REPLY

MORE ON *ACT AND CRIME*

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Not only were the editors of the *Law Review* kind enough to organize and host the *Act & Crime Symposium* whose articles precede this one, but they have also graciously allowed me a chance to respond to some of the suggestions and criticisms made in those articles. Since each article contains many points, I will not attempt to respond to all of them. Nor shall I seek to respond to each author separately. Rather, I have grouped my responses to all authors around eight topics: (1) the relevance of metaphysics and the philosophy of action to issues of legal and moral responsibility; (2) stylistic and organizational issues as to how to draw certain distinctions and how to have organized *Act and Crime*¹; (3) the proper way to conceive of omissions; (4) the moral and legal relevance of omissions so conceived; (5) whether the concurrence requirement—that act, mental state, and causation all concur for prima facie liability—is always true of our ascriptions of moral and legal responsibility; (6) the nature of the criminal law’s voluntary act requirement and its application to troublesome cases such as sleepwalking and other dissociated states; (7) whether volitions are a kind of intention and how they contrast with other candidates for the immediate mental executors of those bodily movements that are actions; and (8) whether actions and events are to be individuated by the properties they exemplify or in the manner I propose in *Act and Crime*. I welcome the opportunity to say more on these topics, although I would venture that it is not so much more that it leads to any wholesale surrender by those whose criticisms I seek to deflect.

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I. THE RELEVANCE OF THE "HIGH METAPHYSICS" OF ACTION TO ISSUES OF LEGAL AND MORAL RESPONSIBILITY

In presentations of some of my more metaphysical papers over the years I have noticed a marked reluctance of political and legal philosophers to concede me a worthwhile topic. Indeed, even the use of the word "metaphysics" often bothers my colleagues in legal/political philosophy. My suspicion is that many philosophers who specialize in legal or political philosophy choose to do so in part to get away from the abstractness and seeming irrelevance of metaphysical questions like, "What is an action?" They also resist what they see as the cabining effect of the "brute facts" of metaphysics dictating answers to the design of legal and political institutions when those answers seem better argued for on normative grounds.

Of the present commentators on Act and Crime, Bernard Williams and, to a lesser extent, Samuel Freeman, Stephen Morse, and Jennifer Hornsby seem to have experienced a bit of this resistance to metaphysics. Williams, for example, urges that "the criminal law, after all, has special aims and purposes" that should guide "the requirements that it imposes on describing people's actions," whereas the metaphysics of action is "motivated quite independently of those special purposes." Similarly, Freeman finds the principles and norms relevant to criminal law to "have their bases not in metaphysical considerations, but in the practical necessities and interests of democratic citizens." Even were this not true, Freeman adds, we should "avoid using the metaphysics of action as much as possible" in criminal law because of the difficulties of obtaining agreement on the truth of any one version of such metaphysics.

The structure of Act and Crime was designed to forestall such worries. For each of its three parts, the book begins with criminal law doctrine, probes that doctrine's moral point, and only then asks metaphysical questions about actions. This structure was adopted to justify a metaphysical analysis before any was done. Moreover, if the purposes behind the doctrines in question did not require a metaphysical answer, none was sought. For example, on the individuation of "units of offense" required for double jeopardy,

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3 Samuel Freeman, Criminal Liability and the Duty to Aid the Distressed, 142 U. PA. L. Rev. 1455, 1456 (1994).
4 Id. at 1455.
one might think that the metaphysics of event-tokens and of act-tokens should be used to give the legally appropriate answer. In chapter 14 I argue to the contrary, setting aside any metaphysics-of-action answer to the unit of offense question in favor of a "wrong-relative" mode of individuation. I do this because the dominating purpose animating the double jeopardy requirement—to proportion punishment to desert—requires a count of the separate instances of wrongs done by an accused, not a count of the separate act-tokens he may have done in doing those wrongs.

Williams and Freeman applaud my eschewal of the metaphysics of action on such occasions. They worry, however, that much of my book presupposes "a more robust view of the role of metaphysics" in criminal law theory. They are right to worry, since I do have a more robust view. When the criminal law requires a voluntary act, I take that doctrine to require the doing of an action—as that natural kind of event is theorized about in the metaphysics of action. When the criminal law prohibits complex act types like killings, maimings, burnings, frightenings, and the like, I take those doctrines to require the causing of certain states of affairs (deaths, disfigurements, and so forth)—as the metaphysics of causation would analyze such causings. When the criminal law requires that a prohibited action take place when the actor also has a culpable mental state and where the state trying him has both jurisdiction to legislate and to adjudicate, I take those doctrines to require the finding of the temporal and spatial locations of actions—as the metaphysics of action would analyze such locations.

