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# The Model Penal Code's Conceptual Error on the Nature of Proximate Cause, and How to Fix it

Paul H. Robinson\*

## ABSTRACT

*The Model Penal Code reconceptualized proximate cause to see it as part of the offense culpability requirements rather than as, in the traditional view, a minimum requirement for the strength of the connection between the actor's conduct and the prohibited result. That conceptual error, rare in the well-thought-out Model Code, invites misinterpretation and misapplication of the proximate cause provision, and can produce improper liability results. The failure is all the more unfortunate because the Model Penal Code drafters did have an important improvement to offer in dealing with the challenging issue of proximate cause. Their jettison of fixed detailed rules in favor of a useful general standard — “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” — could have significantly simplified and improved proximate cause analysis, but their conceptual error created needless problems that helped lead most states to reject the Model Penal Code provision.*

Where an offense is defined to include a prohibited result, such as death or property destruction, criminal liability traditionally requires not only proof of the result but also proof of an adequate causal connection between the defendant's conduct and the result. That required connection is commonly seen as being of two sorts. First, there must be a defined logical, physical connection, usually a requirement that the result would not have occurred “but for” the actor's conduct. This statement of the required real-world relation is commonly termed the “factual cause” or “but-for” cause requirement.<sup>1</sup>

It is also generally agreed that something more is required. Even if the defendant's conduct is a but-for cause of the prohibited result, he will not be causally accountable for it unless his conduct is also a

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<sup>1</sup>See generally Paul H. Robinson & Michael T. Cahill, Criminal Law § 3.2.1 (2d ed. 2012). A few jurisdictions purport to use a sufficient cause test, rather than the classic necessary cause (but-for cause) test, as the factual cause requirement. Robinson & Cahil, supra note 1, § 3.21.

“proximate cause” or “legal cause” of the prohibited result.<sup>2</sup> In the classic example used to illustrate the point, the defendant shoots at the victim but misses, the victim flees, and twenty blocks later is killed when a piano being hoisted to an upper window falls on him. The victim would not have been killed *but for* the defendant’s earlier conduct in shooting at him, which sent him running to the spot where the falling piano would hit, but all agree that the strength of the causal connection is too weak to be a basis for the defendant’s causal accountability for the death. In the words of the Model Code, the result is “too remote or accidental in its occurrence to have a [just] bearing on the actor’s liability or on the gravity of his offense.”<sup>3</sup>

There is general agreement, then, on what the criminal liability results should be in the standard causation cases. The defendant in the falling piano case should be liable only for attempted murder, not murder — the same result as would occur if the defendant shot and missed the victim and the victim was never killed by the falling piano. (There is also general agreement that attempted murder ought to be graded less seriously than murder, giving practical significance to the distinction being made here).<sup>4</sup>

Despite this agreement on the proper results in these cases, the Model Code drafters have made a rare conceptual error that invites improper results and seriously confuses clear drafting and rational conceptualization. In what the drafters call a “fresh approach,” they treat the issue of proximate cause, as in the falling-piano case, as a matter of a defendant’s culpability as to causing the prohibited result, rather than as an aspect of the causal connection between the defendant’s conduct and the prohibited result.<sup>5</sup> Their culpability approach to proximate cause, it is argued here, invites complexity and confusion that essentially assures errors in interpretation and application. It creates problems that need not exist, then fails to solve those self-made problems.

It is not unusual for scholars to criticize the Model Code’s positions on any number of issues. Certainly the Code’s underlying distributive principles — with its tendency to promote crime control through principles of deterrence and incapacitation even when they conflict

<sup>2</sup>Robinson & Cahill, *supra* note 1.

<sup>3</sup>Model Penal Code § 2.03(2)(b), 2.03(3)(b).

<sup>4</sup>Model Penal Code § 5.05(1). Among scholars, however, this is dissent on this point, with some arguing that resulting harm ought not be significant. And a few codes claim to hold resulting harm significance in offenses less serious than murder. See generally Robinson & Cahill, *supra* note 1, § 11.0.2.

