IS THERE AN ACT REQUIREMENT IN THE CRIMINAL LAW?

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INTRODUCTION

No one should be punished except for something she does. She shouldn't be punished for what wasn't done at all; she shouldn't be punished for what someone else does; she shouldn't be punished for being the sort of person she is, unless it is up to her whether or not she is a person of that sort. She shouldn't be punished for being blond or short, for example, because it isn't up to her whether she is blond or short. Our conduct is what justifies punishing us. One way of expressing this point is to say that there is a voluntary act requirement in the criminal law.

There is a view of this voluntary act requirement that I will call the traditional view in the common law.¹ One of the most significant features of the traditional view is that it takes willing or volition to be the key to voluntariness. Sir James Stephen, for example, states that a voluntary act "is a motion or group of motions accompanied or preceded by volition and directed toward some object."² According to Charles Torcia, "[a]n act is 'voluntary' when the bodily movement is the product of conscious effort or determination."³ And Arnold Loewy says of his usage that "the term voluntary simply means that the muscular contraction [is] willed."⁴

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¹ See Michael Corrado, *Automatism and the Theory of Action*, 39 EMORY L.J. 1191, 1195-96 (1990) (describing the traditional formulations as requiring "internal 'volitions'"). Hyman Gross calls it the "orthodox view." HYMAN GROSS, *A THEORY OF CRIMINAL JUSTICE* 48-73 (1979). The view was held by Austin, Mill, Holland, Holmes, Stephen, Markby, Pound, Perkins, Cook, and Prosser. Among contemporary writers it appears to be the dominant view; it is held by Torcia, Loewy, and Dressler, among others. See Corrado, *supra*, at 1195-96 nn.11-23. There is some variation in terminology: for Holmes, the act consisted of a muscular contraction caused by a volition, rather than a bodily movement. See OLIVER W. HOLMES, *THE COMMON LAW* 45-46 (Mark D. Wolfe ed., 1963) (1881) ("An act . . . imports intention A spasm is not an act. The contraction of the muscles must be willed."). Austin called the movement itself the act, rather than the movement together with the volition that preceded it. See Corrado, *supra*, at 1195 n.11.

² 2 JAMES F. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 100 (London, MacMillan 1883).

³ CHARLES E. TORCIA, *WHARTON'S CRIMINAL LAW* § 25, at 117-18 (14th ed. 1978).

⁴ ARNOLD H. LOEWY, *CRIMINAL LAW IN A NUTSHELL* 138 (1975).

In the traditional analysis then, the act requirement is a voluntary act requirement, and is satisfied by a willed or volitional movement.

The traditional view has recently been rearticulated in rather precise form by Michael Moore.⁵ According to Moore's detailed view, the statement of a *prima facie* case in criminal law presupposes the existence of a basic act, which consists of a bodily movement caused by a willing or volition.⁶ A basic act is the simplest thing we do that has an effect on the physical world. It is something we bring about directly, and not by means of something else that we do.

Basic acts are also, in a sense, the *only* things that we do, because an act, properly so called, does not include the circumstances, conditions, or consequences of the bodily movement involved in the act. "[T]he criminal law's act requirement requires that there be a simple bodily movement that is caused by a volition before criminal liability attaches, and that such a movement is all the action that a person ever performs."⁷ In other words, the act of killing is reducible to a basic act and the death that it causes. A description of an act of killing is really a description of a basic act together with the ensuing death.

An act is an event,⁸ which means it is a change that takes place in an object.⁹ A bodily movement is a change in the relative position of the parts of the body, not merely holding still.¹⁰ A volition is a type of intention, although I do not think Moore would be unhappy to think of it as an "undertaking" or a "trying." It is a functional state of the brain, or perhaps a change in a functional state of the brain. It is an Intentional state, taking propositions as objects.¹¹

The act itself, the basic act, is neither the volition nor the movement; it is the causing of the movement by the volition. There are, of course, deviant ways in which volitions can cause movements, such that no acts result. In the act requirement, causation between

⁵ See generally MICHAEL MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* (1993).

⁶ See *id.* at 44-45.

⁷ *Id.* at 45.

⁸ See *id.* at 61 (discussing the existence of actions and events).

⁹ See *id.* at 67 ("Fundamentally, events seem to be *changes* in objects.").

¹⁰ See *id.* at 82 (stating that "bodily movement means motion (not stillness)"). Moore allows that we may be punished for certain omissions, see *id.* at 33-34, but omissions are not acts. They are exceptions to the act requirements.

¹¹ See *id.* at 123-24 (indicating that volitions are "construed to be Intentional states").

volition and movement must be direct in a sense to be provided by empirical, case by case study.¹² The basic act, that is, the causing, is partially identical to the movement which is caused.¹³ What this appears to mean is that the movement is *part of* the causing. The causing is also partially identical to the volition.¹⁴ Unlike the volition, the basic act itself is not an Intentional state.¹⁵ These observations are meant to be an analysis of the voluntary act requirement, and not, for example, a description of conditions we take as evidence that a voluntary act has occurred. In Moore's usage, "voluntary" is "a synonym for 'willed' or 'volitional.'"¹⁶

Moore's account of action is causal all the way through: In an intentional crime the volition must be caused, in the proper way, by the intention or belief which is the crime's *mens rea*; and the resulting action must cause (in the proper way) the prohibited consequences which are the *actus reus*.¹⁷ Suppose the question is whether Jones is liable for the murder of Smith. In order to be liable, she must have brought about Smith's death. And she must have intended to, or known that she would, cause that death. But if she ran over Smith by accident on her way to the store, she has not committed murder. If she had the intention to kill Smith, it played no causal role in her bringing about Smith's death.

Further, if she ran over Smith on her way to Smith's house to carry out the killing, she still has not committed murder. Although she had the intention to kill Smith, and that intention played a causal role in the killing (leading to the volitions and the movements that resulted in the killing), the causation was deviant, not the sort that counts in questions of intentional action. If her intention had, on the other hand, led her to confront Smith and then, with a gun in her hand, to squeeze her finger on the trigger until the gun fired, killing Smith, she would then have committed murder. Her intention caused her to will (or try, or undertake, or choose) to squeeze her finger, which caused the trigger to move, which caused the gun to fire, which caused the bullet to pierce Smith, which caused Smith to die. There is only one act in all this, the basic act

¹² See *id.* at 159-60.

¹³ See 2 D. M. ARMSTRONG, *A THEORY OF UNIVERSALS: UNIVERSALS AND SCIENTIFIC REALISM* 148-57 (1980).

¹⁴ See MOORE, *supra* note 5, at 84-85 (discussing the partial identity between acts and volitions causing bodily movements).

¹⁵ See *id.* at 64 ("Intentionality . . . is not even a feature of any action itself.").

¹⁶ *Id.* at 41 (discussing various conceptions of "voluntary").

¹⁷ See *id.* at 45-46, 150.

of Jones moving her finger. It can, however, be described in various ways depending upon which of the consequences are read into the description: pulling the trigger, firing the gun, wounding Smith, killing Smith.

In Moore's view, then, there are these elements of intentional homicide:

- Voluntary act: There was a basic action of Jones, consisting of a bodily movement caused (nondeviantly) by a volition.
- Mens rea: The volition was caused (nondeviantly) by Jones's intention to bring about Smith's death by means of that movement, or by her intention to bring about something she knew would bring about Smith's death.
- Actus reus: Jones's basic action did in fact (nondeviantly) cause Smith's death.

Moore concedes that where the law requires us to act in a certain way—for example, a parent is required to care for her child—a failure to act will violate the law and justify punishment.¹⁸ Since a failure to act is not a willed movement, such "omissions" are a counterexample to the general thesis. Moore acknowledges this point, while maintaining that laws punishing omissions are (appropriately) rare.¹⁹ Since they infringe on liberty to the extent of requiring an affirmative act, such laws punish only violations of those moral obligations that we find most significant.²⁰

For example, we have a moral obligation to avoid killing people, and intentionally killing them is criminalized. But we also have a moral obligation to prevent people from being killed; yet the law

¹⁸ See *id.* at 32-33.

¹⁹ See *id.* at 34 ("The most one can say of the Anglo-American criminal law's act requirement is that either an act or an omission is required for liability, with the proviso that true omission liability is exceptional rather than customary.").

