CAUSATION IN CRIMINAL LAW

Paul K. Ryu†

This paper has two purposes. Because of what is believed to be a misunderstanding of the concept of "causal relationship" in criminal law both on the continent and in Anglo-American jurisdictions, the first purpose is to clarify that concept. Actually, the problem of causation has received scant attention in Anglo-American criminal law literature. Discussion of causation has been restricted primarily to the law of torts. Recently in England, however, an attempt was made to reduce causation to a problem of responsibility. Professors Hart and Honore responded with a warning against "a general elimination of the notion of causation," and suggested what they believed to be a new formula: "the common sense notion of causation." While their advocacy of the preservation of "causation" in criminal law is meritorious, the notion of causation which they advance is outmoded.

In Germany decisional law has viewed the causal connection as an exclusively scientific or logical relationship. This theory is believed erroneous also, but clarification of the concept of causality does require examination of the place it occupies not only in law, criminal, civil and

† Professor of Law, Seoul National University, Seoul, Korea.

1. Professor Jerome Hall's discussion of "Causation and Imputation" is perhaps the most elaborate. See Hall, Principles of Criminal Law 256-66 (1947). However, even this discussion is merely incidental to examination of the problems of omissions. Focht, Proximate Cause in the Law of Homicide, 12 So. Calif. L. Rev. 19 (1938), contains a detailed study of causation. However, the author seems to have misunderstood the appropriate functions of civil and criminal law.


4. For a discussion of this test, known in Germany as the "popular (vulgär) conception of causality," see text at p. 786 infra.

5. For a discussion of German decisional law see text at pp. 794-95 infra.
administrative, but also in other disciplines of thought such as philosophy and the sciences, natural as well as humanistic.

The second purpose of the paper is to suggest the criteria which may enable us to judge whether there is a causal relationship between criminal conduct and its result. This requires a critical examination of the traditional concepts of "cause," particularly that of "proximate cause," and the various notions of cause elaborated abroad. It also requires ultimately that causation in law be viewed in context with the practical consequences to which a resolution of that problem may lead. From the outset it should be noted that the criteria of causation are not necessarily the same in all fields of law, as some writers assume.

If causal relationship is viewed in a broad sense, most criminal law problems can be interpreted as involving such relationship. For every occurrence in criminal law produces some effect. Thus, complicity was analyzed in terms of causation both in the Anglo-American legal system and in Germany. In Rex v. Saunders, a defendant charged with instigation to murder was acquitted on the ground that his advice was "a distant thing from that to which he was privy." The view was expressed in Germany that since the act of an accomplice must be "causal" with regard to the effect, he actually qualifies as a principal perpetrator, and not solely by virtue of specific statutory provisions defining complicity as a separate crime. The "causality" concept has also been used in interpreting attempt. In United States v. Stephens, the court, following Wharton, differentiated attempt from preparation saying that the former constitutes a "cause" whereas the latter is merely a "condition." Causality has been considered relevant in crimes com-


7. [1578] Plowden 473. In this case B, desiring to kill his wife in order to marry another woman, consulted A who advised him to put a certain poison in an apple which was to be given to the wife. B did so (A not being present), but the wife gave the apple to the child who died of poisoning. It was held that since A's advice was only to kill B's wife, his connection with the act was too distant.

8. Michelson, Die Lehre von der Unterbrechung des Kausalzusammenhangs und die neue strafgerichtliche Rechtsprechung des Reichsgerichts, in Rechtswissenschaftliche Studien 31, 32 (1932); Liszt-Schmidt, Lehrbuch des Deutschen Strafrechts 309-14 (25th ed. 1927), discusses complicity in terms of causation. Thus, according to Liszt, if A instigates B to commit a crime, but B does not commit any, A should be responsible for attempt to commit the crime instigated, the theory of voluntary intervening agent (Theorie der Unterbrechung des Kausalzusammenhangs) being applicable to this as to other situations involving causation. Ryu, The New Korean Criminal Code of October 3, 1953—An Analysis of Ideologies Embedded in the Code, 48 J. Crim. L., C. & P.S. 275 (1957). At the time of the enactment of the German Penal Code in 1871, mere solicitation was not punished.

mitted by the medium of innocent human agents and in conspiracy. Similarly, causal tests have been used in law in a number of other contexts, foremost among them, since the Durham decision, that of insanity as a defense in criminal cases. However, all the mentioned areas of law—complicity, attempt, crime by the medium of an innocent agent, conspiracy, insanity—raise completely different issues from that involved in determining the relationship between criminal conduct and its result as a requisite of criminal responsibility. The tests of causation applicable to them need not be identical with that involved in the latter relationship. The erroneous assumption—often unconsciously made—that the test of causation must be the same in all these areas of criminal law, notwithstanding the fact that each may be governed by distinct legislative policies, has led to considerable confusion. Professors Hart and Honore deserve credit for trying to “avoid an over-concentration on the law of negligence in civil cases and, to appreciate the wide range of context in which the law has recourse to causal notions.” But, in suggesting that the proper test is a “common sense notion of causation,” they introduce an element of casuistry which cannot be tolerated in a criminal law based on the principle of nulla poena sine lege. The problem of causation is not the same in the various contexts of law; nor is it the same in the various contexts of criminal law; but in each context the test of causation should be fixed and clearly discernible.

THE MEANING OF CAUSATION IN CRIMINAL LAW

The ultimate aim of the present inquiry is to ascertain the practical criteria for judging under what conditions an event should be deemed the “result” of a person’s conduct for the purpose of holding him criminally responsible. This, in essence, is the problem of “causation” in criminal law. However, the meaning of causal relationship in law has been the subject of vigorous controversy, in the course of which it has been mostly identified with causation in other disciplines, and only rarely viewed as an independent notion. In order to separate legal causation, it is therefore necessary to examine the entire concept of causation generally. Traeger has made a decisive contribution to the theory in drawing a conceptual distinction between causation in the various disciplines. He classified the field into causation in


epistemology, in the natural sciences, and in law.13 A brief survey of the influence which the epistemological and scientific tests have exercised upon the legal tests may serve as a background for presentation of the writer's own proposals.

In philosophy the problem is whether causal laws are a matter of perception, a conceptual a priori, or, indeed, whether we are at all justified in speaking in terms of "causal laws." The Cartesian and Hegelian philosophies assumed an ontological approach, whereas Kant regarded causation as an a priori category,14 i.e., a necessity of empirical scientific inquiry. Hume, on the other hand, denied any power of causation or causality in the sense of necessary connection between "cause" and "effect."15 However, a relation of necessary connection between the present and future states of physical systems has been demonstrated to exist in the experimentally verified theoretical physics of Newton's mechanics, Maxwell's electromagnetics and Einstein's special and general theories of relativity.16 Such systems are subject to mechanical causality which is deterministic; given the indirectly and experimentally verified postulates of these theories and given the determination of the present state of the system, its future state follows necessarily and can be deduced by mathematical calculation. The determinism of the mechanical causality was insured because the postulates of these theories did not introduce the concept of probability or chance into the definitions of either (a) the state or (b) the time relation between states.17

With the proof by Heisenberg that Planck's quantum mechanics entails the Principle of Indeterminacy, it became evident for sub-atomic physical systems that while the time relation between states is one of necessary connection and mechanically causal in the sense that given the experimentally verified postulates of the theory and the experimental observation of the present state the future state can be deduced, nevertheless, the mechanical causation is not deterministic. The latter consequence followed because Heisenberg's Principle of Indeterminacy requires the introduction of probability in principle into the definition of state.18

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13. TRAÆGER, DER KAUSALDEGRIFF IM STRAF- UND ZivilRECHT (1929).
15. AYER, THE FOUNDATIONS OF EMPIRICAL KNOWLEDGE 171 (1955); see also RUSSELL, HUMAN KNOWLEDGE 421 (1948).
16. As regards Planck's idea of causation and freedom, see PLANCK, KAUSALGESETZ UND WILLENSFREIZEIT (1923).
18. Id. at c. 11; EDDINGTON, THE NATURE OF THE PHYSICAL WORLD 293-315 (1928).
One may claim that causation in law is not related to the philosophical concept of causation. However, surprisingly enough, though no direct influence of the philosophical upon the legal concept is shown to exist, it may be observed that for practically each of the philosophical theories a legal equivalent may be found. Engisch shows such equivalence to prevail between Schlick's view of causation—causation obtaining between events that are in spatial and temporal immediate vicinity of each other—and the legal theory of "last condition," as well as between Robert Mayer's conception of a quantitative connection of cause and effect and Kohler's view that cause in law is that which in kind and intensity determines the result. Among other philosophical theories of causation reflected in law, perhaps the neo-Hegelian deserves special notice. One of the most prominent German writers on criminal law, Max Ernst Mayer, a neo-Hegelian of the Baden School of Philosophy, denied the need for an independent theory of causation in criminal law, asserting that the legal problem is identical with the logical-philosophical one; that is, that it is reducible to "objective imputation" (objektive Zurechnung) determined by causation in the world of facts. This position is implied in the Hegelian view that the distinction between reality and value, causation and evaluation, while conceptually essential, is ultimately overcome in a synthesis and merger of these opposites. This is dialectical causation which is different from any of the causation concepts discussed in the preceding paragraph. According to Mayer, there can be no separation at law between norm and fact (causation and evaluation) and the relation between them is at best one of the general to the particular. It follows that in law as in philosophy there can be no distinction between "cause" and "condition," for all "conditions" which must be present in order that a result be produced are equally "causal" in producing it. Although in his early treatise on causation, Mayer seems to stress certain distinctive elements governed by principles not derived from general philosophy, in final analysis his view of causation does not differ from that