Each of these criminal law doctrines invites my metaphysical enquiries because of the moral points behind such doctrines. Such purposes are themselves subservient to the overarching purpose of criminal punishment, which is retributive: people should be punished because of (and only in proportion to) their moral deserts. This means that legal doctrines (such as that requiring a voluntary act or that requiring punishable acts to be instances of wrongful act-types, like killings) are best interpreted so as to get at the moral deserts of offenders, and morality itself invites metaphysical answers to questions like, "Is sleepwalking really an action?"

There are five sets of concerns that appear to motivate Williams, Freeman, Morse, and Hornsby to their sharing of a less optimistic

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5 See Williams, supra note 2, at 1662; Freeman, supra note 3, at 1455.
6 Freeman, supra note 3, at 1456.
view about the role of the metaphysics of action in criminal law theory (recognizing that not all of them share each of these concerns). This first concern comes from Williams's uniformly practical view of the law, morality, and the metaphysics of action. Each of these areas of thought, Williams believes, is guided by its own unique purposes and concerns. And why should we think that a criminal law act requirement (guided, for example, by a concern not to punish the undeterrable) should track an act condition we might attach to our everyday ascriptions of moral responsibility (which are themselves guided, say, by the purpose of directing an appropriate response of shame)?

The probable difference in the purposes guiding the criminal law and those guiding our ordinary responsibility ascriptions exists for Williams only because of his own theories in political philosophy and in metaethics. More specifically, Williams is not a retributivist in his political philosophy about punishment. He thus thinks reasons other than giving guilty offenders their just deserts justify and guide criminal sanctions. It is this more heterogeneous theory of punishment that allows him to think that the criminal law should be guided by a set of purposes that are unique to it. Then one might well think that such other purposes set aside the metaphysics of action because they set aside the morality (of desert) that requires such metaphysical analysis of action.

In addition, Williams is not a realist in his metaphysics of morality. He does not, in other words, believe that moral qualities like desert exist in the mind- and convention-independent way that defines moral realism. Williams is thus free to think, as indeed he does, that the ascriptions of moral responsibility by one person to another are guided by "the aim of directing some response" to the one about whom the ascription is made.\(^7\) Moral responsibility ascriptions, in other words, are judgments made to achieve some purpose and not simply to describe the moral truth about someone. Such purpose of guiding responses of various kinds need have no correspondence with the purpose of getting the morality right, so Williams may also put the metaphysics of action aside just because he puts aside (as meaningless) any concern with the moral truths that require such metaphysical enquiries.

I cannot hope to bridge these first kinds of differences with Williams here, constituting as they do two large issues of political

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\(^7\) Williams, supra note 2, at 1662.
philosophy and metaethics. My only point here is to note that insofar as Williams's suspicions about the metaphysics of action stem from these sources, they presuppose a good deal against which I have explicitly argued elsewhere, outside of Act and Crime. If one adopts my own retributivist theory of punishment, then the guiding purpose of criminal law is to punish those who deserve it in proportion to their desert. If one adopts my own noninterest relative metaethics, then the finding of moral desert is not a matter of any purpose of ours, save the purpose of describing the moral facts of responsibility accurately. And if one adopts the view of the relevant moral facts about responsibility that I offer in chapter 3 of Act and Crime, one will find questions like “What is an action?” to be central in assessing moral desert.

A second set of concerns about the relevance of the metaphysics of action to the criminal law is openly avowed by none of my commentators. Yet I suspect it may be present (and if not, it is certainly present in others). This concern stems from an antirealist position about actions (and perhaps events more generally). A good working hypothesis is that if you scratch a skeptic about the utility of a metaphysical analysis you will find a skeptic about the truth of that metaphysical analysis. This is certainly true in metaethics, where those who argue against the relevance of the moral realist/antirealist debate are invariably skeptical antirealists about morality. The same may be true here on the metaphysics of action. Thus, Williams wishes to substitute “philosophical” for “metaphysical” because I gather he is more comfortable discussing “philosophical procedures” than he is discussing “metaphysical truths.”