²⁰ See *id.* at 58-59:

Wrongful as it is to let the child drown, it is much more wrongful to drown the child. . . .

. . . .
 . . . Normatively, the retributive value of punishment justifies . . . why we should punish *only* actions and not character, emotions, or omissions. The only exception to this is for those omissions that violate our duties sufficiently that the injustice of not punishing such wrongs outweighs the diminution of liberty such punishment entails.

does not ordinarily punish failures to save lives. As important as it may be to save a life, failure to do so cannot justify imposing an affirmative legal duty on each of us. On the other hand, the duty of a parent toward her child is much more significant than the general duty toward strangers. Consequently, it is reasonable to impose on parents a legal duty to protect their children. Nevertheless, such affirmative legal duties are relatively rare, and do not require a revision of the willed movement thesis. They may be treated, according to Moore, as an exception to the rule requiring voluntary acts.²¹

In the remainder of this Article I will argue for these points: (1) There is no movement requirement in the criminal law; (2) There may, however, be a requirement of physical conduct which would include both movements and failures to move; (3) The requirement of a volition, to the extent it is a requirement, follows from *mens rea* and is not independent; and (4) The traditional analysis of a voluntary act fails to include the sense of "voluntariness" that seems to be part of the *prima facie* criminal case.²²

²¹ See *supra* notes 19-20 and accompanying text.

²² I have a number of technical questions about Moore's analysis that it did not seem proper to raise in this Article. Here are two that I find the most puzzling. First, on Moore's analysis, an action is neither a movement nor a volition. An action is the causing of the first by the second. At the same time, an action is (quite reasonably) said to be an event. Can a causing be an event? If a causing is an event, in what substance is it a change? The actor? The change in the actor is the volition which causes the movement; the movement is also a change in the actor. Is the cause some other change in the actor besides those two? Or is it a change in yet some other substance? I do not see what answer there could be to this question.

Second, suppose that in fact causings are events. Can such events cause other events? Basic actions are supposed to cause the consequences that violate the law. In an unjustifiable homicide, it is not the moving finger that violates the law, but the death of someone; or better, the death being caused by someone's action. If a basic action is a causing, the question naturally arises whether a causing can itself be a cause. That is, can the causing of a movement by a volition cause a death? The question is not about whether the movement can cause a death, or whether the volition can ultimately cause a death, but whether the causing can cause the death. When my trying or willing certain movements results in those movements, and the movements result in a fire being set, it is the movements which cause the fire. So the causal chain resulting in the fire will include my volitions or efforts, the movements that result from them, the striking of the match, and so on. There does not seem to be any reason here to say that the fire was not caused by my volition, or by my movements, and instead was caused by the causing of one by the other. Yet the fire was indeed caused by my action. And that seems to cast some doubt upon the idea that actions are causings.

I. THE MOVEMENT REQUIREMENT AND PHYSICAL CONDUCT

A. *The Hypothesis of a Movement Requirement*

According to the traditional view, a *prima facie* case in criminal law consists of the following:

(PF1) Jones may be punished for violating law *L* only if:

- (1) *L* forbids the bringing about of (an instance of) α ; and
- (2) Jones brings about (such an instance of) α (at *t*); and
- (3) Jones does so by bringing about β (at *t-n*), which is the non-deviant causing of a bodily movement of Jones by a volition of Jones; and
- (4) that volition is caused in a non-deviant way by Jones's intention to bring about Γ , and bringing about Γ bears the appropriate relation to bringing about α .

Condition (1), taken together with condition (2), is required by the principle of legality. That principle requires that the specific consequence for which Jones is to be punished be something that is prohibited by the law. Although there is the normal concern about when (precisely) we can declare that something is the very thing prohibited by law, it is clear enough what this provision is meant to rule out.²³ In some penal codes there are provisions that embody what is called "the principle of analogy."²⁴ Under those

²³ See MOORE, *supra* note 5, at 239-44.

²⁴ See, for example, the 1926 Soviet Criminal Code: under article 6, a socially dangerous act is "any act or omission that is directed against the Soviet system or that violates the legal order established by the worker-peasant power during the period of transition to the communist system." HAROLD J. BERMAN, *SOVIET CRIMINAL LAW AND PROCEDURE* 22 (Harold J. Berman & James W. Spindler trans., 2d ed. 1972) (quoting RSFSR (Russian Soviet Federated Socialist Republic) CRIMINAL CODE art. 6 (1926)). Article 16 embodies the doctrine of analogy: "If any socially dangerous act is not directly provided for by the present Code, the basis and limits of responsibility for it shall be determined by application of those articles of the Code which provide for crimes most similar to it in nature." *Id.* (quoting RSFSR CRIMINAL CODE art. 16 (1926)).

Germany prohibited the use of the principle of analogy before 1933 because it conflicted with the principle *nulla poena sine lege* ("no punishment unless law has been infringed"). On this point, a National Socialist minister is quoted as saying: "We have substituted for the outworn maxim *nulla poena sine lege* . . . the more efficacious *nulla crimen sine poena* ("no crime left unpunished"), regardless of whether or not law has been infringed." EDITH ROPER & CLARA LEISER, *SKELETON OF JUSTICE* 289 (AMS Press Inc. 1975) (1941). Indeed, in the 1935 revision of the German Criminal Code the following appeared: "That person will be punished who commits an act which the law declares to be punishable or which deserves punishment according to the *funda-*

provisions, if the behavior of the defendant has been antisocial or socially dangerous, but the judge cannot find any legal provision that outlaws that particular behavior, she may look for a provision that penalizes behavior somehow "analogous" to the behavior in question, and administer the punishment provided for that analogous behavior. If we restrict substituends for " α " to narrowly defined classes of actions, we significantly limit the discretion of judges in this connection.

Condition (2) is the requirement of an *actus reus*. We may not punish a defendant unless she has brought about the prohibited consequence.²⁵ The point of that limitation should be obvious: No one should be punished unless (a) a prohibition is violated, and (b) the person to be punished did the thing prohibited. Condition (3) is the voluntary act requirement, as understood in the traditional analysis. It is not enough that an individual brought about the prohibited state of affairs; she must have brought it about by means of a willed movement.

We may understand (3) as entailed by (2), or as an entirely separate requirement, depending upon how broadly we understand "brings about" in (2). Under the broadest usage of that locution, we may say that I "brought about" the toppling of the side table by ramming into it after falling down the stairs. Or that the president "brought about" the wrinkling of his suit, and the concern of the media, when he collapsed in public. If we use "brings about" in that way ("He knocked over the ambassador when he fell"), then (2) and (3) are independent requirements. If, on the other hand, we reserve "brings about" for the consequences of volitional movement, (2) naturally entails (3). I do not know of any principled reason for favoring one of these approaches over the other, so long as we are clear about which one we choose.²⁶

mental principle of a criminal statute or healthy popular opinion." INGO MÜLLER, HITLER'S JUSTICE 74 (Deborah L. Schneider trans., 1991) (emphasis added) (quoting Law of June 28, 1935, Reichsgesetzblatt I 839 (1935)).

²⁵ Of course it is not the consequence that is prohibited; it is the consequence produced in a certain way, with a certain *mens rea*. But it saves time to refer to "the prohibited consequence," "the prohibited state of mind," and so on, so long as it is understood that these things refer to elements of something that is prohibited.

²⁶ As Moore and others define *actus reus*, it entails, but is not entailed by, the act requirement. "[T]he act for which an accused is punished must be an act (bodily-movement-caused-by-a-volition) that has the properties required by some complex act description contained in some valid source of criminal law." MOORE, *supra* note 5, at 169. "[A]ctus reus has here been defined as the whole situation forbidden by law with the exception of the mental element (but including so much of the mental

Condition (4) is the requirement of mens rea. As I have spelled it out here, the condition requires that there be some intentional undertaking that causes the volition in question, and that the intentional undertaking bear a specified relationship to the prohibited consequence. For example, the relationship may be identity, as would be the case if the volition were simply caused by the intention to bring about α (so that $\Gamma = \alpha$). In that case the violation would be intentional in the strong sense.

Or the relationship may have to do with knowledge: Jones's undertaking is caused by an intention to bring about Γ , in the knowledge that it would also bring about α . Then the violation would be intentional in a weaker sense. If Jones undertook to bring about Γ and used insufficient care to avoid bringing about α , then the crime would be a crime of negligence. In the case of strict liability crimes, the relationship is universal: Jones's volition is caused by her intention to bring about Γ , and as a matter of fact undertaking to bring about Γ caused α . This underscores the fact that even for strict liability, the agent must be doing *something* intentionally.

