

THE ACTUS REUS OF DR. CALIGARI

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I.

Michael Moore's book is subtitled "the philosophy of action and its implications for criminal law."¹ For much of his discussion, this formulation does express the way in which he proceeds: an account of action that is philosophically (as he often puts it, "metaphysically") motivated yields the kinds of distinctions and conclusions that are needed in order to support central principles of the criminal law, particularly as these have been formulated in the tradition reaching back to Jeremy Bentham and John Austin. In particular, three fundamental principles of the criminal law are defended, on the basis of philosophical considerations, from philosophical skepticism. These are the principles that Moore calls the voluntary act requirement, the actus reus requirement, and the double jeopardy requirement.² Moore's many subtle and interesting discussions succeed in showing that these principles can be defended against skepticism by philosophical argument.

However, there are areas in relation to which the subtitle seems to me to represent, as one might say, an exaggeration. In these areas, the best that one can do is to take some distinction or conclusion necessary to the criminal law and show that a theoretical account of it can be given that is at least not inconsistent with formulations motivated by the philosophy of action. It seems obvious, on reflection, that there must be areas about which this is true. The criminal law, after all, has special aims and purposes, and the requirements that it imposes on describing people's actions are unlikely to coincide throughout with distinctions that are motivated quite independently of those special purposes. I have argued elsewhere that any conception of responsibility involves the four elements of cause, intention, state, and response.³ Responsibility is (with certain comprehensible exceptions) standardly ascribed to a person as the cause of a state of affairs; the questions will arise of

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¹ MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* (1993).

² *See id.* at 4-5.

³ *See* BERNARD WILLIAMS, *SHAME AND NECESSITY* 55-56 (1993).

what that person was trying to bring about and of what state of mind he or she was in at the time. Finally, an ascription is made with the aim of directing some response to that agent in this connection.

There is no one setting of these various factors, particularly those of intention and state of mind, that will suit every purpose, and this is manifestly so in contemporary law, where the setting of the requirements on intention are typically different in tort law from what they are in the criminal law. All the more, then, the various settings of these conditions in our everyday descriptions of action are unlikely to coincide already with those required by various branches of the law. There is no reason to believe that the various distinctions we use will provide, *ready-made*, what the criminal law needs, without taking account of special requirements within the criminal law.

Moore has no need to deny this point, and he often seems to accept it. He says, for example: "[T]he relevant question here is not: can *any* complex action be performed without the performance of a volitionally caused bodily movement? Rather, the question is: can any of the complex actions *prohibited by Anglo-American criminal law* be performed except by volitionally caused movement?"⁴ This, in itself, does not require much modification or redirection of the philosophy of action by the concerns of the criminal law. The relevant question might collect its answer on purely philosophical grounds, and the only way in which the discussion will have been shaped by the interests of the criminal law will be the restriction of the question to a certain class of actions that are the law's concern. However, even this modest step does require the notion of the kind of actions that are the criminal law's concern, and that notion itself is not going to be generated by the philosophy of action.

A more significant consideration arises when the law demands answers (as, of course, it often does) which everyday users of action descriptions would not feel compelled to give—which, indeed, they might well feel disposed in common sense not to give. Consider the well-known questions of where and when *A* killed *B*.⁵ If *A* squeezes the trigger in one jurisdiction and *B* is hit by the bullet in another, or if *A* administers the poison at one time and *B* dies as a result very much later, there is a notorious difficulty in answering

⁴ MOORE, *supra* note 1, at 263.

⁵ See *id.* at 280-92.

questions of "where" or "when." The philosophy of action—more specifically, perhaps, the analysis of action descriptions—certainly shows why there is a difficulty, and indeed it is a condition on the adequacy of such a philosophy that it should be able to explain why there is a difficulty. However, there is no reason to suppose that philosophical procedures themselves can answer that difficulty. This is because we need a special reason, such as the reasons provided by the demands of the criminal law, to want to answer the question at all.