<sup>5</sup>Model Penal Code Official Commentaries § 2.03, at 254, 258, 260. For example, the Commentary explains: “[T]he Code proceeds on the assumption that [proximate cause] issues ought to be dealt with as problems of the culpability required for conviction and not as problems of ‘causation.’” Model Penal Code Official Commentaries § 2.03, at 258.

with just deserts — are often maligned, but the Code is generally acknowledged to be a thoughtful and carefully drafted document, whose provisions usually logically follow from its well-conceptualized underlying principles. So it is somewhat unusual to see such a conceptual error.

#### I. THE MODEL CODE'S CAUSATION PROVISION, AND ITS RESTRUCTURING

Model Penal Code section 2.03 is reproduced below in Graphic 1. Subsection (1), with the double-line border, concerns the standard but-for cause issue (along with the standard provision in subsection (1)(b) providing that an offense definition might introduce additional causation requirements unique to that offense). The second traditional causation requirement — proximate cause — is also reflected in Section 2.03. As noted above, the Code is not insensitive to the proximate cause issue, and includes its proximate-cause language — “too remote or accidental in its occurrence to have a [just] bearing on the actor’s liability or on the gravity of his offense” — in subsections (2)(b) and (3)(b), bordered with the non-bold dotted line.

But this proximate cause language is included in a subsection whose focus is the defendant’s culpable state of mind, and there lies the problem. Why should proximate cause be conceptualized as part of the requirement of culpability as to causing a prohibited result, rather than as an independent requirement about the relation between the actor’s conduct and the prohibited result?

Let me give some general background regarding the requirement of a culpable state of mind as to causing a prohibited result. As a basic operating principle, the Code (properly) requires that the defendant have some culpable state of mind, as defined in section 2.02, as to every objective element. Indeed, even if no such culpability is expressly stated in an offense definition,<sup>6</sup> a general provision directs that it be essentially *read in* as an offense element.<sup>7</sup> When an offense includes a result element, then, it is not enough that the defendant caused the prohibited result, it must also be shown that at the time of his conduct causing it he had a culpable state of mind as to causing it. If the death of another human being is the prohibited result, for example, he may be liable for murder if he was purposeful or knowing as to causing the death, liable for reckless homicide, manslaughter, if he was reckless as to causing death, and liable for negligent homicide if he was negligent as to causing death.<sup>8</sup>

But there are cases where a defendant might not actually have the required culpable state of mind as to causing the prohibited result, but we nonetheless believe that he is properly treated *as if* he possessed

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<sup>6</sup>Model Penal Code § 2.02(1).

<sup>7</sup>Model Penal Code § 2.02(3).

<sup>8</sup>Model Penal Code §§ 210 to 210.4.

it. For example, if he tries to kill the victim but ends up only maiming him, he ought not be able to defend against a charge of maiming by claiming that he had no intent at all to maim the victim; his actual intention was to kill the victim cleanly. Or he ought not be able to defend against a charge of murder of Victim A by claiming that he was actually intending to kill Victim B, who was standing adjacent to A. The Code addresses these kinds of cases in Subsections (2)(a) and (3)(a), bordered with the bold single line, where it directs that the culpable state of mind required by the offense definition should essentially be imputed to the defendant in such cases. The required element is satisfied if:

**GRAPHIC 1. MODEL PENAL CODE CAUSATION PROVISION AS DRAFTED**

**Section 2.03. Causal Relationship Between Conduct and Result; Divergence Between Result Designed or Contemplated and Actual Result or Between Probable and Actual Result.**

(1) Conduct is the cause of a result when:

- (a) it is an antecedent but for which the result in question would not have occurred; and
- (b) the relationship between the conduct and result satisfies any additional causal requirements imposed by the Code or by the law defining the offense.

(2) When purposely or knowingly causing a particular result is an element of an offense, the element is not established if the actual result is not within the purpose or the contemplation of the actor unless:

- (a) the actual result differs from that designed or contemplated, as the case may be, only in the respect that a different person or different property is injured or affected or that the injury or harm designed or contemplated would have been more serious or more extensive than that caused; or
- (b) the actual result involves the same kind of injury or harm as that designed or contemplated and is 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.

(3) When recklessly or negligently causing a particular result is an element of an offense, the element is not established if the actual result is not within the risk of which the actor is aware or, in the case of negligence, of which he should be aware unless:

- (a) the actual result differs from the probable result only in the respect that a different person or different property is injured or affected or that the probable injury or harm would have been more serious or more extensive than that caused; or
- (b) the actual result involves the same kind of injury or harm as the probable result and is 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.