Were every criminal violation the causal consequence of some willed action, then something very much like (PF1) would describe the prima facie case. There are, however, omissions which may be punished, and Moore concedes that these cannot be explained as willed movements. How should we expand the requirement to cover them? It would be a mistake, I think, to talk about instances of failures to act and about the things that such failures cause. As Moore observes, failures are not something; they are the absence of something.²⁷ It would be better, I think, to do it like this:

(PF2) Jones may be punished for violating law L only if either

- (1) L forbids the bringing about of α ; and
 - (a) Jones brings about α ; and
 - (b) Jones does so by bringing about β , which is the non-deviant causing of a bodily movement

element as is contained in the definition of an act)." GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 22 (2d ed. 1961). Actus reus can, however, be distinguished from the voluntary act requirement. If we characterize actus reus in terms of what the agent has brought about, as I do here, and use "bringing about" in a very broad sense, so that one who stumbles or has a spasm might thereby bring something about, then clearly the voluntary act requirement would be independent of actus reus.

²⁷ See MOORE, *supra* note 5, at 28 (asserting that "omissions are the absence of any willed bodily movements").

- of Jones by a volition of Jones; and
- (c) that volition is caused in a non-deviant way by Jones's intention to bring about Γ , and bringing about Γ bears the appropriate relation to bringing about α ; or
- (2) L commands the bringing about of α by Jones, and
- (a) it is not the case that there is any willed movement by means of which Jones brings about α ; and
 - (b) the absence of such willed movement is caused in a nondeviant way by Jones's intention to bring about Γ , and bringing about Γ bears the appropriate relation to the failure to bring about α .

Provision (1) is simply our earlier incomplete formulation, and provision (2) contains the new material. Penal laws that fit under provision (1) are prohibitions. Violations of such laws are said to be crimes of *commission*. Penal laws that depend upon special relationships and fit under provision (2) are commands. Crimes of omission are violations of such laws. Condition (2)(a) tells us that the obligatory outcome has not been brought about by any willed movement of Jones. That condition serves as the *actus reus* for an omission. Condition (2)(b), on the other hand, provides that a certain state of mind is required, and serves as the *mens rea* for an omission.

Moore, as I have already said, appears to believe that omissions are a more or less insignificant exception, not affecting the bulk of the criminal law.²⁸ Only when the persons involved are related in certain ways will an omission to prevent a killing take on the seriousness of an act designed to cause death. So although the willed-movement analysis is compromised, it is not compromised much. Moore says:

[T]he omissions objection is . . . irrelevant. I have already conceded that sometimes, if rarely, our criminal law does punish true omissions, and that the act requirement, accordingly, is not a requirement for crimes of omission. We are now engaged in trying to figure out what an act is We thus need objections

²⁸ See *supra* notes 19-20 and accompanying text.

showing us that acts are not what Austin and Holmes said they were²⁹

B. *There Is No Movement Requirement*

But certain sorts of examples raise a question about the adequacy of even this compromised version of the analysis. Consider this case: I am driving down a long, straight highway; the car is on cruise control, and I am not moving the wheel because my steering is accurate and the road is straight. (Or perhaps I have a way of locking the steering on straight stretches of road; it requires some positive movement by me for it to become disengaged.) Suddenly and unexpectedly I see an old enemy standing in my lane about two hundred yards ahead of me. Her back is turned; she does not see me approaching. I turn to the passenger next to me and I say: "Watch me carefully. I want you to be able to testify that I did not move a muscle." Thereafter I do not move, and the car runs over my old enemy, killing her.

There is no doubt that killing the woman was something I did, and that it was voluntary and intentional. It was an act of mine. But no volitional movement was part of it. If we allow that holding steady could be an action (as we should) then the example does not present a problem.³⁰ But if I understand Moore correctly, only a volitional movement can violate a prohibitory law, and a volitional movement is a willed change in the relationship of bodily parts. Stillness is not movement;³¹ if Moore is right, then running down my enemy does not satisfy the act requirement for intentional homicide.

It may seem that we could point to the voluntary act of starting the car and setting it in this general direction at the start of the straight stretch as volitional movements. But the intention is not simultaneous with the volition, as it must be for liability to exist. At the time I set the car going, and at the last moment at which I made any movement to control the direction of the car, I did not intend to kill anyone and I did not know that my enemy would be where she turned out to be. According to Moore, if "the court can find a voluntary act by the defendant, accompanied *at that time* by

²⁹ MOORE, *supra* note 5, at 89.

³⁰ Moore allows that holding steady can be a basic act when it requires us to brace ourselves or move our muscles in certain ways to resist change. *See id.* at 82. But that is not this case; notice that either I am lightly resting my hands on the wheel and failing to move them, or I am on some advanced form of cruise control.

³¹ *See id.* ("[B]odily movement means motion (not stillness)")

whatever culpable *mens rea* that is required, which act in fact and proximately causes some legally prohibited state of affairs, then the defendant is *prima facie* liable for that legal harm."³² But if the *mens rea* does not accompany the act, there is no liability.

There is an exception to that rule: If I have myself innocently or with fault created the situation that puts the victim at risk, then I have a positive duty to prevent the harm to her.³³ But that does not fit the case at hand: I did not create the situation that put my victim at risk. She did, by standing in the road and not looking out for herself. My presence in the road is perfectly reasonable—I did not create the risk.³⁴ And there are other reasons why that exception would fail to explain my liability: According to Moore, the exception creates an affirmative duty, violation of which is an omission.³⁵ But violation of an affirmative duty is or should be a much less serious crime than an act having the same consequence.³⁶ From that I conclude that I am liable for an act in the example above, and not an omission.

³² *Id.* at 35-36.

³³ See *id.* at 34 (discussing the "causing-of-the-condition-of-peril" doctrine, where "those who innocently or culpably cause the condition of peril . . . are liable if they omit to rescue when they can do so at minimum risk to themselves").

³⁴ Consider the following from Roman law:

So, if someone engaged in sport or practice with javelins transfixes your slave, a distinction has to be taken. Suppose first that it was done by a soldier and in a field where it was usual to practise. Here there is no fault on his part. Suppose some other person does the same thing. He is guilty of fault. It is the same with the soldier if the act is done in some place other than one designated for military exercise.

JUSTINIAN'S INSTITUTES 125 (Peter Birks & Grant McLeod trans., 1987) (533). Indeed, if a soldier hurls a javelin into the middle of a crowded square, he has created the risk. But if someone walks onto a field where javelin practice is going on, he has created the risk to himself. That is not to say, of course, that the soldier who sees him may throw his javelin in his direction anyway. The soldier has a duty to avoid harm even though he did not create the risk. The same is true of the driver in my example above.

³⁵ See MOORE, *supra* note 5, at 34 (asserting that liability under the causing-of-the-condition-of-peril doctrine can only be for "the subsequent omission, not for the earlier, innocent act").

³⁶ As Moore notes:

We do much more wrong when we kill than when we fail to save, even when such failure violates a positive duty to prevent death. . . .

... Wrongful as it is to let the child drown, it is much more wrongful to drown the child. Drowning it makes the world a worse place, whereas not preventing its drowning only fails to improve the world.

Id. at 58-59.

Moreover, if the exception were extended to this case, it is not clear that there are many provisions of the Code that would escape the reach of the exception, contradicting Moore's claim that liability for omissions is appropriately rare. Notice too that the supposition that I have created the risk supposes that I put things into motion, perhaps by starting my car and setting out on the road, and that the bodily movements involved in those things satisfy the act requirement. But even if we were to trace liability back to my voluntary movements of starting the car and setting it going, there would be another problem: in the circumstances described I would be liable, I think, even if I had not performed any of those movements. Suppose, for example, that I was sitting in the car at the top of a hill, and that for reasons having nothing to do with my being in the car it began to roll down the hill. I have my hands on the wheel, but there is no occasion to turn, since the road is straight. If I run down my enemy as before, am I not liable for killing her? Of course I am.³⁷ It seems to me, therefore, that movement is not necessary even to violate a general prohibitory law.