The point is similar to those raised by indeterminacy through vagueness. It is a requirement on the philosophy of language that it should make plain what our difficulty is in saying when people become bald or (to take a more contentious case) in saying at what point a fertilized ovum becomes a human baby. But those explanations themselves should not be expected to answer the question. Aristotle was prepared to move the same point into metaphysics itself, when he said that it was sensible not to seek more precision than is allowed by the underlying subject matter.⁶ But this absorption of the issue into metaphysics is, in relation to the present questions, slightly misleading. Aristotle's suggestion is that if the metaphysics of the situation (the underlying subject matter) does not in itself permit the distinction to be made, then the distinction should not be made. But this does not follow—all that follows is that the distinction should not be made if one is solely interested in metaphysics. If the distinction has to be made for some other reason, as when, for legal reasons, it must be determined where or when Smith was killed, then one has to go beyond metaphysics or the philosophy of action to make distinctions that one cannot get from those subjects if they are left to themselves.

II.

Moore respects this point in a good deal of his practice. However, there is at least one area in which Moore tries to make the philosophy of action generate a determinate answer when it cannot do so and it is explicable that it cannot do so. He does this because of fairly obvious requirements of the criminal law. In this connection, we might perhaps say that Moore's subtitle represents more than an exaggeration. Here, it should rather read: "criminal law and its implications for the philosophy of action." The area in

⁶ See ARISTOTLE, *ETHICA NICHOMACHEA* 1094 b 12.

question is that of somnambulism or behavior under hypnosis, and the rest of this Article will be devoted to this issue and to the lessons that it has for the general methodology. This is a matter on which Moore disagrees with a claim that I have made (in agreement with Herbert Hart⁷) that it is appropriate beyond dispute to describe somnambulistic and similar behavior in the language, not just of action, but of purposive action; I have cited in this respect Shakespeare's wonderful description of the actions of Lady Macbeth.⁸ Moore claims that "the data of ordinary English usage"⁹ do not provide us with any argument to show this at all.

Now if my argument had been, as Moore implies, simply that it was "idiomatic in ordinary English to describe (these happenings) with the ordinary verbs of action," this would not have been much of an argument, and Moore would be right in drawing our attention to the fact that active verbs can be ascribed to inanimate subjects, as when we say that sulfuric acid dissolves zinc. But this was not all there was to the argument. The claim was, rather, that Lady Macbeth acted purposively in various respects and that her movements had an intentional contour.¹⁰ She had, for instance, gotten out of bed, recognized something as a light, picked it up, opened a door, and come downstairs. All of these were actions that she might have performed when fully awake, and in good part they are explained by the kinds of reasons by which they would be explained if she were awake. Thus she opened the door because she had the aim of getting out of her bedroom. One unusual thing she did was rub her hands as though she were washing them (when they were not actually in water). This is something that Shakespeare caught exactly:

Doctor: Look how she rubs her hands

Gentleman: It is an accustomed action with her, to seem thus washing her hands.¹¹

It is very important for the description of Lady Macbeth's case that, with the exception of the deviant handwashing performance, her actions are purposively the same as actions that she might have

⁷ See H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 109 (1968).

⁸ See Bernard Williams, *Voluntary Acts and Responsible Agents*, 10 OXFORD J. LEGAL STUD. 1, 1 (1990).

⁹ MOORE, *supra* note 1, at 253.

¹⁰ See Williams, *supra* note 8, at 1.

¹¹ WILLIAM SHAKESPEARE, *MACBETH* act 5, sc. 1.

performed when awake, and the same with respect to the reasons that we could ascribe to her. It is thus not simply a matter of an inanimate object being in causal relations to its environment. The problem is set precisely by the fact that actions of this kind have an intentional or purposive aspect.

Now Moore has a way of acknowledging this point, when he says that the actions of a somnambulist are "metaphorical."¹² What is it for them to be "metaphorical actions" or, as he also puts it, "metaphorically actions?"¹³ Moore is not referring to a metaphorical description of something that is certainly an action, as when we say the objector drove a horse and cart through the speaker's argument. What he means is that bodily movements of the agent are metaphorically described as actions. He explains this idea, moreover, in terms of a peculiar theory. He draws our attention to what he calls

the often unnoticed ambiguity in the nouns and pronouns by which we refer to persons. I may say: 'I hit the ball,' and 'I am six feet tall,' yet the thing referred to in these two sentences is different. The first 'I' refers to me as a personal agent, the second, only to my body as inanimate object.¹⁴

The account of the metaphor, then, seems to be that there are two objects of reference, and we can use in a metaphorical way the verbs of action (which in their literal sense apply to the person) by applying them to a subject which is in fact the body.