(4) When causing a particular result is a material element of an offense for which absolute liability is imposed by law, the element is not established unless the actual result is a probable consequence of the actor's conduct.

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There is general agreement as to the propriety of this kind of imputation of a required culpable state of mind, which has been termed “substituted mental elements,”<sup>9</sup> although some states do not have an express codification of the doctrine.<sup>10</sup> The defendant’s intention to kill is an adequate basis on which to justly impute to him the less serious intention to maim. His intention to kill *A* is an adequate basis on which to impute to him the equally serious intention to kill *B*. The “different person or different property” portion of the provision is what traditionally has been referred to as the doctrine of “transferred intent.”<sup>11</sup> (The provision of the Model Code is drafted in two parallel parts, in subsections (2) and (3), to account for the slightly different situations of intentionally causing results and unintentionally risking results that occur — see the bracketed language in the offset, showing the language difference between the two subsections.)

The question that all this background analysis leads to is whether the issue of proximate cause — “too remote or accidental in its occurrence to have a [just] bearing on the actor’s liability or on the gravity of his offense” — is conceptually akin to the issue of culpable state of mind as to causing a prohibited result, like the doctrines of substituted mental elements such as transferred intent in subsections (2)(a) and (3)(a), or whether it is conceptually akin to the definition of the strength of the causal connection between the defendant’s conduct and the prohibited result, like the but-for cause issue in subsection (1)(a)?

Consider a rewrite of the Model Code’s causation provision, as set out in Graphic 2 *infra*, which uses the Code’s proximate cause language but restructures the subsections to treat the proximate cause issue as the latter sort (a conduct-result relation issue), rather than as the former sort (a culpable state of mind issue).

As in Graphic 1, the double lines border the but-for cause rule. The bold single line borders the transferred-intent imputation-of-culpability doctrine. In this formulation, the proximate cause rule, bordered by the non-bold dotted line, is moved to that part of the causation definition defining the required strength of the causal connection (treating it as conceptually similar to the but-for cause requirement), rather than being part of the culpability-as-to-causing-the-prohibited-result provision. This reformulation would seem to produce all of the results that all agree are appropriate in the causation cases but, as explained below, avoids both dispositional and conceptual complications.<sup>12</sup>

<sup>9</sup>Robinson & Cahill, *supra* note 1, § 5.1.

<sup>10</sup>Robinson & Cahill, *supra* note 1, § 5.1.

<sup>11</sup>Robinson & Cahill, *supra* note 1, § 5.1.

<sup>12</sup>The rewrite uses the Model Code’s language, in order to show how the drafter’s could have drafted it using their own terms. That language might be improved upon,

**GRAPHIC 2. MODEL CODE CAUSATION PROVISION REFORMULATED**

**Section 2.03. Causal Relationship Between Conduct and Result**

(1) Conduct is the cause of a result if:  
 (a) the conduct is an antecedent but for which the result in question would not have occurred; and

(b) the result is 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; and

(c) the relationship between the conduct and result satisfies any additional causal requirements imposed by the Code or by the law defining the offense.

(2) Concurrent Causes. Where the conduct of two or more persons each causally contributes to a result and each alone would have been sufficient to cause the result, the requirement of Subsection (1) of this section is satisfied as to both persons.

**Section 2.03A. Divergence Between Consequences Intended or Risked and Actual Consequences**

(1) When culpability as to a particular consequence of a person's conduct is required by an offense definition and the consequence that actually occurs is not that designed, contemplated, or risked by the person, as the case may be, the required culpability nonetheless is established if the actual consequence differs from the consequence designed, contemplated, or risked only in the respect that:

- (a) a different person or different property is injured or affected, or
- (b) the consequence intended, contemplated, or risked was as or more serious or extensive an injury or harm than the actual consequence.

(2) "Consequence," as used in this Section, means a result element of an offense definition and the attendant circumstance elements that characterize the result.

however. A better formulation might read something like: "the result is not too remote in its occurrence, too peculiar in its manner of occurrence, or too dependent upon another's volitional act."

## II. APPLICATION OF THE MODEL PENAL CODE'S PROXIMATE CAUSE ANALYSIS

Presumably the Model Code wants to give a proximate cause remoteness defense to murder to *D* in the falling piano case, as it should. After all, that would seem to be the point of its including the proximate cause language in subsection (2)(b): "too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense."