22. Mayer, Rechtsphilosophie 3 (2d ed. 1926).
23. Mayer, Der Kausalzusammenhang zwischen Handlung und Erfolg im Strafrecht, Eine rechtsphilosophische Untersuchung (1899). The author maintained that causality is relevant in law only where a condition and an effect are connected with each other in a special manner, namely, where they form one of three "generations" (Mayer uses here the image of a generation of descent): (1) causal generation, (2) teleological generation, or (3) potential generation. (1) is illustrated by the following example: B is a hopeless drunkard. Physicians say that he will die if he takes another drink. A, knowing this, puts a drink beside B's bed; B drinks and dies. A has caused B's drinking and drinking has caused his death. (2) and (3)
of the so-called "theory of the equivalence of conditions." But the prevalence in German law of that theory used to be explained by the fact that it is also supported by the philosophical views of Hume and John Stuart Mill. Von Liszt's definition of causation, accepted by the Reichsgericht and later by the Bundesgerichtshof, is the equivalent of Mill's view of cause as the totality of positive and negative conditions.

The breakdown of the causation concept in philosophy is—the writer believes—reflected in the law of England and America in the trend toward substitution of a pure responsibility test for the causation test. Recent decisions in England tend to dispense with the notion of causation. As stated by A. L. Goodhart, "It is now recognized in almost all cases that the problem is one of degree of fault and not of causation, and that, I believe, is a highly satisfactory result." Wigmore treats causation not as a distinct element of legal liability, but makes it, if anything, a mere qualifying factor to be considered in determining wrongdoing. But as in philosophy discussion of causation is still meaningful, so the concept of causation in law is by no means obsolete.

The connection between the scientific and the legal view of causation is more direct than that between the latter and the philosophical view. But the term "scientific" notion of causation is often used in a confusing manner for it is rarely properly circumscribed. The usual assumption made is that "scientific" refers to the sciences of nature. But causation also plays a role in the social sciences (economics, sociology, etc.) as well as the humanistic sciences (history). It is important to identify the context, for although all sciences seek to discover causes of the phenomena with which they are concerned, regard-

follow Schopenhauer's formula, according to which cause and effect are the changes connected in time in necessary succession. In (2) the actor utilizes an existing condition, whereas in (3) the condition is not present at the time of the act as a quality of an object but may intervene later. An example of (2) is the case of a person tying another to the plank of a sinking ship, and an example of (3) is that of a person putting a lantern in an insecure position in a barn, so that in the case of a storm the lantern might fall and cause a fire.

24. The philosophical theory of causation is believed to be also implied in the fact that the German Penal Code does not define causation. Mayer, op. cit. supra note 20, at 141.


26. On the theory of the Reichsgericht and the Bundesgerichtshof see text at pp. 787-88 infra. The Reichsgericht was the supreme court of the Reich. It ceased to operate with the fall of the Reich. The Bundesgerichtshof is the supreme court of the Federal Republic of Germany in civil and criminal matters.


29. Goodhart, supra note 2, at 414.

30. Wigmore, Selected Cases on Torts 866-70 (1911).
less of what explanation is philosophically acceptable, each science may not be interested in the same conditions of such phenomena. In law scientific causal connection may mean different things depending on the science that is involved. It is thus insufficient to speak, as Glanville Williams does, of "causation in the scientific sense." Citing Ayer's *Foundation of Empirical Knowledge*, Williams says that "modern philosophers and scientists refuse to differentiate between causes and between a cause," and he continues stating that "liability in tort thus presupposes causation in the scientific sense.... The question whether the act was a "cause" of the death is a question of causation in the scientific sense, i.e., a question of fact." Apparently Williams refers to causation in the natural sciences. But causation in law does not always presuppose causation in this scientific sense. Suffice it to refer to liability arising out of an omission. Could the failure of a bystander to rescue a drowning person be the "cause" of an accident in any sense attributed to this term within the context of natural science? One of the basic axioms in natural science is that "nothing" cannot produce "something." If the relevant science is social, omission may be meaningful as a "cause." Nor is social science the sole alternative for natural science in such contexts as that indicated above. The science of axiology comprises also legal science; the latter is indeed the most likely context within which problems such as causation of an omission must be resolved.

Possibly Hart and Honore's interpretation of cause in law can be best classified within the category of "legal science." They insist that a general elimination of the notion of causation would be an absurdity and suggest a criterion for establishing legal cause not as a matter of policy but as a matter of "common sense" apparently implied in law. Upon closer analysis, their approach to legal causation is but a variation of the outmoded method of seeking a logical cause. Since their discussion of cause presents the most recent comprehensive treatment of the subject in the Anglo-American sphere of thought, it seems

35. According to Feuerbach, it is impossible to consider causal problems in cases of "pseudo-omissions." See Maurach, *Deutsches Strafrecht, Allgemeiner Teil* 174 (1954).
36. The jurisprudential problem may be raised in what sense we use the term "legal science." The traditional concept of science has not been accepted in this paper. See note 64 infra.
37. See text at pp. 788-89 infra.
proper to deal with it at some length. This will require some anticipation of the subject matter of the next following section on criteria of causation.

Rejecting the view that all conditions "but for" which an event would not have occurred are equivalent and that none of them can be singled out as its "cause," Hart and Honore suggest that a "cause" as distinct from conditions can be found in the factual basis of the event. That "cause" is the sum of "jointly sufficient conditions." But the concept of cause—according to Hart and Honore—may be further circumscribed by use of two tests. The first is the normality test. "Conditions are mere conditions as distinct from causes because they are normal and not because they are contemporaneous with the cause." The normality test is actually used in determining what conditions are "jointly sufficient." The second test is that of "voluntary human action." "... [A] voluntary act may negative causal connection even though it is earlier in time than both the contingencies in question, i.e., it may precede both the wrongful act and the harm." On the other hand, an abnormal contingency only negatives causal connection if it intervenes in time between the wrongful act and the harm. The operation of these tests may be best shown by citing the examples set forth by the authors. With regard to "jointly sufficient conditions," the authors state:

"... D, driving in breach of the statute on Sunday, but without negligence, injures P. Here most lawyers would agree that D's wrongful act is not the cause of P's injury: the natural comment of lawyer and layman alike would be that the aspect of the defendant's action which is wrongful ('the Sunday element') was causally irrelevant. But no simple application of the notion of necessary condition or the 'but for' test unless supplemented by the notion of sufficient conditions will enable us to prove the causal irrelevance of the fact that D in this case drove on Sunday in breach of the statute. A crude application of the 'but for' test might lead to the argument that if D had not driven on Sunday he would not have knocked this plaintiff down and that therefore the Sunday element was relevant."  

The test of "normality" is exemplified by examining a match manufacturer's relation to a fire produced by arson in which the matches are used as a tool. Here the authors say that: "... the manu-

38. Hart & Honore, supra note 3, at 60, 69, 74, 77.
39. Id. at 77.
40. Id. at 263. See Hogan v. Bentinck Collieries, [1949] 1 All E.R. 588, 608.
41. Hart & Honore, supra note 3, at 87.
The "voluntary human action" is a more effective causal element than absence of normality: it "interrupts" the chain of causation where mere absence of normality would not. Thus, in the arson example "... the manufacturer's action in making the match is 'severed' from the outbreak of fire by the intervention of the voluntary action of the man in using it to kindle the fire. ..." 44

The basic misconception of the authors consists in their assumption that normality can afford a criterion for distinguishing a cause from conditions, based on their failure to realize that no evaluation is possible unless its purpose is known. The inadequacy of their test becomes clear as soon as the Sunday driver case, which they use as an illustration, is analyzed. In it they eventually confuse the problem of causation with that of the defendant's fault. They advance as the reason for substituting the "jointly sufficient conditions" test—which is derived from the normality test—for the "but for" test that only the former "... will enable us to prove the causal irrelevance of the fact that D in this case drove on Sunday in breach of the statute." 45 However, as pointed out in decisions and legal literature, 46 it is not the "jointly sufficient conditions" test that proves the causal irrelevance of the Sunday element. That irrelevance is rather implied in the element of fault, namely, that the causal connection between negligent conduct and its results is required by the purpose of the law. 47

Equally subject to challenge is the authors' adoption of the outmoded "interruption of the chain of causation" doctrine, which was

42. Id. at 86.
43. Id. at 77.
44. Id. at 86.
45. Id. at 87.
47. Of course, the negligence that is required is negligence in driving (the tortious conduct) and not negligence in Sunday driving. See text at p. 800 infra.
invented for the purpose of limiting the wide scope of the causality concept as viewed by the theory of equivalence. The philosophical background of the doctrine that a voluntary human agent interrupts causation was influenced by the nineteenth century version of the idea of free will, following Kant's view that man's voluntary action always starts a new chain of causation and can never be the effect of the latter.\textsuperscript{48} That doctrine, hardly ever applied by German decisional law, has since been entirely abandoned as a result of vigorous criticism by practically all German writers.\textsuperscript{49} It is hard to explain why English and American courts persist in following it.\textsuperscript{50} Apparently, Hart and Honore are attempting to rationalize this position of the courts. Within the conception of logical cause assumed by these writers, they cannot satisfactorily explain the prominence accorded to "voluntary human action," as contrasted with an abnormal condition.\textsuperscript{51} According to their view, where a victim was hit by a falling tree and later run over by a car negligently driven by the defendant, he would be responsible, although the victim would not have died from being run over absent the previous blow. Let us assume, however, that a third person, intending the death

\textsuperscript{48} MicHelson, \textit{op. cit. supra} note 8, at 11.

