived. There the negligent medical care is like the intersecting tributary that overwhelms and dominates the original causal stream.

Though often tried, these arguments about "negligent intervening causes" almost always fail. The complications that occur in the hospital are seen as part of the background circumstances that worsen the original wound. In these situations, Goetz's shooting and Nelson's alleged wounding were the causal factors that remained in the foreground. This distinction between background and foreground factors captures the theme of this chapter. When a factor recedes into the background, it is a natural event, not a cause that generates criminal liability.

To grasp the subtlety of these notions of background events and foreground causes, compare these cases of negligent treatment in the hospital with a hypothetical situation in which the argument of "supervening cause" is likely to succeed. Suppose Jack negligently runs down the mob boss Gabe. While Gabe is recuperating in the hospital, his nemesis in the criminal underground, Mike, finds him in the room and executes him, mob style, with a rope around the neck. In this situation the party responsible for Gabe's death appears to be Mike, not Jack. Jack's negligence merely explains why Mike finds his victim in the hospital rather than at home. In other words, Mike's actions emerge in the foreground as the responsible cause and Jack's bringing about the car accident recedes into the background. There is good authority for the conclusion that Jack would not be liable for Gabe's death.[13]

Now what is the difference between medical negligence in treating Darrell Cabey and Mike's executing Gabe? Is it a matter of probability? Of foreseeability, as lawyers say? Some prominent judges, notably Justice Benjamin Cardozo, have reasoned that analyzing proximate cause is nothing more than assessing "the eye of vigilance" and the degree of foreseeability.[14] But this seems to be an oversimplification. The per-

spective of probability ignores the key factor in the situation, namely, that the wound injuring Darrell Cabey in the hospital was merely negligence. The mode of Mike's killing Gabe was intentional and willful. It could well be the case that the intentional killing of a mob boss in the hospital was more probable, more foreseeable, than the hospital staff's negligent treatment after a gunshot wound. Yet increasing or decreasing the probability of the intervening cause would not change the analysis. What, then, is the difference between a negligent and an intentional intervening cause?

To express our intuitions in this context, we have to invoke some rather imprecise ideas. I would rely on the metaphor of "causal energy." When Mike enters Gabe's room and lays his hand on his intended victim, he invests more personality, more energy, into the unfolding of causes and events. This greater input of personal force brings his actions into the foreground. In our perception of Gabe's demise, Mike becomes the responsible cause. It is also worth noting another difference between the stories of Darrell Cabey and of the hypothetical victim Gabe. Goetz injured Cabey intentionally, though arguably in self-defense.[15] Jack's initial injury of Gabe is merely negligent. This means that at the outset of the story, Goetz invests more energy into Cabey's suffering than does Jack in the negligent accident that lands Gabe in the hospital. Goetz's causal contribution is stronger at the outset and it survives intervention by the negligent hospital staff. Jack's contribution at the outset is less substantial and it is overwhelmed by Mike's committed and willful intervention.

It should be noted that intentional intervening causes are more likely to be recognized in tort than in criminal cases. Most of tort law is about responsibility for negligently causing harm. Most of criminal law is about responsibility for intentional invasions into the interests of others. This means that at the outset of the analysis in criminal cases, we have a stronger contribution by the alleged offender. That stronger contribution is likely to survive against intervening causes.

The difficulties of getting precise about cause has lead some theorists to argue that proximate cause is just a value judgment, a matter of policy.[16] This argument is less threatening in the field of torts than in criminal law. Tort law proceeds without a principle of legality, of prior warning of potential liability. If proximate cause in murder cases were simply a value judgment, however, we would encounter serious problems of principle. Would it be right to convict someone of one of our most serious offenses, the only offense subject to the death penalty in the United States, simply because judge or jury made a value judgment that he ought to be held responsible for the far-flung consequences of his attack on the victim? Admittedly, we have not yet addressed the theory of legality. Until we assay the field in chapter 12, we shall leave the matter of proximate cause with our concerns prop-

erly noted. It is clear that great issues of justice and of legality inhere in our analysis of when we hold individuals accountable for the remote consequences of their actions.

Problem Three: Omissions

If the implications of the "but for" test are followed through, there is no important difference between the causal role of acts and of omissions. The implication is that a failure to intervene and prevent a suicide causes death in the same sense as strangling the victim to death. A doctor's failing to aid a stranger in need causes death in the same sense that injecting air into a patient's veins causes death. It follows as well that for every crime there are a large if not infinite number of factors that could have prevented its occurrence. The fact that no one killed B the day before A's assault is as much a "cause" of death as A's actually killing B. This is the third major objection to the theory of "but for" causation.

One way of coping with this objection is simply to deny that omissions can be causes. This view, which has some support in the history of philosophy, draws on the popular idea that causes must be operative forces in the circumstances leading to the harm.[17] This view holds that omissions are not forces; they are "literally nothing at all."[18] To use language already introduced, omissions display no "causal energy." In this example we see a clear contrast between the quasiscientific "but for" test, which implies that all omissions are causes, and the view of the ordinary observer, which stresses our shared perception of causal forces at work.