Also, Williams at one incautious point misreads my metaphysical analysis as if it were seeking a conceptual essence to actions, not a real essence—but then, if one is an antirealist about actions, such conceptual (or nominal) essences, are all the essences there are. Also, Williams seems to suggest that our ordinary

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9 I explore a variety of antirealisms about actions in Act and Crime. See Moore, supra note 1, at 60-77.

10 See Williams, supra note 2, at 1661-62.

11 See id. at 1669.
ascriptions of action must be motivated by their own purposes (which need not be the same as the purposes of the criminal law), as if our ordinary ascriptions were not guided simply by a desire to get to the (moral and/or explanatory) truth of the matter. Also, Williams finds that “there is something odd about discussing such cases [as somnambulism] and their relation to action in terms of appearance and reality.” Yet if one were a realist about human actions constituting a natural kind, it would hardly be odd to think that there could be the “fool’s gold of actions” because the essence of natural kinds is often found in deeper, less knowable natures and not in easily known symptoms. Only someone who thinks that all there is to human action is what we see—such as an intelligent pattern of behavior in sleepwalking—should find this potential divorce of appearance and reality “odd.” Finally, and most tellingly, Williams finds significance in the fact that “everyday users of action descriptions” do not ask or answer certain questions about actions that the criminal law must ask and answer. More specifically, Williams thinks that this fact of ordinary usage of action verbs shows that “there is no reason to suppose that philosophical procedures themselves [metaphysics of action?] can answer” such questions. Williams’s view must be that the metaphysics of action runs out of answers because the conventional discourse about actions has run out of questions. Only an antirealist about actions could think this.

In chapter 4 of Act and Crime I deal with a variety of antirealisms about human actions, or about events more generally. Since there is no explicitly argued for antirealism amongst my commentators, there is no new argument to address. To the extent that doubts about the relevance of the metaphysics of action arise from this quarter, some new argument would have to be found.

A third set of concerns more plainly motivates the reservations about the role of metaphysics in criminal law theory of Morse, Hornsby, and Williams. This is the concern that the metaphysics of action, even conceding arguendo its relevance, yields no answers in problematic or borderline cases. Williams conceives of the concept of action as having an “indeterminacy through vagueness.” Such degree-vagueness in the concept of action creates a continuum

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12 See id. at 1661-62.
13 Id. at 1667.
14 Id. at 1662.
15 Id. at 1663.
16 Id.
between action and involuntary bodily movement, and on such a smooth and slippery slope, Williams tells us, "[i]t must be a scholastic illusion to suppose that somewhere on those slopes . . . real, full-blown action is suddenly to be found as opposed to mere bodily movement." On this point Morse finds common cause with Williams, for Morse concludes that the problem cases cannot be "decided by a natural kind theory of action" and must instead be reached by other, more practical considerations. Hornsby too suggests that "[p]erhaps it is not always determinate whether 'is an action' applies," stating that she would therefore be happy to concede a vagueness in her own definition of action (since it would match the vagueness of the concept of action).

Under a nonmetaphysical, epistemic interpretation of Morse, Hornsby, and Williams, it would be easy to agree with them. The epistemic interpretation is that we presently lack sufficient information to resolve questions like "Are somnambulistic behaviors really actions?" I myself regard the question as rather underdetermined by the presently available evidence. In default of such information, we may indeed do better to repair to Morse's more practical concerns.

Yet I understand Morse, Hornsby, and Williams not to be making an epistemic point. Rather, theirs seems to be the metaphysical point that there are no metaphysical answers "at the border," not just that we at present lack sufficient information to justify belief in one answer over another. Yet I am not sure that I see the backing for their point when taken metaphysically. The vagueness of the concept of action—or in our usage of the word, "action"—is surely no argument that the metaphysics of action is indeterminate in the penumbral range of application of action terms. Vagueness and open texture are conventional features of language use not reflective of what may or may not exist in the way of a hidden nature of a natural kind. If I am right in Act and Crime that human actions are a natural kind of event, then it takes

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17 Id. at 1672.
20 See Moore, supra note 1, at 259.
some argument besides vagueness to suggest that there is no determinative answer in borderline cases.

So Morse, Williams, and Hornsby must be suggesting one of two things. They either disagree with me about human actions being a natural kind of event, or they must think that natural kinds may have fuzzy borders, that the kind, human actions, is one such fuzzy kind, and that somnambulism and hypnotic behaviors are in the fuzzy border of the kind.