Under the reformulated provision in Graphic 2, the application of the falling piano facts to the statute is clear:

- (1) Conduct is the cause of a result if:
  - (a) the conduct is an antecedent but for which the result in question would not have occurred; and
  - (b) the result is 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.

The death by piano may be a but-for cause under (1)(a) but fails to satisfy (1)(b) because the prohibited result, the death of *V*, is "too remote or accidental in its occurrence to have a just bearing on the actor's liability or on the gravity of his offense." Hence, there is no causal accountability and *D* is liable at most for the attempted murder of *V*.

How is one to reach this same result under the Model Code's provision?

- (2) When purposely or knowingly causing a particular result is an element of an offense, the element is not established if the actual result is not within the purpose or the contemplation of the actor unless:
  - (b) the actual result involves the same kind of injury or harm as that designed or contemplated and is 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.

The Model Code's provision is not about the strength of the causal connection between *D*'s conduct and the prohibited death of another human being, but rather is about *D*'s culpable state of mind as to the death.

To understand how the Model Code provision works, consider a case in which all would agree there is no proximate cause problem — *D* ought not get a remoteness defense: *D* wants to kill *V*; he shoots him in the chest; *V* dies. More specifically, one might normally expect that *V* would die because the bullet pierced his heart, which then stops. *D* has some medical background and this is exactly what he intends when he aims his shot at *V*'s heart. In fact, however, *D*'s shot misses the heart and punctures a lung. *V* drowns in his own blood from the internal bleeding.

I take it no one cares that *V* died by blood-drowning rather than by heart stoppage. He ought to be liable for murder. In the reformulated provision in Graphic 2, *D*'s conduct in shooting is a but-for cause of the prohibited result — death of another human being — and it is “not too remote or accidental . . .” End of story.

Now consider the case under the Model Code's provision. Let us work through that provision phrase by phrase: “When purposely or knowingly causing a particular result is an element of an offense . . .” — yes, murder is an offense of this sort — “the element is not established if the actual result is not within the purpose or the contemplation of the actor unless:” — This seems a bit odd. Do the drafters mean to say “the element *is* established *if* the actual result *is* within . . .”? If so, why not say that? If they mean something else, what could they mean? But let's continue. — “the actual result involves the same kind of injury or harm as that designed or contemplated” — *V*'s death was designed and contemplated and *V*'s death is what occurred, so this phrase seems to be satisfied; but what do they mean by “actual result,” which they want to distinguish from the “result designed or contemplated”? On these facts there is a difference between the two. *D* designed and contemplated death by heart stoppage but in fact got death by blood-drowning. Are they “the same kind of injury or harm”? Hard to say. It depends on what you mean by “same kind.” They both caused death but the organs injured were different. Should that matter? If they are held to be not “the same kind,” then apparently the required element of culpability as to causing the result is *not* established, and *D* is *not* liable for murder, which would clearly be an improper result. To get to the right result, then, we must find that they are the “same kind” (more on this later). — “and [the actual result] is 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.” — Again, what is meant here by “actual result”? Is it death by blood-drowning? Apparently that is what the drafters have in mind, in which case a jury would hopefully conclude (if they were following all this analysis, which seems doubtful) that blood-drowning is “not too remote or accidental . . .” as compared to the designed and contemplated heart-stoppage. So, with luck, the Model Code could get the jury to the correct result.

But the obvious question is, why such a mess? Why do we care at all about whether *D* intended heart stoppage rather than blood-drowning? There is no apparent policy or theoretical reason to care and, more importantly, there is nothing in the Model Code to suggest that the Code's culpability requirements care. The Code's culpability scheme is one in which the prosecution must prove culpability as to all elements of the offense definition. If the offense requires that the defendant by his conduct cause the death of another human being, then the Code's scheme requires proof of the defendant's culpability *as to causing the death of another human being*. Nowhere does the

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Code's scheme require proof of culpability as to the *manner of occurrence* of the result.