\textsuperscript{49} German writers claim that the notion of "interruption of the causal chain" is devoid of meaning. Max Ernst Mayer describes this notion as "wooden iron." See Mayer, \textit{op. cit. supra} note 23, at 94. All writers agree that a causal relationship between two phenomena is either present or absent; that a present causal relationship cannot be "cut off"; and that the same is true, of course, of an absent causal relationship. See Wiechowski, \textit{Die Unterbrechung des Kausalzusammenhanges} (1904); TRAEGER, \textit{op. cit. supra} note 13, at 179 n.187; Pomp, \textit{Die sogenannte Unterbrechung des Kausalzusammenhanges} (1911). The doctrine was gradually limited by German writers. Originally it was assumed that any extraordinary event (abnormal contingency) will interrupt causation. Later, capacity to interrupt a chain of causation was attributed solely to a human act. Subsequently, the interrupting act was required to be voluntary. Eventually, such an act was believed to qualify as an "interrupting" agent only if it was independent from the act that started the chain of causation. Today, interruption is believed to be an historical absurdity. The courts began by disregarding interruption. Thus, the Preussisches Obertribunal in an early case held that where \textit{A} promised \textit{B} to treat him to a quart of brandy if he drank it in one gulp and \textit{B} drank it and died, \textit{A} was guilty of negligent killing, although \textit{B}'s action was voluntary. The Reichsgericht, in a long line of decisions, held charges of negligent killing to lie in spite of an intervening voluntary act of murder. Thus, in \textit{S. v. T.} (I. Strafsenat), Sept. 27, 1927, 61 Entscheidungen des Reichsgerichts in Strafsachen [hereinafter R.G.S.] 379, it held that where accused had built an apartment in violation of building regulations and without a building license, he would be responsible for the death of several people in a subsequent fire, even if that fire was intentionally caused by an independent act of a third party, indeed, even if that third party should have entertained a murderous design. It was similarly held in \textit{S. v. U.} (III. Strafsenat), Oct. 20, 1930, 64 R.G.S. 379, that where a husband was convicted of murder of his wife by poison, a co-defendant who had negligently supplied the poison could be convicted of negligent killing. In \textit{S. v. W.} (I. Strafsenat), Oct. 17, 1930, 64 R.G.S. 370, a mother left her daughter alone who was about to give birth to an illegitimate child. The daughter, in despair, killed the child. The mother was convicted of negligent killing by omission. The Bundesgerichtshof has consistently refused to give effect to the doctrine of interruption, holding all "conditions" of an event as causally equivalent. For a report on decisions of that court see text at notes 116, 117, 118 \textit{infra}.

\textsuperscript{50} For citation of authorities and discussion of decisional law on the point see Hall, \textit{op. cit. supra}, note 1, at 262-63.

\textsuperscript{51} Cf. Hart & Honore, \textit{supra} note 3, at 86.
of the victim, had sent him into the forest knowing that he would be likely to be hit by a tree. In such case, in accordance with Hart and Honore's view, the subsequent act of the negligent driver would not be deemed "causal." But why should the negligent driver's responsibility be affected by whether or not the fall of the tree was utilized by a human agent in the course of a voluntary scheme?

The authors actually go far beyond the traditional doctrine of "interruption" by voluntary human action in according to such action importance both as antecedent and as intervening cause. As they point out, where the human action is supervening, it will cut off the chain of causation in accordance with well established judicial doctrine which holds that a physical susceptibility of the victim such as alcoholism or hemophilia does not negative the causal connection between the human act and the result. But the theory of "voluntary human action," hardly fits into a theory of "cause" in either a "common sense" or a logical system. For in such systems, there should be no difference, so far as "causation" is concerned, between a human act and a physical event not referable to human action. Perhaps, the clue to attributing prominence to human action may be found in Professor Hart's notion, discussed in another context, of human action as "an ascriptive one." But such interpretation requires an entirely different basic approach to causation than that assumed by the authors.

The reason why oxygen in the air or the match manufacturer's action in the arson example cannot be a "cause" is not that they have no such "normal or general connection with" the result, nor that the connection is severed by the intervention of the voluntary action, but that these elements are outside the object of evaluation in the light of present legal purpose. Our focus is directed to a specific topic; in the legal context, we are interested solely in imputing a result to a criminal conduct. The lawyer evaluates the situation for purposes of establishing responsibility and responsibility at law consists in answering for an action or for the results of action. The terms or conditions of that responsibility are basically problems of jurisprudence and must be determined within the scope of a theory of responsibility. It is essential to

52. According to M. E. Mayer, this is causation of a potential generation. See note 23 supra.
53. Hart & Honore, supra note 3, at 406.
55. The question of why we proceed from the notions of criminal conduct and of its result constitutes another issue which cannot be answered within the scope of the present paper. Researchers in chemistry, sociology or even criminology may be interested in the wider chain of "cone of causation" for different purposes, and to them oxygen in the air or the manufacturer's action is exactly the same condition of the event as the action of setting fire.
grasp the fact that the problem of causation in law can be resolved only if we pose the problem correctly. Whether a logical differentiation can be made between "cause" and "condition" is not relevant to the present purpose. Rather, it is important to know what kind of process it is whereby a causal connection is established. In order to establish a norm of responsibility based upon facts, we must know the policy underlying the specific crime within which the issue of causation is raised. Thus, in the Sunday driver example it would be entirely possible that a statute, based on particular demands, might declare Sunday driving a misdemeanor, and that anyone so driving will incur strict liability (manslaughter) for any incidental homicide. If such were the statutory policy, would a man who runs over the victim without fault be acquitted because driving on Sunday cannot be a "jointly sufficient condition"? Finally, a theory of responsibility might afford grounds for distinguishing between causality in criminal and in civil law. Hart and Honore fail to realize that the causal relationship need not be the same in both fields, although they suggest that the concept of causation might bring about a different result in a tort case and in a contract case.

Recognition that a doctrine of causation forms a part of a theory of responsibility, however, is predicated upon a total shift of point of view. It requires the realization that there is, beyond a philosophical or natural, social or humanistic science "causation," "causation" within the meaning of "legal science." The writer hopes to show that "causation" within the latter meaning affords a proper criterion for distinguishing between "cause" and "condition" in legal context.

To summarize the foregoing, any approach other than the one here suggested must lead to a confusing notion of legal causation. Confusion, for example, resulted from identification of legal with philosophical "cause," as exemplified by the doctrine of Max Ernst Mayer and the medieval notion of "proximate cause." A similar confusion results from identification of legal cause with cause within the meaning of "natural science," assumed by the "theory oriented to natural science" (naturwissenschaftlich orientierte Theorie). Nor can clarification of the problem of legal causation be expected from attempts at establishing a logical formula for drawing a line of demarcation between causes and conditions. The Hart and Honore interpretation appears to fall within this category. It constitutes but a

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56. See text at p. 780 supra.
57. Hart & Honore, supra note 3, at 260, 261 n.4.
58. See text at p. 789 infra.
variation of the German "theory of specific cause" (*Verursachungstheorie*),\(^6\) which will be more fully discussed below.

As any element in criminal law, "causation" is ultimately a problem of responsibility. Most modern writers recognize that causation in law is a matter of imputation.\(^{61}\) It is a factor in determining whether an accused is to be subject to criminal sanctions for certain conduct. The test of causality must be geared to this function and the choice of the proper test is, therefore, ultimately a matter of legal policy rather than of science or philosophy. This does not mean, however, that scientific and philosophical tests are irrelevant in determining the choice of policy, for sound policy must be oriented to scientific data and philosophical criteria. It is theoretically possible to visualize criminal legislation drafted solely in terms of conduct without reference to causation, in fact, there are examples of crimes formulated exclusively in terms of conduct without regard to result presently extant.\(^{62}\) When the legislator limits or extends responsibility to situations in which causation prevails, he in a sense indicates that he does not wish to be limited to an exclusively legal criterion of responsibility but chooses to invoke the aid of disciplines other than law—philosophy and the sciences—in which the concept of causation is at present rooted.\(^{63}\) But sound policy requires conscious conceptual differentiation of the elements of policy making and those of scientific and philosophical findings. A policy maker should be aware of the nature of the test which he is utilizing and know why he utilizes it. Since most penal codes contain no statutory provision defining causation, imputing responsibility to a defendant for having "caused" or brought about a result requires finding a standard that fits the policy underlying the particular crime, as defined by statute. The evaluating process must also be oriented to the basic ideological policies followed by the given society. Since the "ideology" is dictated by a given community context—it is, indeed, impossible to make an evaluative statement without reference to a particular community context—the establishment of the proper standard is not a purely subjective process but is rather a process of objective scientific inquiry.\(^{64}\) The inquiry the present writer pursues is based

\(^6\) For discussion of this theory see text at pp. 788-89 *infra*.