In introducing this theory, Moore refers in a note to Peter Strawson's distinction between P-predicates and M-predicates, offered in Strawson's book *Individuals*.¹⁵ It is rather ironic that Moore should make this reference, since Strawson's aim in using this distinction of predicates was precisely to avoid a distinction of subjects—his whole thesis was that the two supposed classes of predicate applied to one and the same subject, namely a person. In any case, the invocation of Strawson's distinction is not very helpful to Moore. We run into great difficulties when we try to sort predicates into the two kinds,¹⁶ and Moore's idea involves an even

¹² MOORE, *supra* note 1, at 254.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See P.F. STRAWSON, *INDIVIDUALS: AN ESSAY IN DESCRIPTIVE METAPHYSICS* 87-116 (1959).

¹⁶ I have argued this previously. See BERNARD WILLIAMS, *Are Persons Bodies?, in PROBLEMS OF THE SELF: PHILOSOPHICAL PAPERS 1956-1972* at 64, 64-70 (1973).

more severe version of the same difficulty, where if we attempt to determine when in a given statement the reference has changed. "He became embarrassed, turned red, and broke out in a sweat" presumably refers to two different subjects, though it may be rather unclear which of them the second conjunct involves. "He dried himself with a towel" does not, as you might have thought, introduce a reflexive action, in the strict sense of an action that an agent does to himself. Again, a sentence such as "people who are very heavy have difficulty lifting themselves over a wall" will require considerable analysis in order to discover the various things that we are talking about.

Besides difficulties of this kind, there is the basic problem that we only know, on Moore's account, which of these objects of reference is being picked out by a given pronoun because we understand the predicate that is applied to it. We have been led to the distinction by Moore's use of the example "I am six feet tall." (This is the lead that I followed in constructing the difficult sentences above.) But at least "is six feet tall" is a kind of predicate that could be ascribed to something that was not a person—it belongs, to the extent that we can understand that distinction, with Strawson's M-predicates. However, "has just picked up a light, opened a door, and walked down the stairs" seemed to be paradigmatically the kind of predicate that is applied to a person. So even if we accepted Moore's quite implausible suggestion that apparent references to persons may really be references to a different object of reference, namely a body, we would be very unlikely to pick out the sentences that ascribe, as it seems, actions to somnambulists as introducing that bodily object of reference. It is only if we have *already* decided that there is something peculiar about these predications that we would start to look in that direction.

The idea of the two objects of reference does seem manifestly an unhelpful device. Indeed, it introduces a kind of dualism which is quite foreign to many things that Moore wants to say about actions and their relations to bodily movements. Why should he possibly be forced in this direction? Why should he say, further, that what somnambulists perform—or rather, on his dualistic view, what their "inanimate" bodies do—are "involuntary bodily movements"¹⁷ which we mistake for actions? The movements of Lady Macbeth are not, in an easily recognizable sense, involuntary bodily

¹⁷ MOORE, *supra* note 1, at 255.

movements. Moore admits that responsiveness to the environment and so forth, the adjustment of bodily motion to perceptual cues, is present, and these features, he says, "certainly make such movements look like actions."¹⁸ This, he claims, is an illusion.

Except on extremely Cartesian views, there is something odd about discussing such cases and their relation to action in terms of *appearance and reality*. A set of movements can of course look like an action of a certain kind without being an example of an action of that kind; this is familiar enough from the stage. There could, indeed, be some reflex or similar movement of a limb that was not an action of any kind, which we took for an action of some particular kind. But the most obvious case in which this would be so would be one in which there was not the array of features to which Moore agrees, such as the shaping of behavior to a purposive end and the responsiveness to perceptual cues—it is precisely the absence of such things that would lead one to say it was not after all an action, but something that we took for an action. But that, certainly, is not the problem with Lady Macbeth. There is no doubt that Lady Macbeth has picked up the light, found the door, undone its bolt, and carefully come down the stairs. Moreover, it is not a matter of a mechanically determined routine which merely looks as though it were responsive to perceptual cues; some somnambulists, at least, and we may suppose that they include Lady Macbeth, will walk around pieces of furniture that are not in their normal place. So why should we say that these movements only *look like* actions?