I do not deny that an act is required; the acts involved in this case are the acts of driving, hitting my enemy, and killing her. Is there a basic action? I think there is, but that may mean one of two things. We can say that basic actions include failures to move, when such failures are intentional—in causal language, when the failure to will a movement is caused directly by my intention, without the intervention of a volition. Here the failure to move would be caused by my intention not to turn aside. Or we can say that the absence of some movement was itself something I willed, and include among basic actions "willed stillnesses."

The motorist in my example is different from the mere bystander who might save the victim but does not. Unless the bystander bears some special relationship to the victim she does not have a duty to act. Not having a duty, she does not commit a crime by her failure to act. What is it that distinguishes the bystander's failure to act from the motorist's act, since neither involved any bodily movement? We need not decide that now. The point is that, however the motorist's involvement is treated, it must be treated as

³⁷ Imagine a judge saying: "Well, the defense counsel has a good point, Mr. Prosecutor. We know that the defendant saw the victim and could have avoided hitting her but made no effort to do so. But can you establish that she actually made some bodily movement after the point at which she became aware of the victim? Because if you can't, you haven't got a *prima facie* case."

an act, and not as an omission.³⁸ And since that is true, and since it does not involve a movement, we cannot section off a part of the criminal law, including the prohibition against killing, that involves a basic act involving a bodily movement. Either no basic action is necessary for actions such as killing, or basic actions do not essentially involve volitional movements, whether or not they involve volitions.³⁹

C. *A Controversial Physical Conduct Requirement*

The act requirement now seems to come to this: No one can be punished unless she either moves or fails to move her body. That may seem to be an empty requirement (who could fail to satisfy it?), but in fact it is not. The occurrence of the prohibited consequence must be traceable either to a movement or to a failure to move. By filtering out the elements of the *prima facie* case (PF2) that do not refer to bodily involvement, we find that this much remains:

(PF2') Jones may be punished for violating law *L* only if either

- (1) *L* forbids the bringing about of α , and either Jones brings about . . . β , which is the non-deviant causing of a bodily movement of Jones by a volition of Jones; or
- (2) *L* commands the bringing about of α , and it is not the case that there is any . . . movement by means of which Jones brings about α .

This must be supplemented, in light of the recent discussion of acts, to include cases of action that do not involve bodily movements:

(PCon) Jones may be punished for violating law *L* only if either

- (1) *L* forbids the bringing about of α , and either Jones brings about . . . β , which is the non-deviant causing of a bodily state or movement of Jones by a volition

³⁸ Killing is equivalent to causing a death, see MOORE, *supra* note 5, at 110, and since omissions can't be causes, see *id.* at 267-78, what the motorist in the example has done cannot be an omission (assuming that you agree that he has killed the victim). Moore challenges his opponents to come up with an alternative conception of an act before they attack his version. But I do not see why that is necessary. If Moore claims that killing is an act rather than an omission, and I can find a case of killing that does not involve a bodily movement, then any definition of "act" that, for the purposes of the law, requires a bodily movement, *must* be mistaken.

³⁹ For a different sort of attack on the movement requirement, see GROSS, *supra* note 1, at 49-55.

[or other intention] of Jones; or

- (2) *L* commands the bringing about of α , and it is not the case that there is any . . . movement by means of which Jones brings about α .

What (*PCon*) excludes is punishment for internal or purely mental events. I will call this the physical conduct requirement. The physical conduct requirement differs from the willed-movement requirement in that it makes clear that although liability rests ultimately on physical conduct, physical conduct is not limited to movements.

Is there any basis for such a requirement? In a way it is superfluous, since it is difficult to conceive how we might be liable for harm to another unless that harm results either from our having moved our bodies or from our having failed to move them. And if we cannot conceive of such harm, then (*PCon*) would express a true proposition about liability, but would have no normative force. There is nothing that it would exclude from punishment that is not excluded by whichever version of the harm principle happens to be true.

However, although it may be difficult to conceive of liability without physical conduct, it is not impossible. There was a time when it was punishable to "compass" or imagine the death of the king. I think it is possible to make a case for the proposition that we might harm others purely through the ways in which we think about them. What harm is there in libel, for example? The harm is not the saying of an untruth, but the saying of something that affects reputation. Reputation has to do with the way others think of us. Good reputation is something we desire, something that affects our feeling about our position in the world. It may affect the way we are treated later on; but proof of bad treatment is not essential to a libel case, while effect on reputation is a required element. Furthermore, the resulting bad treatment may not be harmful in a legally cognizable sense: If I am a merchant, I have no right to someone's trade. What I have a right to is the reputation I deserve.

Suppose now that I heard a defamatory remark, and that though the remark was so ludicrous that no one else would be fooled (and perhaps was not intended by the speaker to fool anyone), and I unreasonably changed my view of the person defamed for the worse without making the slightest effort to learn the truth of the matter. Let us say that what I did was utterly without warrant; I should not have done it. As a consequence of my doing it the person in

question has been wronged. To some small extent she has been deprived of the esteem I owe her through my lack of reasonable care. I am not arguing that I should be punished for this or even be made liable in tort, only that I have done something that has harmed someone and that behavior should be considered wrongdoing.⁴⁰

By similar reasoning, suppose that pornography tends to change our opinion of the subjects of the pornography. If I knowingly listen to a pornographic broadcast and my view of women changes for the worse, is that not harm to women? If we refuse to punish the consumption of pornography (in this example limited to listening to pornography, so that there are no volitional bodily movements involved), surely it is not because there can be no injury without physical conduct. It is more likely that we do not punish because there are some types of injury we will live with rather than countenance the sort of invasion necessary to prevent them.⁴¹

Whether that argument is persuasive or not, the point is this: If I am wrong and it is inconceivable that we can harm another by our thoughts and other mental actions, then there is no need for a physical conduct requirement.⁴² On the other hand, if I am right and such harm is conceivable, then a physical conduct requirement is a meaningful, though perhaps controversial, limitation on the

⁴⁰ See ROBERT NOZICK, *ANARCHY, STATE, & UTOPIA* 43 (1974) (asserting that a basic human instinct is the desire "to be a certain way, to be a certain sort of person").

⁴¹ According to Hall:

The current restrictive meaning of "act" also indicates a misreading of a fundamental doctrine of political ideology—that distinguishing law from morals. The older writers had treated the requirement of an "act" in connection with treason statutes which ran in terms of merely "compassing or imagining"; the principle was established that "men were not to be tried for their thoughts." . . . [T]he political value, reflected in the demand for protection against tyranny, provides no warrant for the restriction of "act" to external behavior. The needed protection was and is derived from the requirement of external harm that is rationally imputed to a responsible person.

JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 254 (1947).

⁴² There are, of course, inchoate crimes like attempt and conspiracy, and we must decide at what point we are willing to say that there has been an attempt or that a conspiracy has been formed. But such determinations have more to do with questions of proof and the dangerousness of the activity contemplated than they do with the ability to harm others by thought. If there were some relatively infallible way to establish that someone had for some time been thinking through a way to assassinate the President, for example, I am not certain that the presence or absence of bodily movements directed to that end would (or should) prevent us from locking him up.

state's right to punish. Support for it would come from our concerns about privacy and from such practical considerations as the difficulty (and intrusiveness) of finding evidence in such cases. But these concerns give rise to defeasible limitations, and not to any fundamental requirement of the criminal law.

II. MENS REA AND VOLITIONS

The requirement that there be a willing or volition, to the extent that it is a requirement at all,⁴³ is entailed by mens rea. No one can be convicted of a crime unless what she did was done intentionally (if that was what the crime required) or through negligence or recklessness. There are some examples of strict liability in the criminal law, but they are rare and they are generally disliked by the commentators.⁴⁴

But although different mental states are required by different crimes, each crime, even a crime of strict liability, entails an intentional action *under some description*. I suggested this conclusion in describing the prima facie case (*PF1*) above. For example, an individual can be convicted of bringing about some harm through negligence only if in neglecting to take due care she was doing *something* intentionally. If she is unconscious at the switch, she is not generally liable for the harm due to her failure to throw the switch, unless her unconsciousness can be attributed to some intentional action of hers, like drinking, or to negligence during the performance of some intentional action, like failing to take proper care not to fall asleep while going about her duties.