Perhaps surprising to my commentators, I think either of these is genuinely possible. As I said in Act and Crime, "what is and is not a natural kind is itself a matter of scientific discovery, not of conceptual necessity." I also think it possible for natural kinds to have fuzzy borders. If species, for example, are natural kinds—a much disputed point—their gradual evolution from one to another belies any bright line between them. The same could be true of the kind, human action. But one would like to see the argument and the evidence. Whether there is a metaphysical answer about somnambulism and like cases is a question on which all the evidence is not in. The only point of the section of Act and Crime dealing with these problem cases was to indicate what one should look for in the way of evidence in light of the volitional theory of action. It might indeed turn out that the volitional theory is falsified or that, under that theory, the evidence is indeterminate as to whether volitions cause the pertinent behavior sequences in the way that would make them actions.

My disagreement with Morse, Hornsby, and Williams here is apparently a disagreement about the state of our evidence. They seem sure that there are no metaphysical answers about somnambulism and like cases whereas I think the evidence does not (yet) warrant that conclusion. Williams's label for my view, "new scholasticism," seems an odd one for what I would think of as a cautious empiricism.

A fourth set of concerns about the relevance of the metaphysics of action to criminal law theory is shared by at least Hornsby and Williams. They both think that moral responsibility is such that action does not play the decisive role I assign to it. Thus, even if the purposes of the criminal law mandated an exclusive focus on moral desert, and even if the metaphysics of action were such that it could

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22 MOORE, supra note 1, at 76.
23 See id. at 257.
24 See Williams, supra note 2, at 1669, 1672.
generate determinate answers about what is and is not an action, moral desert itself is such that the metaphysical answers are idle.

Hornsby puts this cautiously as a question,\textsuperscript{25} whereas Williams is more insistent. In his tale of the evil Caligari controlling the somnambulistic Cesare, what Williams "want[s] to insist is that the conclusions about responsibility should not be based on supposing that the reason why Caligari, and not Cesare, is the murderer is simply that the killing of the town clerk was Caligari's action and not Cesare's."\textsuperscript{26} I want to insist just the opposite, so I guess issue is joined here.

Williams is surely correct to assume that the somnambulistic Cesare is not morally responsible for the death of the town clerk caused by Cesare's sleep stabbing. The question is why Cesare is not responsible. I think it is because he did not perform the action of \textit{killing} the town clerk because he did not act at that time at all. Williams thinks that it is because Caligari controlled Cesare's objectives.\textsuperscript{27} Williams's alternative explanation seems problematic. Having one's objectives controlled by another does not generally defeat responsibility. As I explore in \textit{Act and Crime}, when Patty Hearst had her objectives controlled by the Simbionese Liberation Army, that did not relieve her of responsibility for bank robbery.\textsuperscript{28} What is relevant to her responsibility is whether she \textit{executed} her newly implanted objectives, that is, whether she \textit{acted}. The same is true of Cesare.

Williams himself seems to appreciate the nature of this execution perfectly well. He points out that the somnambulistic Cesare is so dissociated "from considerations that essentially bear" on what he is doing that he "cannot summon up . . . thoughts that would relate the killing to the rest of his life."\textsuperscript{29} This lack of integration of Cesare's implanted objective (to kill the town clerk) with many of his other objectives helps to explain why Cesare is not responsible for the death.\textsuperscript{30} It even explains why Cesare could not have done any \textit{acts} of agreeing to kill.\textsuperscript{31} But for Williams, none of this lends support to the idea that Cesare does not perform the action of

\begin{footnotes}
\textsuperscript{25} See Hornsby, \textit{supra} notc 19, at 1740.
\textsuperscript{26} Williams, \textit{supra} note 2, at 1670-71.
\textsuperscript{27} See id.
\textsuperscript{28} See \textit{MOORE}, \textit{supra} note 1, at 259-60.
\textsuperscript{29} Williams, \textit{supra} note 2, at 1671.
\textsuperscript{30} See id.
\textsuperscript{31} See id.
\end{footnotes}
killing the town clerk. Yet Williams has actually described why it is that Cesare did not perform the action of killing the town clerk. Integration of conflicting objectives is one of the defining functions of volitions, so that when that function is absent volition (and thus, action) is absent. The asleep Cesare did no actions of stabbing or killing. In fact, he slept through the whole thing.