The reason must be, presumably, that they have no intentional aspect. I have already suggested that this is incorrect, since the movements that Lady Macbeth made in opening the door were done as movements that open the door, and indeed she has succeeded in opening the door. Relatedly, the somnambulist may try to do things that she fails in doing: she may try more than one way of getting the door open. Is there an argument, nevertheless, that the somnambulist does not act intentionally?

III.

Here we may get some help from cases of hypnotic suggestion. The hypnotist tells the hypnotized subject to do various things, and quite often the subject does those very things, and may indeed, in the more spectacular cases, take various steps to do those things.

¹⁸ *Id.*

Again, the hypnotist may tell the subject to do a certain thing when there is no way of doing that thing, but the hypnotist has made the subject believe that there is. In those cases, the subject may go through the appropriate movements without doing that thing. Now this subject is of course suffering from false belief, and is under some kind of illusion about her environment. If she has been instructed to lay a table and, in the embarrassing way that some stage hypnotists impose on their subjects, she is given quite inappropriate objects to lay out, she can rightly be said not to know what she is doing.

Now it might be argued that if the hypnotized subject is told to lay a table, and is given real knives and forks, she still does not know what she is doing, since she is in a state in which the hypnotist could just as well have persuaded her that she was handling knives and forks when she was not. The argument might then be generalized to suggest that hypnotized subjects never know what they are doing. This, in turn, might suggest that they do nothing intentionally, and hence (on Davidsonian principles, at least)¹⁹ that they do not really do anything. This is the conclusion that Moore wants, for the hypnotized and for the somnambulist.

This is probably the best argument for Moore's conclusion, but it is not a very good one. First, there is a paradox in arriving at this conclusion from these premises, as what she is supposed not to know is *what she is doing*, and this certainly does not mean that she does not know what *her body* is doing. The implication, rather, is that she is doing certain things, but she does not know what they are.

This implication is surely correct. Even if we accept the argument to the effect that even when she is handling knives and forks she does not know what she is doing, and hence is not acting intentionally under the description *laying a table*,²⁰ this would give no reason to deny that her bodily movements are intentional; nor to deny that she does various other things intentionally, such as

¹⁹ See DONALD DAVIDSON, *Agency*, in *ESSAYS ON ACTIONS AND EVENTS* 43, 43-61 (1980). Davidson's view is that an event constitutes an action only if there is some description under which that action is intentional.

²⁰ I shall not engage with this argument here. It is important that it is stronger than a mere application of the argument from illusion. When the agent gets it right, she is in the same unusual cognitive state (subject to the hypnotist's suggestions) as she is when she gets it wrong. All the same, the argument still relies on disputable assumptions in the theory of knowledge.

moving towards one piece of furniture while avoiding others, placing rather than dropping an object on to a surface, and so forth. Indeed, there is a large class of things that the hypnotized subject must be able to do if she is to do whatever it is she does do in supposedly carrying out the hypnotist's commands.

The state of the hypnotist's subject is that she acts under the hypnotist's suggestions. One aspect of this is that he can induce in her (something like) false beliefs. Another aspect is that, to some extent, he can get her to do things that she would not otherwise do in those circumstances. This second aspect is not simply an application of the first: in some cases, she would not do in those circumstances (in public, for instance, before an audience) the things that he has made her think that she is doing. The argument we have considered relies on the cognitive aspect in order to say that the agent does not really act, and I have denied that this can be generalized to everything that she does.