*D*'s culpable state of mind as to hearth stoppage versus blood-drowning is irrelevant to the law, as irrelevant as his culpable state of mind as to whether *V* was very scared when shot or was a talented painter or was nice to his children. In some larger moral inquiry, someone might think *D*'s culpable state of mind as to these circumstances might be relevant, *but nothing in the Code makes them legally relevant*. Yet the drafters write section 2.03 as if culpability as to the offense definition's stated prohibited result — culpability as to causing the death of another human being — is not enough. They write section 2.03 as if the prosecution also must prove that the defendant had a culpable state of mind as to the *manner of occurrence* of the prohibited result.

There could be an offense in which culpability as to the manner of occurrence was required. If an offense is defined as causing death by poisoning, for example, then the prosecution would have to prove not only that the defendant intended to cause the death but also intended to cause it in that particular manner — by poisoning. But culpability as to manner of occurrence is legally relevant only if the offense definition makes it so, and this it almost never does.

Once the drafters took this odd, and erroneous, view of what culpability as to causing was required, they had a serious practical problem on their hands. It would be the rare case indeed in which a prosecutor could prove beyond a reasonable doubt that the death had *occurred in exactly the manner* in which the defendant had designed or contemplated it. Indeed, if the defendant does not testify, how would anyone ever know just what he designed or contemplated at this level of detail. Such a vastly expanded culpability requirement would produce a world in which one could never get a conviction for a result element offense.

But the drafters had a solution to the problem. They would create a general provision that would essentially *impute* to each actor the culpability as to the manner of occurrence of a result (except in cases of “too remote or accidental . . .”). From that contorted perspective, the machinations of the Model Code's provision make sense:

(2) When purposely or knowingly causing a particular result is an element of an offense, the element is not established if the actual result is not within the purpose or the contemplation of the actor unless: . . .

(b) the actual result involves the same kind of injury or harm as that designed or contemplated and is 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.

If the actual result is “the same kind” as the result that is designed or contemplated, then the required culpability as to manner of occurrence *is established* (unless too remote or accidental). (To make this

work, of course, we have to assume that when the provision says the required culpability element “is not established . . . unless . . .,” they really mean it “is established if . . .,” so as to provide an affirmative imputation of the required element.)

But the larger question is why bother with all this mess in the first place? The drafters’ provision is solving a problem of their own making. The problem disappears if they simply follow the Code’s culpability scheme and require culpability only as to the offense elements — culpability as to causing the result *prohibited by the offense definition*, that is, causing the death of another human being.

### III. WHY WOULD THE MODEL CODE TAKE SUCH AN ODD AND TROUBLE-SOME APPROACH?

Given the unnecessary complexity and confusion of the Code’s formulation, which simply invites errors in interpretation and application, why would the drafters have taken such an approach? They might have just made an unprovoked error in interpreting what the Code’s general culpability scheme required. But given how thoughtful the drafters are, it seems more likely that there was some matter of principle driving them toward this mess. It is only speculation, but the answer may well lie in their erroneous conceptualization of proximate cause as a matter of culpable state of mind rather than a matter of conduct-result relation.<sup>13</sup>

If you started with the assumption that matters of proximate cause are really matters of culpable state of mind, it would be easy to see why one might want to shoehorn the “too remote or accidental . . .” defense into a culpability context. How can one do that? The remoteness cases are commonly cases where something unexpected happens in the causal chain, so it is a small leap to conclude that where this occurs, it must cause a failure to satisfy the culpable state of mind requirement.

But remoteness problems won’t normally negate required offense culpability. In the falling piano case, *D* has the required culpability as to causing *V*’s death. But if one expands the notion of required offense culpability to include not just causing *V*’s death but also its manner of occurrence, then the falling piano’s remoteness does negate the (expanded) culpability requirement.

What would make the drafters erroneously assume in the first place that proximate cause issues ought to be seen as offense culpability requirements? Again, one can only speculate, but here is one theory. The drafters’ work on proximate cause was insightful in an important respect. They took what the drafters called a “fresh approach” to

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<sup>13</sup>Perhaps they saw that the proximate cause issue required a general normative judgment — “not too remote or accidental . . .” — and mistakenly equated this broad sense of culpability with culpability in the narrow sense of a culpability element in an offense definition?