\(^{61}\) See HALL, *op. cit. supra* note 1, at 256. Hart & Honore say that it is a matter of "attribution of consequences." As to the meaning of imputation, see Kelsen, *Causality and Imputation*, 61 *Ethics* 1-11 (1950). However, in this paper the writer has not followed the Kantian position.

\(^{62}\) Typical of these are solicitation, perjury in federal law, conspiracy. In Germany such crimes are known as "formal crimes."

\(^{63}\) It would be too far afield were I to inquire into the problem of whether the concepts of causation of the sciences and philosophy ultimately determine those of the law or are rather determined by the law.

\(^{64}\) The traditional view in science is that evaluation should be purged from science. Max Weber, *Die "Objecktivit"at sozialwissenschaftlicher und sozial-poli-
upon the ideology of a "free society" in which human dignity is the ultimate goal.

**CRITERIA OF CAUSATION IN CRIMINAL LAW**

To be functional, a theory of causation must afford a criterion for establishing a cause and effect connection between specific conduct and a result in such a manner that similar situations are governed by a uniform rule. Before presenting what this writer believes to be correct criteria, it seems proper to review briefly the traditional theories and the criteria they advance.

Theories of causation may be classified into those which assume a meta-juristic approach, meaning that the criteria of their choice are derived from areas outside the law, and those which assume a legal evaluational approach. In addition, there are two elusive approaches, not fitting within either category. The so-called "common man's view of causation" or the "popular theory" (Vulgärtheorie) assumes that since most penal codes do not define the notion of cause and since they address themselves to people generally, the notion of causation they wish to convey is that which the "man in the street" will best understand. Were it not for the fact that Hart and Honore refer to decisions in support of their "common sense" theory of causation, it would appear that their theory is identical with, or at least very close to, the "popular theory." The test applied by this theory has the advantage of being presumably that applied by the potential criminal. However, this test is much broader than any other test, for the common man tends to assume a position of post hoc propter hoc. It is also unduly vague, for so-called "common sense" (or the test applied by the common man) compares with scientific thinking as sight estimates of size compare with scientific measure. This naive conception is wholly inadequate to afford a reliable standard of legal causation. The second elusive approach has been summarized below under a separate heading, "'Proximate Cause' in Anglo-American Law," following discussion of the meta-juristic theories. It does not represent any specific theory or trend but rather assumes various theories to fit individual cases.

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65. In *Ueber Ursachenbegriff und Kausalzusammenhang im Strafrecht*, in *Gerichtssaal* 37, 257, 264 (1885), Birkmeyer dealt at length with this test.


Meta-Juristic Approach

Theory of Condition (Bedingungstheorie)

Like the "common sense" theory, the so-called "theory of condition" would seem to be useful at best in the sense of affording a reservoir of selection. This theory rejects the anthropomorphic conception of "cause" as an agent which produces or creates the effect and conceives of the "cause-effect" relationship as but successions of events and of "cause" as the totality of positive and negative conditions preceding an event. In law this theory was classically formulated by von Liszt,68 and adopted by the Reichsgericht and later by the Bundesgerichtshof: 59 "A cause of a criminally relevant effect is every condition which cannot be assumed absent [imagined absent—*hinweggedacht*] without failure of the effect." (Sine qua non or "but for" test of our law). This formula—if read literally—appears dubious in light of the numerous cases in which the effect would have been produced as well by other agencies or natural events.70 The retrospective fictitious assumption of a happening is frequently misleading.71 The Bundesgerichtshof, in fact, rejected the contention that conduct is not causal where the result would have been in any event produced by other agents.72 Traeger suggested 73 the case of a man who paints a vase that is later broken by another. Had he not painted the vase, the effect would have been different, for the broken pieces would have been unpainted. This, of course, may be esthetically relevant. It may also be relevant to the issue of damage. But the painting can hardly be regarded as one of the conditions—as a "cause"—of the breaking. Traeger, therefore, suggests that the purely "causal" inquiry must be supplemental by a legal evaluation of relevancy in the light of the criminal *actus reus*.74 Undoubtedly the most questionable element of this theory of condition is that it treats all conditions as "equivalent," a position not even justified by the so-called "scientific approach" it pur-

68 von Liszt, Lehrbuch des deutsichen Strafrechts 106 (11th ed. 1902). The originator of this theory was von Buri.
70 S. v. K. (I. Strafsenat), Jan. 5, 1951, 1 B.G.H.S. 20, is a case in point. The defendant was charged with having caused the transportation of certain individuals to a concentration camp during the Nazi era. He argued that they would have been deported in any event by action of other persons. The court rejected this contention.
71 Traeger, op. cit. *supra* note 13, at 40, uses the example of a man charged with cheating at cards and thus causing a loss to his fellow players. There is no way of telling whether they would have won "but for" the cheating.
73 Traeger, op. cit. *supra* note 13, at 40.
74 Id. at 41, 42.
ports to follow, for if science assumes a neutral position with regard to value, it cannot describe any conditions as "equivalent."

Theories of Specific Cause (*Verursachungstheorien*)

While the theory of condition regards all conditions as equivalent, the theories of specific cause attempt to single out one condition from the total "cone of causation" as the "real" cause. These theories admit that the event in issue would not have occurred "but for" all conditions but claim that a particular condition is so outstanding as to qualify as a "cause." What is a "cause," they assume, can be determined by a process of logical selection. Since they attempt to reach a single cause, they are called "individualizing theories" (*individualisierende Theorien*). Among these theories, the following are most prominent.

**Binding's Theory of Preponderance**

According to Binding, 76 "cause" is the last condition. It is that condition which disrupts the equilibrium between positive and negative conditions. Ortmann found a similar element to Binding's last condition in the *conditio proxima.* 6 In this country the same idea was expressed by Wharton. 77

**Theories of Quantitative Criteria:** *causa efficiens* (Birkmeyer) and *causa determinans* (Brusa)

According to Birkmeyer, all conditions are necessary, but only that which has the greatest influence upon the result—the most efficient condition (*die wirksamste Bedingung*)—is the "cause." 78 In order to demonstrate how these "theories of cause" work in practice, it may be instructive to examine a hypothetical case. Let us assume that ten grains of a certain poison are sufficient to cause the death of a man. With the intention of killing Z, A sends him three grains. Independently, B sends him four grains. Also independently, C later sends him three grains. After drinking the last dose of poison sent by C, Z dies. According to Binding and Ortmann, C is the murderer because he brought about the last condition; whereas according to Birkmeyer, B is the murderer because he brought about the most efficient condition (four grains are more efficient than three). 79

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75. 2 Binding, *Die Normen und ihre Uebertretung* 470 (1914).
76. 23 Ortmann, *Zur Lehre vom Kausalzusammenhang* 268 (1875).
77. Wharton, *Negligence* 825 (1874).
Hart and Honore's "Jointly Sufficient Conditions"

One might question the propriety of classifying this theory as a meta-juristic one, since it has been conceived as falling within the category of "attribution of consequences" (responsibility), as opposed to discovery of causes (explanation). But since the formula, "normal" or "jointly sufficient conditions," is believed to be a logical one rather than a standard of policy involving a choice of values among facts-data, it would seem justified to mention it in the present context.

Theory of Proximate Cause

This theory, founded upon Aristotle's doctrine that true knowledge is knowledge of the proximate cause, was developed in Europe. It adopts a temporal-empirical criterion, and then declares as cause the condition which is most directly and immediately related to the result. In declaring the relationship to be direct when the result is foreseeable, this theory introduces an element of culpability into the law of causation.

During the middle ages in Europe, theologians manipulated the idea of proximate cause in interpreting theological conceptions. Thus, they said that while the remote cause is necessary for the existence of the proximate one, the latter itself contains the whole causal power and does not derive it from the remote. Had there been no grandfather, there would have been no grandson. But birth is not derived from the grandfather. According to Aquinas, were there no Deity, there would be no sin; but sin is not committed by the agency of the Deity. Some writers adopt a similar line of reasoning. Thus, for example, Kohler asserted that the semen is the sole cause of the birth of a plant, whereas humidity, heat, etc., are but conditions, though without them the plant would not have been born. Of course, distinctions of that nature have no operational meaning for a lawyer as decision maker. The theory of proximate cause was accepted by French writers, Garraud, Garçon and others, and was also adopted in England and in the United States. But the contents of the theory of proximate cause are quite flexible. There is a tendency in this country to speak of "proximate cause" wherever causation is affirmed. Thus, the subject of "proximate cause" in the United States deserves an independent treatment.