The fifth and last set of concerns about reliance upon metaphysics in the criminal law is most directly voiced by Freeman. Freeman's generally Rawlsian outlook inclines him to favor those legal principles that can be publicly understood and agreed upon by citizens in a democracy. Insofar as criminal law principles take their content from the "high metaphysics" of action, they will not be either understood or agreed on. Freeman therefore takes this to be a reason not to have criminal law doctrines and principles depend on such a metaphysics unless absolutely necessary "as a last resort."

It is surely a desideratum of our criminal laws that they be knowable by those who must obey them, and this does require that such laws be understandable to that large majority of citizens not holding philosophy degrees in the metaphysics of action. Yet nothing in my view of the role of metaphysics in criminal law runs contrary to this ideal of legality. The difference between action and bodily movement, for example, is widely experienced and appreciated. Although metaphysicians may talk about it in unfamiliar ways, the difference they are talking about is not unfamiliar, even to the most unreflective among us.

Freeman of course worries that legal policymakers need greater understanding than the intuitive appreciation satisfactory for citizens. Such policymakers need to know, for example, whether Alvin Goldman's single-instance trope metaphysics of actions is both correct and relevant to the tests for double jeopardy, or whether my "wrong-relative" approach and "coarse-grained" metaphysics is what is needed. Freeman probably thinks that if Goldman and I show up in the Arizona or Pennsylvania legislatures with our different

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32 See id.
33 See MOORE, supra note 1, at 137-55, 258.
34 See Freeman, supra note 3, at 1455-56.
35 Id.
approaches to double jeopardy, we would be in some jeopardy of confinement ourselves.

Although the picture admittedly is amusing to contemplate, we should not allow difficulties in immediate translatability to be any more than practical limitations on where and when one argues metaphysics. We should not elevate them into principled limits on what is worth arguing about in the context of drafting a criminal code. We should rather agree with Jeremy Bentham on this, who saw such enquiries, abstract as they are, as the indispensable first steps to a rational criminal law.37

II. THE PRESENTATIONAL STRATEGY OF ACT AND CRIME: HORNSBY'S "CONFUSIONS"

Jennifer Hornsby thinks that I am very confused.38 I am confused about one thing at least—why she should think this. I should have thought her to have been too sophisticated a reader to have so misinterpreted what I wrote in *Act and Crime*. Often the alleged "confusions" she finds in my book are due solely to a lack of context-sensitivity on her part. At these times Hornsby is like the reader who would criticize a metaphorical statement such as, "man is a wolf," because she takes such statements to be attempted contributions to zoological theory and then, having so misconstrued them, gleefully pronounces them to be false. At other times Hornsby creates a "confusion" for me because she has her own stipulated meanings for certain words and phrases, and when my usage does not conform to her own idiosyncratic stipulations she reads me as if it did. Infusing her meanings into my usage when it is plainly not what I meant certainly creates confusion but it equally certainly does not discover antecedently existing confusions. Finally, I do think that there is some genuine misunderstanding of what I meant by Hornsby because she failed to understand the organizational and presentational strategy of *Act and Crime*. One should judge that part of her criticism generated from this source as a criticism of style and of presentational strategy, which is all it amounts to.39

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37 *See* Jeremy Bentham, An Introduction to the Principles of Morals and Legislation 72 n.1 (J.H. Burns & H.L.A. Hart eds., 1988). It is instructive that Bentham's favorite quotation from Helvitius was, "If philosophers would be of use to the world, let them survey it from the point of view of the legislator." Gerald Postema, Bentham and the Common Law Tradition (1986).

38 *See* Hornsby, supra note 19 passim.

39 Sometimes Hornsby's criticisms are explicitly organizational and stylistic, as
Given her background in philosophy, I wish Hornsby had rather focused on the one substantive issue in action theory on which I know we disagree. Not only would this have saved her from torturing what I said so as to create nonexistent “confusions,” “contradictions,” “conflations,” and “absurdities,” but she might have actually advanced our understanding of this issue.

Hornsby thinks I am guilty of two big confusions and many little mistakes.40 The two big confusions are: (1) I confuse the things when she finds “not very inviting” my ordering of my identity and exclusivity theses (in chapters 5 and 11, respectively), see id. at 1727; when she opines that I “take[] matters backwards” in chapter 6 when I clarify what volitions might be before I argue for the existence of volitions, id. at 1730; or when she sniffs an “inconsistency” in my treatment of acts being identical to bodily movements—an inconsistency shown only “in due course” by me to be “apparent only,” id. at 1729. More often Hornsby’s criticisms pretend to be substantive when in reality they amount to no more than either a misunderstanding of, or a disagreement with, the organization and presentational strategy of the book.