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proximate cause.<sup>14</sup> “Rather than seeking to systematize the varying and sometimes inconsistent rules in the numerous areas in which the problem has arisen,”<sup>15</sup> the Code’s formulation provides a general standard, discussed previously: asking whether the result is “too remote or accidental in its occurrence to have a [just] bearing on the actor’s liability or on the gravity of his offense.” In support of this open-ended invitation to the intuitions of justice of judges and jurors, the drafters cited recently published scholarship.<sup>16</sup>

Today, we might not see this as a terribly revolutionary insight. We have a full literature on the importance of criminal law’s expressive function and the practical value of having it reflect shared community views, and have applied the insights to a wide range of criminal law doctrines. But in the late 1950s and the early 1960s, in the midst of the shift from rules without explicated reasons to the supposed scientific application of the crime-control principles of deterrence and incapacitation, this was indeed a new approach. The drafters used it more than they might have realized, but they were rarely so open about it.<sup>17</sup>

This open focus on general blameworthiness might have seemed to them as conceptually related to familiar and important concept of offense culpable state of mind, which the Code pioneered in systematizing in its section 2.02. And the two are conceptually related. The latter, offense culpable state of mind requirements, is one aspect of the former, the larger blameworthiness judgment. But it is only one aspect. Excuse defenses are also part of that larger judgment, as are a host of other doctrines. Note, for example, the Model Code’s broad standard for *de minimis* infractions, where defendant is given a defense if his conduct caused “the harm or evil sought to be prevented by the law defining the offense . . . only to an extent *too trivial to warrant the condemnation of conviction.*”<sup>18</sup>

Adding to the potential for confusion is the dual use of the term “culpability.” It is used in a broad sense as interchangeable with general *blameworthiness*. But the same term is used, in a narrow sense, to refer to the *culpability requirements of the offense definition*. “An actor’s culpability,” without context or further explanation, might be either of these, culpability in the broad sense or in the narrow sense. It is possible that this linguistic ambiguity helped mislead the

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<sup>14</sup>Model Penal Code Official Commentaries § 2.03, at 254.

<sup>15</sup>Model Penal Code Official Commentaries § 2.03, at 255 to 56.

<sup>16</sup>For example, they commonly cite the then-new H.L.A. Hart & A.M. Honore, *Causation in the Law* (1959).

<sup>17</sup>For a review of the Model Code provisions of this sort, see Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks is Just? Coercive vs. Normative Crime Control*, 86 Va. L. Rev. 1839, 1851-57 (2000).

<sup>18</sup>Model Penal Code § 2.12(2) (emphasis added).

Model Code drafters into concluding that proximate cause, which had recently been discovered to be best treated as a matter of *culpability* (in the broad sense), should be drafted to as a matter of offense culpable state of mind (the narrow sense of the term).

Of course, it is hard to know which came first: the conceptual error or the technical statutory interpretation error regarding proof of culpability as to manner of occurrence. Did the drafters first conclude that proximate cause remoteness was a culpability (blameworthiness) issue, then find it convenient to require proof of culpability as to manner of occurrence in order to embody it in the Code? Or did the drafters first conclude that culpability as to manner of occurrence must be proven, then deduce that proximate cause remoteness must be a culpability (offense culpable state of mind) issue? In the end, the historical order of these tied errors does not matter. What matters is that they have produced a set of practical and conceptual problems that are unnecessary.

#### IV. OTHER PRACTICAL PROBLEMS WITH THE MODEL CODE'S APPROACH

Part II has already illustrated the main practical problem with the Model Code's approach: it creates unnecessary complexity and confusion that is sure to invite errors in interpretation and application. But several additional points can be made to detail that conclusion.

First, the Code's approach introduces a new and unnecessary issue: what constitutes "the same kind of injury or harm," in subsections (2)(b) and (3)(b)? If the actual manner of occurrence and the designed and contemplated manner of occurrence are "the same kind," then the remoteness defense to accountability for the result is available; if they are not "the same kind," then it is not available. This, then, is a new requirement with practical effect. Are maiming and death harms of "the same kind"? Are puncturing a lung and puncturing a heart "the same kind"? Without more, the term "kind" gives no effective guidance. How is a judge or a jury to decide what to look at in deciding sameness or differentness in "kind"?

Note that the reformulated provision, in Graphic 2, resolves the proximate cause cases without ever having to rely upon such a concept. The "same kind" problem is one created by the Model Code's reconceptualization of proximate cause as an offense culpability issue.