The same, I believe, is true even of strict liability crimes; we cannot be held liable when no intentional action is involved. Cases that throw light on this issue are rare. In the common law there is a case in which someone was carried, against his will, onto the land of another.⁴⁵ Even though trespass is strict liability with respect to being on the land of another, being on the land must be intentional, and the court held that it was not intentional in that case.⁴⁶ Similarly, assault on a policeman can be strict liability with respect to the fact that the victim is a policeman, and statutory rape may be

⁴³ I add the qualification because, in cases of intentional failures to act, it might be the intentional absence of a volition that makes us liable.

⁴⁴ See, e.g., WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.8, at 348 (1986).

⁴⁵ See *Smith v. Stone*, 82 Eng. Rep. 533 (K.B. 1647).

⁴⁶ See *id.* at 533.

strict liability with respect to the age of the victim, but in each case the act must be intentional under some description, or there cannot be a conviction. I take the need for that to be a mens rea requirement.

I pointed out above that actus reus may be understood either to include the volitional act requirement or to be independent of it. It is independent of the volitional act requirement if "brings about" may be understood so that it is true, for example, that Jones brings about Smith's death when she trips while carrying a knife and the knife plunges into Smith's heart. We do in fact sometimes use our action verbs in that way. Here are some examples: "When I hiccupped I caused her to drop her glass." "When I fainted, I knocked over the lamp." "When I tripped I broke the glass in the door." In each case we may add: "but I did not do it (hiccup/faint/trip) volitionally." Where actus reus is understood to be independent of the volitional act requirement, let us speak of the weak requirement of actus reus. On the other hand, where the actus reus requirement is understood to entail or include volitional action, let us speak of the strong requirement of actus reus. In the strong sense, we do not bring something about unless it results from one of our volitions.

My suggestion comes to this: If we begin with the weak requirement of actus reus, then nothing is left over but mens rea. If I say, "When I tripped I broke the glass," and add: "intentionally," then if what I have said is true, I am responsible for breaking the glass. For what I have said implies that in tripping I broke the glass intentionally, and that further implies that I willed some bit of behavior, or refrained from doing something, and that that is what resulted in the glass breaking. The willing (or the intentional refraining) is entailed by the fact that my "bringing about" was intentional.⁴⁷

It is true, of course, that we need not read the "brings about" of the actus reus requirement in that way. We could understand it as

⁴⁷ My argument here is related to the argument that to say what is willed is voluntary, is to confuse free action with intentional action.

[On the familiar account,] if a person does something intentionally, then surely he was able at that time to do it. Hence, on this analysis, he was free to do it. The familiar account would not seem to allow for any further questions, as far as freedom is concerned, about the action. Accordingly, this account would seem to embody a conflation of free action and intentional action.

Gary Watson, *Free Agency*, in *FREE WILL* 96, 96-97 (Gary Watson ed., 1982).

a strong requirement, so that it includes volitional action. It is significant, however, that we need not, and that by doing so we duplicate a condition already secured by *mens rea*. What I draw from that is that there is no separate requirement of a volitional act.

There are some descriptions of *actus reus* that cannot be separated from the intentional element. You cannot defraud someone without intending the outcome, so that your action must be volitional. This class of actions Moore calls "intentionally complex."⁴⁸ His point is that we can refer to the behavioral aspects of such actions without assuming that what is done has been done intentionally. He means to show that *actus reus* does not imply *mens rea*.

I am arguing something different, namely that *actus reus* can be described (at least sometimes) without assuming that what is done is done volitionally. And although it is not necessary to my argument, it seems that even in the case of intentionally complex actions it would be possible, though something of a stretch, to describe the behavior in a way that was neutral as to volition. Whether or not that can be done in every case, the point is that volition is not essential to *actus reus*, and that if we do not include volition in *actus reus*, *mens rea* makes up the deficit. Thus my conclusion that there is no volition requirement independent of *mens rea*.

But now the act requirement, as traditionally understood, seems to have evaporated. The physical conduct requirement is what remains of the movement requirement, and whether the physical conduct requirement serves any function is subject to serious doubt. And as to the element of willing, there is nothing to it that *mens rea* does not already provide for.

III. VOLUNTARY ACTIONS

The argument so far has been that there is less to the voluntary act requirement than is supposed by the traditional willed-movement analysis. There is no movement requirement, and there is no independent volition requirement. But it may also be true that there is *more* to the voluntary act requirement than the traditional analysis allows. The criminal law requires that the criminal act be voluntary, and voluntariness is not guaranteed by the presence of volition.

⁴⁸ MOORE, *supra* note 5, at 174.

A. Volitional Action and Voluntary Action

To begin, consider the movie scenario of the innocent victim who is programmed, by hypnosis or brainwashing, to commit a murder.⁴⁹ Let us suppose that the agency that did the programming does not oversee the carrying out of the plan; in order to protect itself the agency avoids further contact with the programmed person. She hunts down her prey, takes careful aim, and kills her. Whether or not such things can be done, there is little question of how a court would respond to them: the killer did not act voluntarily and cannot be convicted of a crime. But why do we say she did not act voluntarily? She acted intentionally, as I conceive of the case. We must be wary of so complicating the notion of intention that a jury cannot tell whether or not intention is present. Here she acted upon her purpose; her purpose was to kill, and she undertook to carry out that purpose. Although her action was not voluntary, it was volitional.

Action that is volitional but not voluntary should not be punished. But why? There were other courses of action open to her. She was operating neither under a threat nor under any natural limitation of alternatives. Let us suppose that no great danger awaited her or anyone else if she did not carry out the plan. Thus, she had neither the defense of necessity nor the defense of duress.

We could, of course, insist that the movements involved in the killing were not volitional: she did not really do it at all. But there hardly seems to be any justification for that position, aside from the fact that it generates the desired outcome that the actor is not legally accountable. It does not explain *why* the actor should not be held accountable, since what goes on in her appears indistinguishable from what goes on in someone whose action *is* volitional. Her movements were not like the movements of someone who is pushed over by a strong wind or by another person. And they were not spastic, volitionless movements. They were brought about by the agent, for a certain purpose; she had initiated the movements in the way in which she was accustomed to initiating movements. Part of the killing involved squeezing a trigger; she knew what movements were involved in squeezing a trigger; she made those movements happen. But if her behavior was volitional and thus, according to

⁴⁹ See Bernard Williams, *The Actus Reus of Dr. Caligari*, 142 U. PA. L. REV. 1661, 1670-73 (1994).

the traditional theory, satisfied the act requirement, and she was not entitled to a defense of duress or necessity, then why should she not be punished?

The right answer, I think, is that although our killer's behavior was volitional, it did not satisfy the act requirement. First, she is not held accountable because although she did indeed do the things that caused the death, she did not do them voluntarily. Second, the sense in which those things were not done voluntarily is different from the sense in which things done under duress or necessity are said not to be done voluntarily. It has to do with the voluntariness of the willing itself. Third, the appropriate place for such considerations is not in the affirmative defenses but in the act requirement.

That the killer's behavior was not voluntary I take as a given. In what follows I will argue for the remaining steps in the argument. First, I show that the law's requirement that an act be voluntary is sometimes the requirement that the agent could have done otherwise.

B. *"She Could Have Done Otherwise": Affirmative Defenses as Metaphorical Absence of Alternatives*

Much of what we think of as voluntariness is taken care of by the affirmative defenses. Necessity, for example, provides a defense for those who could not avoid breaking the law because of a constraint on alternatives created by natural conditions.⁵⁰ Duress provides a similar defense for those who could not avoid breaking the law because of a constraint caused by a threat. Although in such cases we say that the agent could not have acted other than she did, and we also say that her act was not voluntary, these claims are usually not literally true. It is not that she had only one alternative, but rather that the other alternatives were so far beyond what we normally require of a person that the law will not take account of them as genuine alternatives. Thus it is only in a figurative sense that we say that she had no alternative in such cases.

To raise an affirmative defense, the defendant denies the voluntariness of her action by offering evidence that her choices were constrained in certain ways. We will not punish her for her

⁵⁰ Sometimes "necessity" is reserved for the justification that claims the defendant's action was the lesser evil, while "duress" is reserved for any constraint that excuses but does not justify. That is not the way I am using these terms here. I am using them both as excuses: "necessity" refers to constraints caused by nature or by innocent human action, and "duress" refers to constraints caused by threat.

action if, under the relevant circumstances, we could not require her to conform her behavior to the law. Although it might be morally preferable for her to conform her behavior to the law, and although so conforming her behavior might have been open to her, taking that route might have been so difficult that we would not require it of her. We might excuse someone under this defense if she were to injure another because her family was threatened with harm if she did not injure the other. The idea behind the defense is that punishment is not justified when there is no possible branch of the tree of possible courses of action that the actor could actualize that both conformed to the law and was within the range of actions we are willing to require of a person.