80. Hart & Honore, Causation in Law, 72 L.Q. Rev. 58, 74-83 (1956).
81. Id. at 78-79.
82. Green, Proximate and Remote Cause, 4 Am. L. Rev. 201 (1870).
83. Id. at 207.
84. Green, PROXIMATE CAUSE (1927).
"Proximate Cause" in Anglo-American Law

Many cases which can be rationalized on diverse grounds have been decided under this label. Thus, *State v. Frazier* 86 belongs to the theory of condition. The defendant was convicted of manslaughter when he struck the victim on the jaw producing a hemorrhage and eventually death, the victim being a hemophiliac. *Hall v. State* 86 and *People v. Ah Fat* 87 are properly classifiable within the theory of specific cause. In the former the defendant was convicted of murder when the victim died of blood poisoning following a fracture of the skull inflicted by the defendant. 88 In the latter the defendant inflicted the death blow with a hatchet upon a person previously mortally wounded by another. The trial court was held to have correctly refused an instruction that a person is not guilty of murder in killing one already mortally wounded, for "... in a certain sense, every man is born mortally wounded." *Commonwealth v. Giacomazzi* 89 may be said to belong to the same category. There the defendant shot a man seventy-four years of age, so handicapped by physical infirmities that he was unable to withstand the wound and died. The court held that the wounds inflicted by the defendant were the proximate cause of death. Where there are intervening causes, the tendency in the United States is to apply the "probable consequence" rule, meaning that the existence of proximate cause is affirmed whenever there is foreseeability. 90 Thus, in *Livingston v. Commonwealth* 91 where the victim died from a disease not caused—though accelerated—by the injury inflicted by the defendant, in *People v. Rockwell*, 92 where the victim died from a mortal kick by a horse inflicted after he had been thrown to the ground by the defendant, and in *People v. Elder*, 93 where the victim was fatally kicked by a third person after being thrown on the ground by the defendant, there was held to be no proximate causation. On the other hand, in *State v. Chiles*, 94 where the victim died from pneumonia contracted after a severe beating by the defendant, in *Johnson v. State*, 95 where the victim died as a result of improper treatment of the wound inflicted by the defendant,

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85. 339 Mo. 966, 98 S.W.2d 707 (1936).
86. 199 Ind. 592, 159 N.E. 420 (1928).
87. 48 Cal. 61 (1874).
88. The principle applied in the *Hall* case was "causa causae causa causati."
89. 311 Mass. 456, 42 N.E.2d 546 (1942).
91. 14 Gratt. 592 (Va. 1857).
92. 39 Mich. 503 (1878).
95. 64 Fla. 321, 59 So. 894 (1912).
and in *People v. Fowler*,\(^96\) where the victim died as a result of being run over on a roadside after a felonious assault by the defendant, defendants were held guilty, proximate causation being found to have been present. In the well known *Lewis* case,\(^97\) where the victim committed suicide while in despair over a fatal wound inflicted upon him by the defendant, the latter was held responsible on the ground that his act was the proximate cause of death. The court justified its holding on the ground that had the victim's throat been cut by a third person after the fatal shot, "both may properly be said to have contributed" to the death.\(^98\) This, however, is inconsistent with the statement in *Staté v. Scates*:\(^99\) "If one man inflicts a mortal wound, of which the victim is languishing, and then a second kills the deceased by an independent act, we cannot imagine how the first can be said to have killed him, without involving the absurdity of saying that the deceased was killed twice. In such a case the two persons could not be indicted as joint murderers, because there was no understanding or connection between them. It is certain that the second person could be convicted of murder, if he killed with malice aforethought, and to convict the first would be assuming that he had also killed the same person at the same time. Such a proposition cannot be sustained."

**Legal Evaluational Approach**

**Theory of Adequate Cause (Adaequanztheorie)**

By contrast to the individualizing theories, the theory of "adequate cause" is a generalizing theory, in that it seeks criteria of causation beyond the scope of specific phenomena. Whether a condition may be regarded as a cause of an event depends, according to this theory, on whether conditions of that type do, generally, in the light of experience, produce effects of that nature. In order that a condition may qualify as a "cause" it is not sufficient that it produced that result in the concrete case, but it is further required that in all cases abstractly possible such result would probably follow in accordance with a judgment, passed on the basis of general laws of nature. In order to determine whether a condition constitutes a cause, therefore, two kinds of knowledge are required: knowledge of the particular facts (the Germans refer

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\(^{96}\) 178 Cal. 657, 174 Pac. 892 (1918).

\(^{97}\) People v. Lewis, 124 Cal. 551, 57 Pac. 470 (1899).

\(^{98}\) Hall, Principles of Criminal Law, 261-66 (1947), severely criticized this decision on the ground that the defendant should not have been held responsible, because death occurred as a result of the act of an independent intervening agent.

\(^{99}\) 50 N.C. 420, 423 (1858).
to this as “ontological knowledge”) and knowledge of the pertinent
general laws of nature (“nomological knowledge”). The latter supplies
the basis for the judgement as to whether a particular condition was
“adequate” to produce the particular effect.

There are three varieties of this theory, depending on who passes
the necessary probability or possibility judgment and at what stage the
judgment is passed. According to von Kries, adequacy is established on
the basis of the actor’s ontological knowledge (meaning what he knew
or should have known regarding the facts) as existing at the time of the
act, and the nomological knowledge, as existing at the time of adjudica-
tion. The objection has been raised that since this theory introduces a
subjective element of knowledge into the field of causation, it actually
brings the latter within the orbit of guilt. Radbruch, indeed, thought
that according to this theory crimes involving causation could be com-
mitted only intentionally. Undoubtedly, von Kries' test comes close
to that applied in determining negligence.100 The Bundesgerichtshof
rejected the theory of adequacy on the ground that it implies inclusion
of a guilt element in causation. Rumelin, on the other hand, assumed
that adequacy must be wholly determined by judicial retrospective
prognosis on the basis of all knowledge available at the time of adjudica-
tion. That knowledge is projected back to the time of the act, and
the question is posed what prognosis would the actor reasonably have
made had he then had such knowledge (“posthumous prognosis”).
The final modification of the theory of adequacy is that introduced by
Traeger in his theory of “generally favored circumstances” (Theorie des
generell beguenstigenden Umstands). He suggested as the basis
of the judgment of possibility the knowledge of the conditions which
could be observed, at the time of the act or of the effect, by “the keenest
observer” in the light of total experimental knowledge. Ferrer de-
scribed that test as imputation from the standpoint of a “superman.”

The theory of adequacy has been adopted by the Swiss Federal
Tribunal. According to it, causation is present “when the effect would

100. Radbruch, Die Lehre von der adäquaten Verursachung 34 (1902), com-
menting on 12 von Kries, Vierteljahresschrift für wissenschaftliche Phi-
osophie 189 (1880).

101. This would undoubtedly be true with regard to the English and American “ob-
jective” test of negligence. In Germany, both knowledge of facts and establishment of
causation for purposes of determining “guilt” are judged subjectively, that is, from
the viewpoint of the actor. On the relation of causation to guilt in von Kries’s theory
see Traeger, op. cit. supra note 13, at 130.


103. The court pointed out that apparently the penal code intends causation to be
determined objectively, since it clearly differentiates it from guilt.

104. Rümelin, Die Verwendung des Kausalbegriffs in Straf- und Zivilrecht, 90
Archiv für zivilistische Praxis 171-344 (1900).

105. Traeger, op. cit. supra note 13, at 159.
not have occurred without the actor's conduct, so that his conduct is a necessary condition of the effect and is apt, in accordance with the ordinary course of events, to produce the effect." This theory has also occasionally been used in other countries. To cite but one example, in the well-known Premier Hamaguchi case, a Japanese intermediate court held that where the accused had shot the victim who later died of intestinal disease, after nine months of treatment, there was no causal relationship between the shooting and the death, although such relationship was undoubtedly present within the "but for" test which is generally applicable in Japan.

Theory of Relevance (Relevanztheorie)

As seen, the theory of adequacy seeks a limitation of the sweeping scope of the theory of condition in the general concept of adequacy, determined by laws of nature. The theory of relevance, on the other hand, considers resort to such laws as unnecessary, claiming that the penal laws themselves, in defining the various crimes, give a clue to what conditions should be deemed "relevant" as "causes." Nor need "cause," in the sense of that condition which a statute determines to be relevant as "cause," to be the same in all crimes. What is relevant as "cause" in a particular situation is determined independently by the specific provision which governs. This theory, developed particularly by Mezger, is being invoked in Germany in attempts at modifying the judicially accepted doctrine of conditions in cases involving particular types of crime. Thus, in one case where accused was convicted of inflicting bodily injury with fatal effect, the defense argued that while the theory of condition may apply generally where the factual situation is coextensive with the mens rea, the theory of adequate cause should be applicable to crimes in which the injury is by statute required to be graver than that intended by the actor (so-called "crimes aggravated by the result"). The Bundesgerichtshof rejected this argument.

106. PFENNINER, SCHWEIZERISCHE JURISTENZEITUNG 79 (1945), however, points out that the German and Swiss doctrines, in spite of divergent points of departure, reach the same practical results.

107. Tokyo High Court decision, Feb. 28, 1933. But the Japanese Supreme Court does not accept the theory of adequacy.


110. He had slapped the victim's face. This brought about a brain concussion and eventually the death of the victim.

111. The pertinent statute was GERMAN PENAL CODE § 26, which provides that "where the bodily injury caused the death of the injured person, punishment of confinement in a penitentiary for not less than three years or imprisonment for not less than three years will be imposed." (Emphasis added.) The court took special note of the use of the term "caused" in the statutory language.