Second, by characterizing the proximate cause remoteness defense as a matter of failed required offense culpability, the Code invites errors where the missing culpability is properly imputed as transferred intent or other substituted mental element. That is, subsections (a) and (b) (in both sections (2) and (3)) offer *alternative* ways of imputing the required culpability as to causing the prohibited result: (a) substituted mental element, such as transferred intent, or (b) "same kind" and not too remote. But if the required culpability is imputed under (a), then (b) becomes irrelevant — and the proximate cause defense is lost. Once the prosecution can impute under (a), it has no need to impute under (b).

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One can see the problem in a variation of the falling piano case: *D* shoots at *V* with the intent to kill him, but it is *V2*, standing next to *V*, who runs away and is killed by the falling piano. Is *D* accountable for *V2*'s death; is he liable for the murder of *V2*? All agree that he should not be. Just as *D* is only liable for the attempted murder of *V*, where the piano kills *V*, so too should he be liable only for the attempted murder of *V2*.<sup>19</sup> The proximate cause problem is identical. Yet, the Model Code provision might well be read to hold him liable for the murder of *V2*, because subsection (2)(a) imputes the missing intention needed for murder liability under the doctrine of transferred intent. By treating proximate cause as simply a matter of culpability as to causing the prohibited result, it might be short-circuited when any other doctrine imputing culpability has effect. Having imputed the missing intention under "transferred intent," subsection (2)(b) becomes irrelevant.

One might argue that the Code avoids the problem by providing that subsection (2)(a) imputes the required culpability only when "the actual result differs from that designed or contemplated . . . *only* in the respect that . . ." Thus, one could argue that there is (appropriately) no imputation even in the transferred intent case above because there was *another* difference between the actual and the intended results, the remoteness difference. But the problem with this solution is that there will in every case *always be some difference* between the actual result and the intended result. This means the requirement that the victim difference is the "only difference" would never be satisfied, and thus transferred intent would never be allowed.

Assume, for example, that there is a victim difference — *D* meant to kill *V* but instead killed *V2* — but there also was a heart-stopping versus blood-drowning difference. The existence of the latter would mean that the victim difference is not the "only difference," thus there could be no transferred intent. Relying upon the "only difference" requirement to isolate subsections (a) from (b) simply makes subsection (a) collapse.

Note that nothing in the reformulated provision in Graphic 2 requires the judge or jury to deal with these issues: neither the problem of short-circuiting the remoteness defense when there is imputation under subsection (a), nor the problem of trying to give meaning to the "only difference" limitation that will not obliterate subsection (a).

Third, a similar problem arises with regard to strict liability offenses. If no culpability is required as to the prohibited result, then, under the Code's conceptualization, the proximate cause remoteness defense drops out along with the culpability requirement. The remoteness defense is available, under the Code's offense culpability approach,

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<sup>19</sup>On these facts, *D* is probably liable for the attempted murder of both *V*, directly, and *V2*, under transferred intent.

only as an exception to the Code's imputation of culpability as to manner of occurrence. If no such offense culpability is required, then the remoteness defense never becomes available. This is a particularly serious problem because felony murder is just such an offense of strict liability as to causing the result, and the remoteness defense is essentially the only limitation on that rule that is left to limit liability.

Luckily, the problem was pointed out to the drafters after they published their Tentative Draft. Their solution was to add in the final draft a special provision, subsection (4):

(4) When causing a particular result is a material element of an offense for which absolute liability is imposed by law, the element is not established unless the actual result is a probable consequence of the actor's conduct.<sup>20</sup>

But their proposed solution simply does not work. Because they want to conceptualize the proximate cause remoteness issue as one of offense culpable state of mind, they have lost their touchstone when it comes to strict liability. For an offense of purpose or knowing, they require that the defendant be purposeful or knowing as to the manner of occurrence — they compare the actual result to that “designed or contemplated,” as the case may be.<sup>21</sup> For an offense of recklessness or negligence, they require that the defendant be reckless or negligent as to the manner of occurrence — they compare the actual result to the “risk of which the defendant is aware” or “should have been aware,” as the case may be.<sup>22</sup> But for an offense of strict liability, what culpability is to be used as the vehicle for the proximate cause remoteness defense?