This defense accounts for many of the cases in which the crime was not voluntarily done because the agent could not have done otherwise. Although there were other courses of action open to the agent, should she have chosen to follow them, the law would not take them into account. We allow the defendant to argue that, from a legal point of view, only one course of action was open to her.

C. *"She Could Have Done Otherwise": The Act Requirement and the Inability to Choose Among Alternatives*

Although the opportunity to do otherwise is part of what we mean by voluntariness, there is another part. It is sometimes referred to as the *ability* to do otherwise, but that is a confusing way to put it. There is a sense in which someone who lacks alternatives lacks the ability to do otherwise, but that is not what is at issue here. In order to make the point clear, I want to briefly recount one phase in the argument over free will. My point, I should say in advance, has nothing to do with the free will controversy, and in particular it has nothing to do with the truth or falsity of compatibilism. My point is merely illustrated by the exchange I will recount.

At one time the following analysis of "She could have done otherwise" was widely accepted: "Had she willed to do otherwise, she would have done otherwise." The attractiveness of the proposal stemmed from the fact that it explained how voluntariness could be compatible with determinism. To be free is just to do what one wants, whether or not one's wants are determined. To be free to do otherwise is just to be in such a position that if one did want to do

otherwise, one would succeed. We may call this position "naive compatibilism."⁵¹

The objection to the naive compatibilist analysis was this: It may be true on a certain occasion that if an actor chooses (wills, tries) to do otherwise she will do otherwise. And yet on that occasion she may not be able to choose to do otherwise. And if that is so, then no matter how many alternative courses of action are open to her, she still cannot do otherwise.

Consider, for example, those things which are such that, if this morning our agent had undertaken (chosen, willed, tried, set out) to bring them about, then he would be in Boston now. And let us suppose (i) that he *could not* have undertaken (chosen, willed, tried, set out) to bring any of those things about and (ii) that he would be in Boston now only if he *had* undertaken (chosen, willed, tried, set out) to bring them about. These suppositions are consistent with saying that he *would* be in Boston now *if* he had undertaken those things, but they are not consistent with saying that he *could* then have arranged things so that he would be in Boston now.⁵²

The free will debate has gone off in other directions. But as far as I know, there has never been any good reply to the argument that the ability to do otherwise includes the ability to choose or will to do otherwise. Jones could have avoided killing Smith (in the sense that makes her responsible for murdering Smith) only if she could have willed to avoid killing him.

What point should we draw from this conclusion? Only this: that there is a second part to the treatment of voluntariness. The affirmative defenses are perfectly adequate to handle that part of voluntariness that deals with the availability of alternative courses of action open to the actor. And if naive compatibilism were true, that would be all there is to voluntariness; the affirmative defenses of duress and necessity would be all that we need. Since naive compatibilism is not true, we must consider whether the issue—the issue of the ability to choose or will to do otherwise—arises in the law, and if it does how the law should properly handle it.

⁵¹ One of the puzzles posed by this so-called conditional analysis of freedom is why, given freedom means doing what you want, it is necessary that the agent also have been able to do otherwise. What precisely does that add to the agent's freedom?

⁵² RODERICK M. CHISHOLM, PERSON AND OBJECT 57 (1976).

D. *The Law and the Ability to Choose Otherwise*

Many of the cases in which the law finds punishment inappropriate are precisely of this sort. They involve not the absence of opportunity to do otherwise, but rather an inability to choose one of those opportunities to do otherwise. That is, they violate the following condition: The actor does not act voluntarily if, though subject to no external constraint, she is not able to *choose* or *will* to do otherwise.

In North Carolina, for example, someone who can demonstrate that she is an alcoholic is not punished for being intoxicated and disruptive in a public place, though that behavior is volitional and those who are not alcoholics can be punished for it.⁵³ The apparent reason for the distinction is that in drinking to drunkenness the alcoholic is not acting voluntarily. Although an offender must be both drunk *and* disruptive to be prosecuted under the statute, being disruptive is apparently considered an unavoidable incident of being drunk.

Cases of automatism, where the behavior is clearly volitional for the purposes of the law (though misleadingly called "unconscious" by some courts), are cases in which the actor is presumed not to have acted voluntarily. There are cases involving epilepsy that illustrate this point. In *People v. Higgins*,⁵⁴ for example, the defendant severely beat his victim with a hammer ("inflicting at least 19 well-aimed blows to the face and head"),⁵⁵ and afterwards drove a car with a manual transmission for a considerable distance. His argument was that he was in the throes of an epileptic seizure during the entire episode, and the court permitted him to raise that defense.⁵⁶ And of course, in the controversial volitional aspect of the traditional insanity defense, the central issue is not whether the

⁵³ See N.C. GEN. STAT. § 14-444(a) (1993) ("It shall be unlawful for any person in a public place to be intoxicated and disruptive in any of the following ways: (1) Blocking or otherwise interfering with traffic . . ."); § 14-445(a) ("It is a defense to a charge of being intoxicated and disruptive in a public place that the defendant suffers from alcoholism."); § 14-443(1) ("Alcoholism" is the state of a person who habitually lacks self-control as to the use of alcoholic beverages . . .").

⁵⁴ 159 N.E.2d 179 (N.Y. 1959).

⁵⁵ *Id.* at 184.

⁵⁶ The court noted four types of epilepsy recognized by experts: grand mal and petit mal, both involving convulsive seizures; psychomotor epilepsy, where the patient is "out of contact" but performs seemingly purposeful movements; and hypothalamic epilepsy, "characterized by partial as well as complete amnesia During the violent stage of a hypothalamic attack, the individual is capable of performing skillful, coordinated movements" *Id.* at 183.

defendant willed and intended to do what she did, but rather whether she did it voluntarily.⁵⁷

Other defenses based on similar reasoning—brainwashing, post-traumatic shock—are more controversial. Sometimes plausible defenses are rejected because the courts are not persuaded that the defendant was indeed deprived of the ability to act voluntarily. The issue in the gambling defense, for example, where the defendant pleads that she could not avoid a theft because she needed the money for a gambling addiction, is not whether she acted intentionally and therefore volitionally, but whether her behavior was voluntary. This defense has been rejected by most courts that have considered it. Even if a court were to grant that *gambling* might be nonvoluntary for an addicted gambler (it being impossible for her to choose otherwise), a court is unlikely to grant that stealing to support the habit might be shown to be nonvoluntary.

Claims that drug addiction may cause defendants to commit crimes have also not been widely accepted. There are, however, strong arguments for allowing such a defense, at least as to the possession of drugs and paraphernalia for personal use. If the taking of drugs is not a voluntary act—itself a controversial claim—then punishment for possession cannot be justified on retributive grounds.⁵⁸

The issue in each of these defenses is voluntariness. It is true that the meaning of the term will vary from case to case. In some

⁵⁷ See *Wood v. Marshall*, 790 F.2d 548, 550 (6th Cir. 1986) ("It is obvious that one may commit a purposeful act not knowing it to be wrong, or commit such a purposeful act, even though the actor knows the act to be wrong, *but lacks the ability to refrain from doing it.*" (emphasis added) (quoting *State v. Howze*, 420 N.E.2d 131, 135 (Ohio Ct. App. 1979))). The last half of this claim, that a purposeful act may be committed even though the actor lacks the ability to refrain from doing it, is what must be denied by one who would, like Moore, reduce voluntariness to volition. And indeed Moore treats the cases in which the agent could not have done otherwise as cases in which no volition was present. If you assume that the ability to choose otherwise is a condition of voluntariness, then it is either an independent requirement that must be represented somewhere, or it is simply equivalent to the fact of willing; whoever wills something *pro tanto* could have willed otherwise. And that leaves no option but to treat cases of hypnotism, brainwashing, automatism, and so on as cases in which volition is absent.