112. The court stated that the doctrine of adequate cause is applicable in only one situation, namely, in that of causation by omission. It has been argued that there
But in other countries the doctrine of adequacy has occasionally been applied although the prevailing doctrine is that of condition, apparently on the ground that where the effect reaches beyond the *mens rea*, the latter doctrine is inappropriate. Thus, the Supreme Court of Spain held that the accused who had hit the victim on the head, causing his fall into a body of water, did not "cause" the victim's death from pneumonia combined with a chronic bronchitis from which the victim suffered. This, of course, presupposes that different rules on causation may be relevant in different crimes.

Perhaps the best evidence of the inadequacy of all the foregoing theories is the fact that courts in many countries have rejected all of them and resigned themselves to application of the sweeping theory of condition, seeking to limit responsibility within the context of guilt. The Bundesgerichtshof of the Federal Republic of Germany thus held that where accused drove a truck at night without proper lights in violation of traffic regulations and was stopped by a police officer, the latter's premature removal of a red light placed behind the truck for protection did not interrupt the chain of causation, originated by the accused, between the illegal driving and death due to collision of the truck with another truck. The court similarly held that an accused who fell on a highway while drunk caused the death of his rescuer hit by a negligently driven car, although the rescuer had at the time

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114. The victim would have recovered within ninety days from the head injury caused by the blow.
115. One more doctrine deserves notice: Frank's so-called "prohibition of regress" (*Regressverbot*). It is not an independent theory but rather a more rational version of the doctrine of "interruption of the chain of causation." It asserts that conditions which are antecedent to a certain event may not be deemed "causal." Thus, according to this doctrine, it is not permissible to look for "causes" beyond the free and conscious (intentional-culpable) act directed to bringing about the particular effect. This doctrine consciously introduces elements of guilt into the area of causation. On this doctrine see ENGISCH, DIE KAUSALITÄT ALS MERKMAL DER STRAFRECHTLICHEN TATBESTÄNDE 21-29 (1931).
117. The police officer had ordered accused to drive to the next gasoline station and told him that he would follow him with his police car. Before placing the car behind the truck, the officer removed the red light, which was intended to warn approaching cars. At this brief interval between removal of the light and placing the police car behind the accused's truck, the other truck drove into that of the accused. The court held that the officer's negligence not only did not interrupt the chain of causation but that it did not affect the guilt of the accused, for he should have foreseen that he might be stopped by a police car and that the danger would be thus increased. The actual course of the accident—the court said—was by no means outside any probability.
of the incident completed his rescue task and was standing on the highway deliberating what further help might be extended to the accused.  

The theory of condition likewise prevails in the decisional law of Austria, Japan, and other countries. In Italy also, where causation is defined in the general part of the penal code, although the interpretation of the statute is controversial, the prevailing view is that the theory of condition governs.

However, as is obvious from study of German decisional law, the theory of condition affords no guidance whatever, for it affirms causation in all cases in which the issue arises. Nor is this theory logically maintainable, for it confuses logical equation with equality of value in the area of law. Attempts at modifying that theory by selecting a “specific cause” (theories of specific cause) have proved equally unsuccessful, for there is no logical test for singling out among all conditions a particular “cause.”

Both the theory of adequacy and that of relevance deserve credit for postulating that causation in law is essentially a matter of imputation. But the former creates a smokescreen, in referring to foreseeability in terms of natural laws, without being able to resolve the essential problem of the proper standpoint from which foreseeability is to be judged. No justification is afforded on the basis of either version of this theory why foreseeability should be objective, subjective, or mixed. The theory of relevance, on the other hand, does not advance any new standard. Its standard may be that of condition or that of adequacy, depending on the statute that governs the situation. While the reference to the terms of the particular statute is heuristic, experience

119. In this case there were two intervening human acts, that of the rescuer and that of the negligent driver. While holding that the accused had caused the death, the court denied his guilt, finding that though he should have foreseen both the act of the rescuer (that act being required by the German Good Samaritan statute, § 330c of the Penal Code) and the presence of negligent drivers on the highway, he could not have foreseen the peculiar concatenation of the two factors.

120. “No one may be punished for an act which the law proscribes as a crime if the injurious or dangerous occurrence on which the existence of the crime depends is not a consequence of his act or omission. . . . Not preventing an occurrence which one has the legal duty to prevent is equivalent to bringing about that occurrence.” ITALIAN PENAL CODE art. 40 (1930). “The concurrence of pre-existing or simultaneous or intervening causes, even if they are independent of the act or omission of the guilty person, does not exclude the relation of causation between the act or omission and the occurrence. . . . Intervening causes exclude the relation of causation if they are in themselves sufficient to determine the occurrence. In such case, if the act or omission previously committed in itself constitutes a crime, the punishment provided for that crime shall be applied. . . . The foregoing provisions are also applicable if the pre-existing or simultaneous or intervening cause consists in an illegal act of another person.” Id. art. 41.

121. Most writers believe that the code follows the theory of equivalence, modified by the doctrine of independent intervening cause, although this is by no means beyond dispute. On this dispute see Díaz Palos, LA CAUSALIDAD MATERIAL EN EL DELITO 85-88 (1953).

shows that statutes do not resolve the problem of causation, as may best be seen in those instances in which causation is specifically defined by a penal code.\textsuperscript{123}

The concept of “proximate cause” in the United States, as has been shown, is comprehensive in including the theories of condition (“but for” test), specific cause and adequacy. Criticism may be addressed to each case illustrating the particular theory involved. Special consideration is necessary only with regard to the distinctive treatment of foreseeability in the United States. The test applied here is the objective criterion of the reasonable man, as contrasted with the subjective criterion applied, \textit{e.g.}, in German law.

\textit{Teleological Theory of Causation}

The fundamental mistake of the traditional approach to causation in criminal law consists in its failure to realize that within the framework of criminal law causation has a special meaning. The view that causation in law is a matter of imputation\textsuperscript{124} constitutes a marked advance as compared with meta-juristic approaches, for the problem is, in the last analysis, but a specific instance of the legal evaluational process. However, the traditional legal evaluational theories, \textit{e.g.}, the theory of “adequate cause” or that of “relevancy,” do not explain from what sources these criteria are derived. Since causation affects responsibility, it would seem that criteria of causation should be related to the actor’s behavior. But the traditional theories disregard this reasonable demand. The criteria they afford appear meaningless for the purpose of introducing the causal problem into criminal law. That purpose plays a decisive role in the teleological theory of causation, submitted in this paper as the correct view. According to this theory, the issue must be formulated in terms of the question of why we require a causal relationship between criminal conduct and its result. An answer may be obtained by analogy to the rationale of attempt. Why do we distinguish in punishment between attempt and consummated

\textsuperscript{123} Causation is defined in the \textit{Korean Criminal Code} art. 17; \textit{Penal Code of Uruguay} arts. 3, 4; \textit{Penal Code of Ecuador} arts. 11, 12; \textit{Penal Code of Brazil} art. 11. The provisions of Uruguay deserve special notice: “No one may be punished for an act which the law describes as a crime unless the injury or danger on which the existence of the crime depends is the consequence of his act or omission. Not to prevent a result which one has the duty to avoid is equivalent to bringing it about.” \textit{Penal Code of Uruguay} art. 3. “A person is not responsible for the pre-existing, supervening or simultaneous concause, independent from the act, if he could not foresee that concause. That which could be but was not foreseen shall be taken into account by the judge in order to reduce the punishment.” \textit{Id.} art. 4. Irureta Goyena believes that the provision of article 3 is derived from the theory of von Hippel who believed in the doctrine of adequate causation. See Díaz Palos, \textit{op. cit. supra} note 121, at 89.

\textsuperscript{124} See note 61 \textit{supra}.
crime? None of the traditional theories of responsibility (retributory, deterrent, reformative) has answered this question satisfactorily. It is believed that it can only be answered on the basis of a particular ideology, namely, the ideology of “free society” whose purpose is accomplishment of the comprehensive goals of human dignity, which in turn require that no person should be subject to punishment beyond a necessary minimum. In order to keep punishment within such necessary minimum, the law of attempt gives effect to the element of “chance.” Attempt is punished less severely than consummation because by accident, independent of the accused’s conduct, the result required for consummation did not occur. Chance is thus an element which reduces responsibility so that the accused may be protected to the utmost extent. Of course, if the “chance” element alleviates criminal responsibility in attempt, consistency requires that responsibility should not be aggravated by “chance” in other contexts. Thus, in the realm of causation, a defendant should not be held responsible for a result produced by “chance.” In all cases involving a so-called “intervening independent agent” or “interruption of the chain of causation” the criterion should be whether the intervention was produced by “chance” or was rather imputable to the criminal act in issue.

It has often been pointed out that the proper standard is not “what would have happened” but rather what did happen. This has been correctly recognized by Professor Jerome Hall. In his criticism of People v. Lewis, the author presents a hypothetical situation: Suppose that X, intentionally pushed by D, was falling from the top of the Empire State Building, and while so falling was shot through the head by A. Undoubtedly A is guilty of homicide. What of D? According to Hall, D did not cause X’s death, although his act, apart from A’s act, would unquestionably have resulted in death. Hall says that “to hold D guilty of X’s homicide is to ignore . . . the subsequent independent act and its consequences, and to treat D as though it had not occurred.”