In Lady Macbeth's case, there is not even a controlling agent, except her own guilty self, and part of the reason for describing her activities, all the more, in terms of purpose and intention is that they are *her* purposes and intentions. She does share some cognitive failings with the hypnotized subject, and she may well not remember afterwards what she has been doing. There is no doubt more to be learned about these states psychologically, and the findings of further enquiries may properly affect our descriptions. But this is not the level at which Moore is working. Rather, he supposes that we can already be clear, for conceptual reasons, that the behavior of the somnambulist or the hypnotized agent should not be classified as actions. But at this prescientific level it is, on the contrary, clear why we do describe this behavior in terms of actions, and in so far as there are manifest differences from normal cases of action, it is not very difficult simply to register them.²¹ We get into difficulties only if we embark on the essentially scholastic task of insisting that the criteria of what it is to be an action is such that there is no middle ground between actions with all their standard features, on the one hand, and, on the other, "involuntary" bodily movements—movements which on Moore's

²¹ This is not to deny that there is a substantive question of what exactly is wrong with such agents—the nature, for instance, of their dissociation. Such questions are discussed by Stephen Morse in his contribution to this volume. See generally Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587 (1994).

suggestion are not even ascribed to the same subject as the subject of actions.

IV.

Why should anyone want to take that scholastic course? In this case the reason is extremely obvious; it lies in the demands of the criminal law. Even if the somnambulist does perform actions, he may very well not be criminally responsible for those actions or for what those actions bring about. Moreover, somebody else may be responsible. We can turn from the case of Lady Macbeth who, though not innocent, was at least innocent in her somnambulism, to another fictional case. This is the criminal figure of Dr. Caligari, who in Robert Wiene's 1919 film *The Cabinet of Dr. Caligari* controlled a figure called Cesare (memorably played by Conrad Veidt).²² Cesare is kept in a box, and, when roused and instructed by Caligari, moves somnambulistically at his bidding. Among other crimes, he kills (as we would naturally put it) the town clerk with a dagger.

Cesare's behavior is interestingly different from both Lady Macbeth's and that of the hypnotized subject. Unlike Lady Macbeth's, his behavior is under someone else's control, but unlike the hypnotized subject's, it does not involve false beliefs. Caligari's control is over his objectives, and Cesare does whatever is needed, in the light of the situation, to achieve those objectives. His state is certainly peculiar; he is a sleepwalker. But the argument, such as it was, for saying that the hypnotized subject displays no intentions or purposes, gets even less grip on him than on the hypnotized subject.

However, this does not mean that Cesare is responsible. I take it that Caligari would be held guilty with respect to these deaths, and not Cesare. I assume that it is fairly obvious why the law can reasonably and justly take this line. Although it is not obvious what exactly is wrong with Cesare, it is obvious that Caligari, in this peculiar way, controls Cesare's objectives. I want to insist that the conclusions about responsibility should not be based on supposing that the reason why Caligari, and not Cesare, is the murderer is

²² I shall follow the story that most of the film presents. It turns out at the end of the film that this story is actually a fantasy of the psychotic young man who has been narrating it.

simply that the killing of the town clerk was Caligari's action and not Cesare's.

The town clerk was killed with a dagger, so, if Caligari killed him (and no one else), he killed him with a dagger. Perhaps he did, and our slight resistance to this may be attributed to an everyday implication of saying that Caligari killed him with a dagger, namely that Caligari drove the dagger into the victim with his own hand; an implication which in these peculiar circumstances is false.²³ This implication, however, seems to be an *entailment* of the description "he stabbed him"; so Caligari did not stab him. But if anyone stabbed him, then (on Moore's line) it was Caligari, so we shall have to deny that the town clerk was stabbed. Perhaps, then, we should deny this implication. But there will always be more difficulties of the same sort. Cesare has been instructed in a repertoire of killing techniques, and some other victim may have met her death by suffocation, a pillow held over her face. Caligari must have killed her, too. And while (I take it) he did not suffocate her, any more than he stabbed the town clerk, he must at least have brought about her death by suffocation, since that was certainly how she was killed. But he did not do that by holding a pillow over her face; yet, surely, she was suffocated because a pillow was held over her face.