⁵⁸ Every conceivable side of this issue is argued in *United States v. Moore*, 486 F.2d 1139 (D.C. Cir. 1973). The majority denied the free will basis of the defense. See *id.* at 1144-46. Judge Skelly Wright dissented, arguing that it would be wrong to punish actions that could not be controlled, like the taking of drugs by an addict, see *id.* at 1209-10 (Wright, J., dissenting); Judge David Bazelon also dissented, arguing that the addict should be allowed to argue that even felonies committed to support the addiction were not voluntary actions, see *id.* at 1144-46 (Bazelon, J., dissenting).

cases of addiction, for example, the claim may be that although alternatives to drug use were open to the agent at the time she broke the law, trying to actualize one of those alternatives would be so painful that no reasonable person could be expected to achieve it. If that is the claim, then the appropriate defense is the affirmative defense of necessity.

In other cases, however, a different claim is made. In such cases the agent *could* have done otherwise without difficulty, *had* she willed or undertaken or chosen to do so. The claim is that she could not have willed or undertaken or chosen to do otherwise. In such cases it would be unfair to punish the actor. How should the law handle such cases?

E. *Choosing and the Ability to Choose Otherwise*

To be more specific, the class of cases I have in mind are cases in which there may be both volition and the opportunity to do otherwise. What is lacking is the ability to choose to do otherwise. Examples of such cases are the following:

- (1) Cases in which the agent may be aware of the unavoidability of her action. This would include both cases of addiction and the cases in which an individual “freezes”—for example, when someone is unable to advance to the edge of a roof to look over, even though she knows that there is no risk of falling. These cases may or may not cause conflicts; the addict may or may not view her inability with regret.
- (2) Cases in which, though the agent is aware of what she is doing, she is likely to be unaware of the unavoidability of her action. These include cases of post-hypnotic activity, speech under the effects of “truth serum,” actions under the influence of brainwashing, and some cases of behavior caused by madness.
- (3) Cases in which the agent is commonly said to be unaware of what she is doing: automatistic action, sleepwalking, some kinds of madness. The designation “unconscious behavior” is utterly unwarranted, since in these cases the actor may respond to her surroundings and exhibit purpose and understanding. But the actor “seems to be someone else.”

These are very different sorts of things. The hypothesis is that each of them raises the possibility that no voluntary act has been performed because although the agent chose to do what she did, she could not have chosen to do otherwise. Could sleepwalking be described as a case in which the agent “chose” to do what she did?

If "choose" is a synonym for "will" (as I mean it to be here), then it seems to me that the agent did indeed will her movements. That is, whatever must go on in an agent when she undertakes to raise her arm to open the door goes on in a sleepwalker when she does the same. The action is purposive, and I see no reason not to describe it as resulting from a volition.

If in fact there are features that distinguish sleepwalking volitions from normal volitions, then that must be part of the description of the voluntary act requirement. But insofar as it follows from those features that the agent could not have chosen otherwise, it would be sufficient, and much less complicated, to require that the agent have that ability. It would also be perspicuous in a way that the other is not. It would suggest the reason why there should be no punishment in such cases.

There is little consistency in the way the law handles such cases. Some courts treat them as affirmative defenses; other courts treat them as cases of involuntary movement, like spastic and reflex movement. Still others treat them as cases in which the act requirement is violated, and provide no further explanation. The Model Penal Code treats some of these cases as negations of the act requirement, but it appears to do that on the ground that—like spasms and reflex motions—they involve no volitions.⁵⁹

F. *The Ability to Choose and the Affirmative Defenses*

If control over one's choices is a condition of punishment, where should this condition appear in the criminal law? One approach is to build it into the affirmative defenses,⁶⁰ but import-

⁵⁹ See MODEL PENAL CODE § 2.01(2) (Proposed Official Draft 1962).

⁶⁰ See Stephen Morse, *Diminished Capacity*, in ACTION AND VALUE IN CRIMINAL LAW 239 (Stephen Shute et al. eds., 1993). Hyman Gross, who recognizes the distinction between having the opportunity to do otherwise and the ability to choose to do otherwise, refers to "the compulsive voyeur, the epileptic, the person under hypnosis," and to cases of "hypnosis, somnambulism, and epileptic seizures," as cases of nonvoluntary action in which the actor had the opportunity but not the ability to do otherwise. GROSS, *supra* note 1, at 71, 293. My main disagreement with Gross is in how to classify defenses based on such behavior. He would put it with the excuses, along with varieties of "compulsion," that is, cases in which alternatives are constrained. Practice is divided on this point. It is well established that the insanity defense is an affirmative defense. On the other hand, the Model Penal Code, as I note below, groups things like automatism under the act requirement. To do that it has to assimilate them to spasms and reflexes, since the Code has no other unifying rationale except that volition is missing in such cases. So far as practice goes, therefore, I think it is still an open question where such defenses go. Conceptually

ing it into the act requirement seems to be a better solution. The reason for putting this condition into the act requirement rather than into the affirmative defenses is that the elements of a crime, including the act requirement, answer roughly to the conditions of responsibility. This observation corresponds with our general sense that those who are *accorded affirmative defenses* are responsible for what they have done in a way that those without the ability to choose are not.

Moreover, that distinction also corresponds roughly to the constitutional distinction between the definition of a crime and the affirmative defenses: An issue that bears on the definition must be proved by the state beyond a reasonable doubt, while it is within the discretion of the legislature to decide who will bear the burden as to affirmative defenses, and what that burden will be. Thus, we afford to the conditions of responsibility more protection by putting them into the definition of the crime. The affirmative defenses are, and should be, a matter of balancing policy concerns, an area within the understanding of the legislature. It may not be constitutional to deny anyone the right to self-defense; but just what self-defense should consist of, the extent of the burden of proof, and who will have to bear it will be something for the legislature to decide.

The distinguishing fact about the affirmative defenses is that in every case of necessity or duress the agent acts voluntarily, strictly speaking. She made a choice, and though we may not blame her, I think it is clear that we hold her responsible for the choice she made.⁶¹ In such cases it seems proper to say that the agent is morally responsible for the consequences of her actions, though we will not punish her for them. Such responsibility is a necessary condition for stating a *prima facie* case, and therefore a necessary condition of the need for affirmative defenses.

The agent who has no control over her choices, on the other hand, does not engage in a voluntary act. She is no more blameworthy than the woman who is thrown against another in a windstorm. In the case of the windstorm, of course, the movement of the

they fit better under the act requirement, understood as a voluntary act requirement. If they do not go there, then in light of the argument so far it might be right to conclude that there is no act requirement at all—only the *mens rea* requirement that whatever is done be done intentionally, or result from something done intentionally.

⁶¹ Where the crisis precipitates an inability to choose, then the analysis should be different (though for policy reasons the classification may be the same): analytically, the inability to control one's response should be treated as literally involving voluntariness and therefore coming under the act requirement.

woman who is thrown by the wind is not an act at all. In the class of cases in which the agent wills but has no control over her willing, what is done can correctly be said to be her act. But because she has no control over it—because she could not have prevented it—she is no more responsible for it than the other person. The better course, it seems to me, is to say that in such a case an element of the *prima facie* case is missing; there is no voluntary act.

G. *The Ability to Choose and the Act Requirement*

But suppose we grant that the inability to choose should not be dealt with under the affirmative defenses. That still leaves open the possibility that in cases in which there is no control over choice, there is simply no volition present at all. This is Moore's way out of the problem. Of somnambulism, "unconsciousness," and hypnotism, for example, he says that there are no volitions involved in such cases. After all, one of the functions of volitions is to resolve disputes:

To serve such a resolving function, volitions must be responsive to all (or at least a fair sample) of what one desires, believes, and intends. And this is what being asleep, being unconscious, or being hypnotized prevents. These states seem to break the unity of consciousness that allows volitions to be formed that are responsive to all of one's desires, beliefs, and intentions, and not just responsive to a small subset.⁶²

But this is not an entirely happy response to the problem. For one thing, it denies that what goes on in a hypnotized person when she initiates action is a volition. But it would be difficult to distinguish what goes on in a hypnotized person from what goes on when we act "absentmindedly," later unable to remember why we did what we did. And even when we are not acting absentmindedly I doubt whether our volitions are responsive to (whatever that means) more than a small sample of our desires and beliefs.