Assuming then that the accused should not be held responsible for chance, the problem arises what “chance” means at law. Here an important reservation is called for. There is no element of chance what-

126. See Hall, op. cit. supra note 98, at 263; see also ENGLICH, DIE KAUSALITÄT ALS MERKMALE DER STRAFRECHTLICHEN TATBESTÄNDE (1931); Beale, The Proximate Consequences of an Act, 33 Harv. L. Rev. 633 (1920).
127. 124 Cal. 551, 57 Pac. 470 (1899) (Accused inflicted a fatal wound upon the victim and the latter, in despair, committed suicide.). Professor Hall criticizes this case. See Hall, op. cit. supra note 98, at 261-66.
128. HALL, op. cit. supra note 98, at 263.
ever in the type of injury that a man inflicts upon another. As shown by Freud,\textsuperscript{129} in the realm of human action no results are purely accidental. If \( A \), an expert with weapons, shoots at \( X \) under optimum conditions and the bullet misses him, there are unconscious reasons for such misfiring. Apparently, not only his act but also his "intent" to kill had "missed" the mark. Since the missing reflects upon his intent, it should be taken into account in imputing a result to him. But where the wound he inflicted was fatal, either because his intention to kill was in no way impaired or because, while not consciously intending to kill, he nevertheless produced an unconsciously intended result, there are sound scientific reasons for imputing the act and its results to him. One might argue that these are matters of culpability and not of causation. But culpability is traditionally conceived of in terms of conscious action or in terms of what should have been consciously known to the actor. Unconscious motivations lie in the realm of causation.

It follows from the foregoing that where the wound inflicted is fatal, the actor is responsible for the result in terms of the "but for" test, meaning that there is causation between his act and the result, even though there has been an intervening factor, provided that the act had in any manner contributed to the intervention. Thus, in the Lewis case, where the accused inflicted a fatal wound upon the victim and the latter, in despair, committed suicide, the accused should be held responsible, the suicide having occurred in consequence of the shooting. Likewise, in the Empire State Building hypothetical situation, since \( D \)'s act was fatal, he should be held responsible if the "intervening agent" utilized the fall for shooting the victim. However, where the wound inflicted is not fatal, there is no reason to impute the result to the accused. Thus, if in the Hall case the wound had been slight and the victim had died due to maltreatment by a physician, this ought not to be imputed to the accused.\textsuperscript{130} The reason underlying this solution is not that the causal process was interrupted by an independent human agent,\textsuperscript{131} or by an abnormal accident, nor that the result was unforeseeable. The reason is rather that the fatality of a wound or the lack of fatality is not accidental, so that he who produces a fatal wound "causes" the result, whereas he who inflicts a minor injury does not. Thus, maltreatment is a "chance" with regard to a minor injury, but not with regard to a fatal wound. The element of "cause" cannot be established

\textsuperscript{129} \textsc{Freud, Psychopathology of Everyday Life} cc. 8, 9, 12 (1930).
\textsuperscript{130} See, \textit{e.g.}, Tibbs v. Commonwealth, 138 Ky. 558, 128 S.W. 871 (1910).
\textsuperscript{131} See the doctrine of "interruption of the chain of causation," discussed at note 49 \textit{supra}.
by pure observation of environmental conditions and without regard to the contribution of the actor. One might argue that diagnosis of fatality by medical science also includes an element of chance, for "no one can predict with accuracy." The real point in issue, however, is whether, in imputing criminal responsibility, we ought to rely on such a vague term as adequacy or utilize sister sciences in evaluating the meaning of chance in criminal law.

The situation is quite different where the intervening condition is entirely unrelated to the act of the accused. Whether or not the wound inflicted is mortal, if the victim is killed by an earthquake there is no causation between the wounding and death. Thus, in the Empire State Building hypothetical situation, if the intervening agent had in no way utilized the fall, but shot the victim independently, the accused should not be held responsible. Like the earthquake, from the point of view of the accused, this is a "pure accident," or an Act of God. In all cases of that nature we must focus on how the actor's conduct controlled the result. He controls the immediate result—the fatal or non-fatal nature of the wound—and, provided that the wound is fatal, all conditions which are connected with the act in terms of the "but for" test. Thus the reasoning of State v. Scates, that in the case of an independent intervening agent the first man cannot be said to have killed the victim "without involving the absurdity of saying that deceased was killed twice" is dubious. The first man's contribution to the death of the victim—provided that the wound was fatal—and an independent intervention by the second person are connected in terms of the "but for" test, for the first man controls the result. It is true that causal and teleological thinking may belong to different categories of thought, but causal thinking in law should be guided by teleological thinking.

A proper understanding of causal problems arising in criminal law is predicated upon three further points.

134. E.g., Associated Portland Cement Mfrs., Ltd. v. Houlder Bros. & Co., 86 L.J.K.B. 1495 (1912), and other cases cited by Hart & Honore, supra note 80, at 403, and by Bauer, op. cit. supra note 133, at 19-34. These cases are instances where the intervening cause is beyond the control of the accused.
135. See text at note 99 supra.
136. According to Braithwaite, Scientific Explanation 327 (1946), "...teleological explanations must be accepted as irreducible to causal explanations at present, but not as in principle irreducible. Thus the philosophical problem presented by the reference to the future in such explanations is a temporary problem only, to be solved by the progress of science." But this is irrelevant from the point of view of our immediate problem.
1. No problem of causation can arise unless there is a criminal "act." The general theory of criminal law predicates responsibility upon the existence of a criminal "act." The question of why an "act" is necessary is not related to the problem of causation. What constitutes a criminal act depends on specific legal provisions which are the crystallization of cultural value judgments. When a man prays for the death of another believing prayer to be an effective measure for bringing about death, and the victim, holding a similar belief, is so emotionally affected by notice of the prayer that he actually dies, there is no logical reason for denying causation in the sense of the theory of specific cause. Yet in our culture no court is likely to affirm causation in such instance, for praying is not considered a criminal act within the meaning of our law. Legal language must be interpreted objectively regardless of any individual's subjective interpretation. It is the statute and not the subject that determines what constitutes "killing." Of course, statutory language may classify as "a criminal act" conduct which other statutes, passed in different eras, will not qualify as such. Thus, the law of the XII Tables in Rome enumerated the singing of a "carmen" bringing about death as a capital crime. Whether conduct is a "criminal act" ultimately is a problem of statutory interpretation rather than causation. Similarly, whether certain behavior is a "criminal act" or mere preparation, cannot be determined by any causal idea. As pointed out before, Hart and Honore's argument about the causal relationship of the manufacture of matches to arson or the illegal Sunday driving to an injury misses the mark, for the problem involved is not one of causation but whether there has been a "criminal act" within the meaning of the pertinent statute or decisional law.

2. In intentional crime the problem arises as to what scope of knowledge concerning the causal process is required to render the actor responsible. It is submitted that such knowledge must comprise the possibility of a causal relationship between the act and the intended result. Thus, in the highly controversial cases where the victim suffers from a peculiar susceptibility such as hemophilia, the causation issue should depend on the actor's knowledge that the victim is a hemophiliac.

137. Cicero, De Republica 4, 10, 12, states: "XII tabulae cum perpata res capite sanxissent, in his hanc quoque sanctiendam putaverunt: si quis occentavisset sive carmen condidisset, quod infamiam faceret flagitiowe alteri." Cicero refers here to defamatory songs. It is believed however, that the crime in issue—punished capitally—consisted in magic cursing. See comment to Table VIII by Dull, in Das Zweitgestet (Dull ed. 1944).

138. In The King v. White, [1910] 2 K.B. 124 (C.A.), accused put two grains of cyanide of potassium in his mother's nectar, with the intention of killing her. He was held guilty of attempt to murder, although the quantity of poison was clearly insufficient to produce death.
and that hemophilia, medically, renders any bleeding fatal. Where he
had such knowledge and intended to kill, he should be deemed a mur-
derer, for he produced a mortal wound which ended in death. If he
did not have such knowledge but had the conscious intention of killing,
yet succeeds merely in slightly wounding the victim who dies only
owing to his particular disease, he should not be deemed guilty of
murder but attempt. Finally, if the accused was not aware of the
victim's condition and had no intention to kill, causation merges with
culpability (negligence). The rulings of both American \(^{139}\) and German
courts \(^ {140}\) are highly dubious in not drawing these distinctions.

The hemophiliac cases, however, should not be confused with those
raising a problem of causal connection between the original act and
ultimate result. In a Bombay case,\(^ {144}\) the defendant's initial assault on
his victim would have been sufficient to support a charge for attempt
to murder. Believing the man dead, defendant then set fire to the hut
in which the victim lay unconscious, hoping in that way to destroy
the evidence of his crime. The High Court at Bombay held that a
charge for murder could not be maintained. "An act of killing done
by a person who believes his victim to be already dead can hardly be said
to be done with the intention of knowledge required by the Code."\(^ {142}\)
A similar case arose in Japan.\(^ {143}\) A struck B on the head with a hammer
and tried to push his body into the river below, but finding the body
hooked by a tree on the way, came down to make sure whether B was
dead. When he touched the body, the bough broke and the body
plunged into the river. It was later disclosed that B was not killed by
A's blow but had drowned. The Japanese Supreme Court held A
guilty of murder on the theory that there was a causal relationship
between A's act and B's death. In a similar American case,\(^ {144}\) the
accused attempted to murder a woman by administering cocaine, and
mistakenly thinking she was dead, cut off her head, perhaps with the
object of preventing identification. Accused was held guilty of
murder.\(^ {145}\) The problem of causation involved in these cases is whether
the original act was causally connected with the subsequent act which,
in turn, produced the result. If the intention to kill existed at the time
of the first act, the requirement of union of intent and act is satisfied.