The debate about whether omissions are causes brings us into a field of subtle differentiation. In one sense omissions are not causes, and in another sense they are. First, I will explain why letting someone die is not a "cause" in the same strong sense that killing someone is. Letting someone die represents the failure to allocate resources to save the person. It is possible to respect the liberty of others and fail, hardheartedly, to allocate resources to save their lives. By contrast, terminating life represents a direct interference with the most basic interest of another human being. There is no way that killing is compatible with respect for the liberty and autonomy of another person. Admittedly, this view has come in for criticism recently in the field of assisted suicide, but if we leave aside this special case, there is no doubt that killing takes on contours entirely different from letting someone die.

The criminal law operates on the assumption of a general prohibition against all cases of direct killing. There is no need, in particular cases, to prove a special duty not to kill. Everyone falls under the general duty not to terminate the life of another. Yet in cases of letting someone die, there is no liability unless the person who could have

saved the life of another was under a duty to do so. These duties are based on a variety of factors, including family relationships, undertakings to assist, communities of shared risk, and professional obligations. The important point is that in cases of letting die as opposed to direct killing, only those who come under a special duty to aid are responsible for the death.

If those who killed and those who let others die both "caused" death in the same way, we would have trouble explaining the differentiation in the law. All those who cause death should be treated in the same way. Yet in fact we do not hold accountable those who merely allow or let others die, unless there is a special duty to render aid. It is clear, then, that the law does not rigorously follow the "but for" test, for if it did, it would treat as causal agents all those who could have saved the life of the deceased and did not.

But if the law took the view that omissions were not causes at all, we would run into problems making sense of our practice of holding liable for homicide those who, under a duty to aid, knowingly let the victim die. The ambivalence of the Model Penal Code illustrates the problem. It is not easy to reconcile these three provisions:

> 1. Section 210.1(1) conditions criminal homicide on "causing the death" of another human being.
>
> 2. Section 2.01(3)(b) restates the traditional rule that liability for commission of an offense by omission turns on whether a "duty to perform the omitted act is . . . imposed by law."
>
> 3. Section 2.03(1)(a) commits itself to the orthodox "but for" rule, namely, that "conduct is the cause of a result when it is an antecedent but for which the result in question would not have occurred." The term "conduct" is defined earlier as an "action or omission."[19]

Rule 3 holds that all cases of letting die are instances of causing death. But if that were true, they would all qualify as criminal homicide under rule 1, in which case rule 2 would be entirely superfluous.[20]

It should be clear from the discussion of the foregoing three problems that at least two conceptions of causation interweave in our legal discussions. On the one hand, we encounter the pervasive "but for" theory, which captures an important truth about the distinction between causes and events. When a harmful occurrence would have taken place anyway, regardless of the suspect's contribution, then it is a natural event. It is not "caused" by the criminal suspect. On the other hand, we work with an intuitive understanding of causation as a force displaying energy in the world. We see this in the analysis of (1) alternative sufficient causes (merging fires), (2) proximate cause and intervening causes, and (3) liability for omissions. The former "but for" test stresses the counterfactual condition question: What would have hap-

pened if the suspect's actions were absent? The latter focuses on what in fact transpires: we see the fires merge and burn down the house, we perceive the intervening intentional killing in the hospital in the causal foreground, and we have trouble recognizing omissions, cases of letting die, as instances of "causal energy."

It seems that the ordinary thinking of lawyers is in conflict. We are drawn simultaneously to quasi-scientific analysis that treats any necessary condition as a cause (the "but for" test) and to the ordinary prescientific view of causation as energy or force that brings about a result. The former has the vice of being out of touch with the reality of the way we think about causation (e.g., all omissions are causes), and the latter posits mysterious metaphysical energies that drive the world (as a result no omissions are causes). To complement this conflict we should consider a recent philosophical account of causation that has gained prominence in the work of H. L. A. Hart and A. Honoré.[21]

4.3 Causation in Ordinary Language

Like so many of the other terms used in criminal law, causation is a concept that figures prominently in our day-to-day efforts to make sense of the world. If we wish to build a system of criminal law on the basis of our ordinary concepts, then we must attend to the way the concept functions in our daily lives. This means that we must examine our reasons for making causal inquiries and pay close attention to the way we ordinarily speak about "causing" harm.

One important feature of causal inquiries is that we do ordinarily inquire about the cause of normal or continuing states of affairs. We speak about the cause of death, but not about the cause of life. Why not? Death at a particular moment is unplanned and unexpected and therefore we wish to know why it happens. But a healthy person's remaining alive does not stimulate our interest in explaining the world around us. Things would be different, of course, if we expected someone to die in an airplane crash and she survived. Then we might appropriately ask: How did she survive? To what does she owe her added days of life? (Note that we still have some difficulty framing our questions with the word "cause.") This difference between life and death demonstrates that causal inquiries are not always appropriate. When inappropriate causal questions are raised, as if someone should ask you the cause of your being alive today or the cause of the water still being in the ocean, we are likely to be puzzled about the point of the question.

It would be difficult to give a complete account of when causal inquiries are appropriate, but one obvious category is precisely the range of accidents, unexpected events, and untoward acts that preoccupy the law. We probably find it odd to ask: What caused him to wear clothes to the office? But we would never find it odd to inquire: Why