We should not have to struggle with these difficulties. Cesare suffocated her, as he stabbed the town clerk. But he did it when he was asleep. He did these things as a result of a very peculiar relation he had to Dr. Caligari, one that enabled Dr. Caligari to bring it about that he did those things without his agreeing to do them. For suppose Caligari had said, "You agree to do it?" and Cesare, in his somnambulistic state, had said "Yes, I agree to do it." Cesare would not have actually agreed to do it: *that* is not an act that in this state he can perform. The explanation is to be found in his dissociation from considerations that essentially bear on his doing so. In this state, he cannot summon up, for instance, thoughts that would relate the killing to the rest of his life. This helps to explain why he is not responsible, but lends no support to the idea that he does not do the killings. We cannot say that he was forced to do them; he put up no resistance, and had no consciousness of a price. We cannot naturally say that he was induced to do them. We can best say, perhaps, that he was instructed to do them,

²³ Moore gives this kind of interpretation. See MOORE, *supra* note 1, at 236. The appeal to what he calls "individual nuances," however, will surely not do for "stab" and "suffocate."

though we would have to add that he received the instructions in a peculiar state. Whatever the best description, we can see how it is on these facts that Caligari is guilty with respect to these deaths and Cesare is not, but that is not because no stabbing or suffocating was done by Cesare.

Recalling that "instructions" can be given to a computer, someone may say on Moore's behalf that Cesare might as well have been a robot. It is not clear exactly what that means, but I think it is not true. What is true is that Caligari, for his murderous purposes, might as well have used a robot.²⁴ There is, certainly, a spectrum of possibilities from Cesare to a robot. But this tells us less than Moore's supporter might hope for. It tells us virtually nothing, in fact, unless we know what a robot can do. More significantly, if there is a slope from Cesare to a robot (however exactly a robot is to be described), there is equally a slope, in the opposite direction, from Cesare to Lady Macbeth, to actual somnambulist and hypnotic subjects, to people who are for various reasons in extremely suggestible states in general or in relation to a particular dominating person. It must be a scholastic illusion to suppose that somewhere on those slopes, uphill from Cesare, real, full-blown action is suddenly to be found as opposed to mere bodily movement.

We already have quite good ways of describing various dimensions in which what is done may fall short of the paradigm of fully voluntary action, and philosophy can help us to understand and to develop those ways. But it must be a mistake to suppose that it can yield by itself everything that the ascription of responsibility, in particular criminal responsibility, requires.

I have said that with respect to these deaths, Caligari is guilty and Cesare is not. Nevertheless, Cesare killed both victims, by stabbing one and suffocating the other. So what is Caligari guilty of? Certainly, of causing or bringing about these deaths. In terms of the four-fold structure that I mentioned earlier,²⁵ what Cesare does is a cause of death, but so is what Caligari does—which we are to assume consists in saying something to Cesare. Caligari in the fullest sense intends that death and has it as an objective. Cesare intends it just to the extent that he brings it about intentionally, rather than (for instance) by mistake—though it is significant that he

²⁴ But not, in terms of the film, for his overriding purpose: he was researching somnambulism.

²⁵ See *supra* note 3 and accompanying text.

might conceivably have done that, in circumstances that would have made it his, and not Caligari's, mistake. Did Caligari kill the victims? On Moore's own view, Caligari certainly did, because Moore defends the principle that "X caused Y's death" entails "X killed Y."²⁶ Moore, however, takes a different view from mine with respect to Cesare's role, one that makes it easier for him to accept "Caligari caused their deaths" and hence (on his understanding of the entailment) "Caligari killed them." I am not clear whether on my view of Cesare's involvement—that Cesare killed them—Moore would say that Caligari killed them. As I have said, it does seem hard to deny that Caligari at least caused their deaths. I also think that he killed them; he killed the suffocated victim, for instance, not by suffocating her, but by bringing it about that Cesare suffocated her.

Of course, there is the further point relevant to responsibility, that if Caligari is a killer, he is a pathological but self-conscious and intelligent killer, a state which indeed raises some questions about the response that might be appropriate to such a person. These are questions, however, that would arise even if he had not used a somnambulistic agent. In short, the questions of responsibility, in the sense of what the law's response should be to these happenings, are questions about the state and the intentions of Caligari and of Cesare, and of the relations between those people. It is not a question that can be answered by ascribing to one of them and not to the other actions and intentions which are the cause of death.

²⁶ MOORE, *supra* note 1, at 226-32.