They adopt a requirement that “the actual result is a probable consequence of the actor's conduct” — the same requirement as they use for offenses of recklessness and negligence. But this will be a non-starter for those jurisdictions — the vast majority of jurisdictions — that have rejected the Model Code's abolition of felony murder.<sup>23</sup> They have expressly rejected a requirement of negligence as to causing the death. Why would they want to allow — or how could they be conceptually consistent if they allowed — such a negligence requirement to be reintroduced through the definition of causation?

But even for the few jurisdictions that follow the Model Code's abolition of felony murder, the section (4) patch hardly makes sense. The drafters have gone on at great length about the value and importance of their proximate cause language — “too remote or ac-

<sup>20</sup>See Model Penal Code Tentative Draft No. 4 (considered at the ALI's May 1955 meeting); Model Penal Code Official Commentaries § 2.03, at 253.

<sup>21</sup>Model Penal Code § 2.03(2)(b), 2.03(3)(b).

<sup>22</sup>Model Penal Code § 2.03(3)(a) to (b).

<sup>23</sup>See Robinson & Cahill, *supra* note 1, at 555-56 (felony murder), 101-04 (presumptions).

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cidental in its occurrence to have a just bearing on the actor's liability or on the gravity of his offense" — in giving judges and juries some guidance on how to think about the factors that ought to be relevant in judging proximate cause.<sup>24</sup> Yet, their section (4) patch fails to include this language.

The drafters could have avoided the problem by simply using the "too remote or accidental" language in subsection (4). But notice that this would have made it essentially identical to the approach of the reformulated provision in Graphic 2: simply requiring but-for and "not too remote or accidental . . ." And presumably that would have been an abandonment of their reconceptualization of proximate cause as an offense culpability issue rather than as a conduct-result connection issue.

Note, again, this problem does not occur under the reformulated provision, in Graphic 2. Under that approach, there is no need for a special provision for strict liability offense. All offenses have the same causation requirement: but-for plus "not too remote."

### V. CONCLUSION

The larger point here is that the issue of remoteness in proximate cause is not simply a subset of the issue of offense culpable state of mind, but rather is a different and independent issue more akin to the but-for cause requirement, which defines the minimum required strength of the causal connection between *D*'s act and the prohibited result. The latter conceptualization of proximate cause allows the clear and clean reformulation in Graphic 2, avoiding the complexities and problems of the Model Code's formulation.

By attempting to treat proximate cause as a matter of offense culpable state of mind, the drafters were doomed to a perverted view of how to proceed. They ended up trying to fix problems that did not exist — problems that they had created for themselves — and produced a provision that not only invites erroneous liability results but also confuses the conceptual context of proximate cause.

The problems with the Code's approach recounted above may help explain why most states, even those with Model Penal Code-based criminal codes, reject the Code's causation provision. Every modern American recodification — three-quarters of the states — are based in significant part on the Model Code, yet its approach to causation is rejected in forty-three jurisdictions.<sup>25</sup> [And in the nine states that have the Model Code's causation section on its books, it has sown confusion and is commonly ignored or informally reinterpreted.

What is particularly unfortunate is that the Model Code really did

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<sup>24</sup>Model Penal Code Official Commentaries § 2.03, at 255 to 56.

<sup>25</sup>Arizona, Delaware, Hawaii, Kentucky, Montana, New Jersey, Pennsylvania, and Tennessee. See Model Penal Code Official Commentaries § 2.03, at 264 n.22.

have an important contribution to make on the issue. Its proximate cause language — “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” — was a significant improvement over what had previously existed, which typically provided little or no guidance to judges and juries or provided fixed rules that were complicated yet incomplete and often conflicted with community intuitions of justice. The Code’s formulation at least gives decisionmakers a framework that helps them think about the issue and to focus their attention on the relevant factors.<sup>26</sup> One can only hope that, while states may (properly) reject the Model Code’s conceptualization of proximate cause as culpability, they nonetheless may appreciate and adopt its useful “not too remote or accidental . . .” language, into a causation provision with a more appropriate conceptualization, as in Graphic 2.

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<sup>26</sup>Some states have built upon the Model Code’s language by adding the phrase: and not too “dependent on another’s volition act.” This helps highlight the shift in relevant factors that occurs when the causal chain includes another human being. See, e.g., N.J. Stat. Ann. § 2C:2-3(b) to (c).