Moreover, an answer to these questions should suggest ways in which the various possibilities might be verified in court. Moore's answer absolutely collapses on this point. Which of these two questions would be more fruitful, when put to an expert: "Was the accused in a condition that deprived her of control over her choices and volitions?" "Was the accused's volition out of touch with the bulk of her beliefs and desires?" The first of them admits of an

⁶² MOORE, *supra* note 5, at 258.

answer that is more or less verifiable: "Here is how the agent was treated beforehand; people who have been treated like that have been shown to be incapable of choosing anything but what they have been directed to choose." But what sort of evidence could there be to support an answer to the second question? Like the claim that the actors are "unconscious," it is basically incapable of proof. Remember that the "unconscious" person responds to her surroundings; the only way to maintain this description of her behavior is to treat the description as irrefutable by evidence. But the truth of the matter is clear: whatever is the proper explanation of the "unconscious" actor's behavior, it is not that she is unconscious.

The same thing is true of the hypnotized subject. She is aware of her surroundings, she makes choices, and she resolves conflicts. Perhaps what the hypnotist has done may be described as instilling in her an overwhelming desire to do what she has been told to do. In responding to that desire, is the volition of the hypnotized person in any different relation to her beliefs and desires than the volition of the ordinary person? Of course it is true that she does not act on her other desires and beliefs; she cannot. If that is what it means to say that she is unresponsive to her other beliefs and desires, then why should we describe it as an absence of willing instead of an inability to choose or will otherwise?

My proposal, therefore, is this: That there is indeed a voluntary act requirement, and that the essence of it is that the actor must have been able to avoid choosing to break the law. She must have been able to control her choice.

H. *"She Could Have Done Otherwise": A Digression*

All that I have said on this point may seem to be contradicted by Frankfurt's proof that voluntariness does not require that the agent could have done otherwise.⁶³ I think that is not so, though I am on uncertain ground here. Whether or not Frankfurt has undermined the analysis of voluntary action as action by an agent who had an ability to do otherwise, he has not undermined these two facts: justified punishment requires a voluntary act, and a voluntary act requires a voluntary choosing or willing to act.

Here is the sort of example Frankfurt uses to make his point:

⁶³ See Harry G. Frankfurt, *Alternate Possibilities and Moral Responsibility*, 66 J. PHIL. 829 *passim* (1969).

There is a person whose brain is wired (unknown to her) to a special device by means of which an evil scientist can control her volitions (her choosings).⁶⁴ Should this person be about to choose to do something the scientist disapproves of, she will intervene and cause the desired volition. Suppose now that the subject chooses, without intervention, to do what the scientist desires, and there is no need for the scientist to intervene. It follows that the subject has chosen freely to do what she did, in spite of the fact that she could not have chosen otherwise. Does that show that the ability to choose otherwise is not an element of voluntariness?

If it does, I think my point can be reformulated to avoid it. It was important to my argument to distinguish between voluntarily doing and voluntarily choosing to do. The affirmative defenses, I said, take care of cases in which we have no other (acceptable) alternatives open to us. But that still leaves the condition that the agent must choose voluntarily the action she took. That distinction, I think, is untouched by Frankfurt's examples.

Think of the person in Frankfurt's example whose brain was wired by the evil scientist. Certainly it is true that in the case I described she acted voluntarily in spite of the fact that she could not have chosen otherwise. But suppose the case had been different, and the scientist had had to intervene to force the volition she wanted. In that case the choice was not voluntary and the resulting action was not voluntary.⁶⁵ The point that survives is that one condition of voluntary action is voluntary choice, and that condition is ineliminable. What Frankfurt has provided is a difficulty for the analysis of that condition, but no reason to think that it is not an independent requirement of the criminal law.

I. *Voluntary Action and Voluntary Choosing*

I have argued so far that being able to choose otherwise is a condition of voluntary action; that there are standard conditions that raise this issue for the law; and that the place where the issue should arise is in connection with the voluntary act requirement. Because of Frankfurt's argument, I have been forced to change one of my conclusions: rather than the ability to choose otherwise, it is

⁶⁴ See *id.* at 835-36.

⁶⁵ See Michael J. Zimmerman, *Moral Responsibility, Freedom, and Alternate Possibilities*, 63 PAC. PHIL. Q. 243, 250 (1982) (stating that freedom of action requires that "the person who acts be, in some sense, the 'source' of his actions").

the voluntariness of choice (as opposed to the voluntariness of action) that is the missing condition. An action is voluntary if (1) the course followed by the actor is one she chose, and (2) her choice was itself voluntary.

If the voluntariness of choice does not mean that the actor could have made a different choice, it is reasonable to ask just what it does mean. The answer to that, however, is irrelevant to my conclusion. All that I have argued is that voluntary choice, however you analyze it, is a condition of legal responsibility and part of the act requirement. But it may be worthwhile to look at one sort of analysis, to get an idea of the sort of thing that must be included in the act requirement.

One important approach is to argue that choices are voluntary, and within the actor's control, when they somehow arise out of the actor's *true* wants. For Gary Watson, for example, agents do not choose freely when they do not get what they *really* want.⁶⁶ What they really want is determined by the way they value things. To value things is to make an objective judgment about the goodness of something; it is different from desiring things.

The possibility of unfree action consists in the fact that an agent's valuational system and motivational system may not completely coincide. . . .

. . . .

. . . What is distinctive about such compulsive behaviour [as exhibited by kleptomaniacs, dipsomaniacs, and the like], I would argue, is that the desires and emotions in question are more or less radically independent of the evaluational systems of these agents.⁶⁷

This distinction between what a person wants and what she really wants keeps compatibilism—a person is free when she gets what she wants—from entailing that intentional action is free action.

Similarly, for Harry Frankfurt an agent does not act freely if she does not identify with the desire that led to her action; that is to say, if there was not a second order volition that the desire be an effective desire or that it end in action.⁶⁸ Thus for her the act requirement requires, among other things, that the agent had a second order volition that the particular desire that eventuated in

⁶⁶ See Watson, *supra* note 47, at 105-06.

⁶⁷ *Id.* at 106, 110.

⁶⁸ See Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, in *FREE WILL*, *supra* note 47, at 81-95.

movement actually eventuate in movement.

There are problems with this general approach, of course. My own preference would be for an interpretation of voluntary choice which made clear that it is incompatible with causation of action. But all of that is neither here nor there as far as the conclusion of this Article is concerned; it still remains that there are certain conditions under which our choices cannot be said to be free, and that under those conditions action will be volitional but not voluntary. To punish such actions would violate the voluntary act requirement of the criminal law.

CONCLUSION

Is there an act requirement in the criminal law? There is the requirement that something be done intentionally; but that is generally said to be part of *mens rea*. Is there the additional requirement that what is done involve our bodies, whether through action or inaction? We do not punish for purely mental acts; but either that follows from the limitation of punishment to cases of harm or dangerousness, or from the difficulty of proof, or it is controversial and not a fundamental limitation upon the right to punish. For supposing that there are reliable ways to establish that someone has harmed or created a danger for others through deliberate or negligent mental acts, whatever reason there is for not trying to deter such behavior can hardly be a basic principle of justice. More likely it is derivative from concerns about privacy and varies in strength from situation to situation, depending on the seriousness of the harm. In that case the fact that we do not punish mental acts simply shows that we do not now consider the effects of such acts to be harmful enough to warrant the necessary intrusion. And if that is so, that point does not support the conclusion that there is a well-defined, black-letter act requirement.

What is left, then, for an act requirement? I have argued that the ability to choose to do otherwise is an essential element of the ability to do otherwise, and that therefore punishment is only appropriate when the agent was able to choose otherwise. I think it makes sense to locate this requirement as part of the *prima facie* case, rather than within the excuses of necessity or duress. The ability to choose otherwise is a basic condition of responsibility for action, whereas the excuses mark circumstances in which we are neither blamed nor punished for actions for which we are responsible. Excuses are based on shifting assessments of the degrees of

firmness and strength that are required of the average citizen. When reasonable people debate whether a threat to an individual's life excuses murder, the debate is not about whether or not the individual is morally responsible for the death in the ordinary sense. It is about whether she is blameworthy for having chosen to do it, and there is no bright line that marks off the threats that do excuse from those that do not. Witness the debate over whether threats can ever excuse killing. On the other hand, one who is unable to control her choices is not responsible for what she does and cannot be punished. If I am wrong about that and such limitations are better made a part of the excuses, then it seems to me that there is very little, if anything, left for an act requirement to do.