\(^{139}\) State v. Frazier, 339 Mo. 966, 98 S.W.2d 707 (1936).
\(^{140}\) S. v. R. (I. Strafsenat), May 31, 1920, 54 R.G.S. 349. On the importance of
accused's knowledge, see generally Ryu & Silving, Error Juris, A Comparative Study,
\(^{141}\) Reg. v. Khandu, 15 Bom. 194 (1873), 36 L.Q. Rev. 6 (1920).
\(^{142}\) 36 L.Q. Rev. 6, 7 (1920).
\(^{143}\) 2 Keizihanreisu 254 (1923).
\(^{144}\) Jackson v. Commonwealth, 100 Ky. 239, 38 S.W. 422 (1896). See also
WILLIAMS, CRIMINAL LAW 137-38 (1953).
\(^{145}\) The problem of causation was not discussed.
In this respect the Bombay opinion is believed to be wrong. The requirement of knowledge of the possibility of causal relationship does not include knowledge of the concrete process of causation, which would lie beyond the scope of any human knowledge.

3. The foregoing tests of causation discussed in the context of homicide cases also apply to other simple intentional crimes. Deviations from this pattern call for variations in applicable rules. In some types of crime, the problem of causation does not arise at all. The so-called "formal crimes" (Formaldelikte) involve proscribed conduct which itself constitutes a crime; no result apart from such conduct is necessary (burglary, gambling). A similar situation obtains with regard to so-called "crimes of abstract risk" (abstrakte Gefährdungsdelikte), in which the conduct itself is required to be dangerous, but which do not require the causing of danger as a result. The same is true of crimes of genuine omission (echte Unterlassungsdelikte) in which the statute punishes omission without regard to any result.

Turning to crimes in which causation may constitute a problem, it is important not to be misled by the desire to establish a uniform theory. In one type of crime the "but for" test may be appropriate, whereas to another type of crime the "adequacy" or the "relevancy" test may be better suited. What test is proper depends on the purpose of the legal provision governing that particular crime. Causation in crimes of negligence depends on the policy adopted by the various legal systems; it is related to the problem of whether foreseeability is based upon a subjective ability or upon objective reasonableness. In the latter event, causation in the sense of adequate causation almost merges with culpability. The theory of adequate cause will be a workable test in such cases. The most important causation field in criminal law lies in so-called "crimes aggravated by the result" (durch den Erfolg qualifizierte Delikte), in which the result exceeds the intent, so that the increase of punishment is predicated upon an unintended result (felony-murder principle). Causation serves here to limit the scope of strict liability. It is important to distinguish two results: the intended one (for example, robbery) and the unintended one (death). The causal relationship between the act and the intended result is not necessary, because the relevant factor lies in mere felonious conduct, whereas causation between the act and the unintended result constitutes a distinctive problem. Since the felony-murder principle is intended to impute responsibility where the criminal does not intend the particular result

146. On this see Ryu, supra note 8.
147. Cf. text and notes at notes 100, 101 supra.
in issue, it is submitted that causation here should be governed by the "but for" formula. A more effective method of resolving the issue raised by crimes aggravated by the result (which have been severely criticized everywhere) has recently been adopted in some countries.  

In Germany, for instance, it may be said that these crimes have been completely eliminated by the provision of section 56 of the Penal Code, which states that "... where the statute attaches a higher punishment to a special consequence of an act, such higher punishment does not affect the actor unless he brought about the consequence at least negligently."  

This provision accomplishes a merger of causation with culpability. In Germany causation in crimes aggravated by the result should hence be governed by the same principle as causation in negligence cases.

Within the field of criminal law itself there is no uniform criterion of causation. It follows a fortiori that the tests of causation need not be the same in criminal and in civil law. Since the purposes of criminal law differ from those of the civil law, it is natural that the applicable principle of justice should also differ. It is unnecessary in an article dealing with causation in the criminal field to discuss in detail the differences of approach. Only the differences in the underlying policy and in context need be indicated. The phenomenon of "formal crime," for example, gives a special imprint to the entire field of criminal law, for it shows that conduct may be proscribed although there is no injury. There is no corresponding tort in civil law. In civil law the major issue is compensation for value lost, whereas in criminal law there are many purposes other than compensation. The problem of group offenders in the criminal law field is not comparable to that of joint tortfeasors in the civil law.  

Contributory negligence is not an issue in criminal law. In civil law, "no intended consequences can be remote," whereas in the criminal law this principle is not applicable. There are also distinctive areas of civil law which raise problems of causation, totally absent in the criminal law. Thus, in the civil law a causal connection must be found not only in order to establish liability but also in order to determine the extent of liability.

148. German Penal Code § 56; Korean Criminal Code art. 15 II.
149. Inserted by Law of April 8, 1953, [1953] Bundesgesetzblatt pt. 1, at 735 (Germany). The Germans are considering amending this new provision.
150. Green, Rationale of Proximate Cause 142 (1927), pointed out: "Let it be noted that the problem of joint and several liability of several tort feasors is not dependent upon any concept of causation." Of course, as suggested above, the problem of causation in group crimes is distinctive.
151. Bauer, op. cit. supra note 133.
152. Carrara opposed it in the criminal law field.
153. Hart & Honore, supra note 80, at 264, cite Enneccerus-Lehmann, Lehrbuch des Bürgerlichen Rechts in this context. So far as civil law countries are con-
In summation, the error of the theories of causation in criminal law presented above is believed to consist in their failure to recognize the purposive element which plays a decisive role in evaluating the causal relationship between a criminal act and its result. The meta-juristic approach fails to understand that logical equation itself is an evaluation. On the other hand, the legal evaluational approach fails to take into account that no evaluation is valid unless its purpose is known. No criterion of causal relationship can be valid unless it is connected with the more basic purposes which, indeed, give rise to problems of causation. It follows that tests of causation vary with the purpose of particular criminal provisions. Thus, in an intentional normal crime the actor's contribution to the particular result should be evaluated by utilizing sister sciences. Factors which are irrelevant to the criminal actor's contribution to the result—as "adequacy" or "relevancy"—cannot be valid criteria, while in negligent crime or "crimes aggravated by the result" (within the German definition) the causal problem merges with culpability. Whether the subjective or the objective standard of foreseeability should be applied will be determined by the overall policy adopted. In a crime where the felony-murder principle prevails, there is no alternative to application of the sine qua non test. Clearly, the test or tests of causation in civil law need not be the same as the tests applicable in criminal law.

Concluding Remarks

Causation, as any issue in law, is not a problem to be dealt with apart from the total framework of the law. It is relative to the context within which it arises, but at the same time also relative to the more general idea prevailing in either criminal or civil law, and, finally, to the most comprehensive idea of justice in a given society. "Justice," however, does not exist in a vacuum. It is affected and, indeed, determined by the overall culture, reflected in science of a given era.

In trying to resolve any fundamental issue, it is most important to formulate the pertinent question correctly, and that means to find the real point in issue and the class of subjects to which it belongs. It would be impossible within the scope of an article to analyze all problems of causation in law. The issue of causation as it arises between criminal conduct and a result has been analyzed here by way of example in order to demonstrate the method of analysis which the writer believes to be concerned, the area of causation in civil law is much broader than it is in criminal law, for crimes are specifically defined and governed by the principle of nulla poena, whereas torts are defined in most general terms (whoever causes damage to another must repair it), referring to causation as a guiding principle. See, e.g., GERMAN CIVIL CODE § 823.
proper in approaching problems of causation. We can summarize the above analysis as follows:

1. Each science—natural, social and humanistic—and philosophy have their own meaning of causation. The proper meaning of causation in law is also sui generis. That meaning can be found only by inquiry into the policy of law, which may vary in different legal provisions.

2. However, substitution of the test of responsibility for that of causation is an oversimplification of the problem. Responsibility arising from the establishment of causation in criminal law ranges, depending upon the nature of the crime involved, from subjective culpability to an objective symbol of the actor’s contribution to the result.

3. Legal science serves the purposes of law. That science, in turn, mobilizes sister sciences for the accomplishment of these purposes. No evaluation can be sound unless it is based upon scientific grounds.

4. Recourse to so-called “common sense” is a method of avoiding the real issue. By invoking “common sense,” the lawyer actually relieves solution of legal problems to juries, as is shown by use of the “product” test in the recent *Durham* decision. It is the task of criminal jurisprudence to find reasonable solutions in the light of scientific knowledge.

154. Whether an act is the “product” of mental disease or defect is, of course, a question of causation. But the *Durham* decision does not suggest how causation between the two factors is to be established. Actually, psychiatrists cannot tell, by use of their notion of causation, whether an act is the product of a disease. Royal Commission on Capital Punishment, *Report of the Commission 1949-53*, Cmd. No. 8932 (1953), recommended relegating the final determination of insanity as a defense to juries.