Very quickly, in reply:

(1) Other philosophers of action, for example, Antony Duff and Alvin Goldman, find my coinage of “complex” useful because it does not reject a scalar approach, as Hornsby suggests; nor does my usage imply that the consequences of act-tokens are parts of act-tokens, even while it would (rightly) allow that act-types such as killings may have certain event-types like deaths as parts. See R.A. Duff, *Acting, Trying, and Criminal Liability*, in *Action and Value in Criminal Law* 75, 77, 80 (Stephen Shute et al. eds., 1993); Goldman, supra note 36, at 1581.

(2) Apparently Hornsby did not read far enough to find my unpacking of “partial identity” at pages 330 through 332 of *Act and Crime*. In any case, the notion is both clear in my usage and philosophically well-established. See, e.g., David M. Armstrong, *A Theory of Universals* 37-38, 120-24 (1978).
we do, which are abstract universals, with actions, which are particular events; and (2) I confuse what it is that can be basic or complex, sometimes applying the opposition to actions and sometimes applying it to descriptions or types of actions. I shall consider each in turn.

A. Types and Tokens, Things Done and Actions

To accuse me of the first of these confusions is preposterous. Early on in Act and Crime I introduce the distinction between tokens of actions and events, which are particulars, and types of actions and events, which are abstract universals. I then employ the distinction to show how certain arguments in the philosophy of action have sometimes neglected this crucial distinction.

Hornsby prefers her own distinctive terminology for the distinction—a terminology that is neither idiomatic in ordinary
English nor standard in the philosophy of action—and then finds “confusions” when I do not follow her peculiar terminological stipulations. For Hornsby, “action” should always be taken to refer to a particular action someone does on a particular occasion, what I and almost all philosophers of action call “act-tokens.” Additionally, according to Hornsby, “things we do” should always be taken to refer to types of action, what I and almost all philosophers of action call “act-types.” Hornsby recognizes that the first of her stipulations does not at all correspond to ordinary usage, because our usage of “a killing,” “a maiming,” or “an action” can as easily refer to an act-type as an act-token. She claims conformity to ordinary English for her second stipulation, however: things we do locutions, like “what she did was to raise her arm,” never refer to act-tokens in ordinary usage.43

This last claim about idiomatic English is surely false. As just one example, consider this bit of unself-conscious prose from Bernard Williams’s contribution to the Symposium: “[W]hat Cesare does is a cause of death, but so is what Caligari does—which we are to assume consists in saying something to Cesare.”44 On one popular common sense view of causation, causal relations exist between event-tokens and it is only causal generalizations whose terms refer to act-types. Yet Hornsby would deny that Williams could have meant to refer to event-tokens. Unfortunately for Hornsby’s denial, ordinary usage simply does not support such a regimentation of Williams’s English. He easily could have meant by what “Cesare does” to refer to an act-token that caused the death of the victim, another event-token. The thing Cesare did was the act-token, because (on the common sense view of singular causal relations) only the act-token caused the particular event that was the victim’s death.

Hornsby notes that I am “not alone in making the confusion,” citing Donald Davidson as an example of how “nearly everyone who writes in the area sometimes talks in ways that partake of the

43 See Hornsby, supra note 19, at 1722 n.11 (stating that “raising my arm’ never applies to a particular in fact”).
44 Williams, supra note 2, at 1672. Or consider this bit of prose from Michael Corrado’s contribution to the Symposium: “Basic acts are . . . 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.” Michael Corrado, Is There an Act Requirement in the Criminal Law?, 142 U. PA. L. REV. 1529, 1530 (1994). By “things we do” Corrado should be taken to be referring to act-tokens, not act-types; otherwise, his claim here would be absurd.
confusion." Yet if I, Williams, Davidson, and everyone else besides Hornsby do not mark the distinction as she marks it, perhaps the correct inference to have drawn was that hers is not an intuitive or idiomatic way in which to mark the distinction.

Despite the artificiality of her two stipulative meanings of "action" and "things one did," Hornsby nonetheless imposes her meanings on my usages of these words and phrases to yield propositions I would not subscribe to for a minute. Small wonder that Hornsby finds "hundreds" of examples of "confusing usage." This also allows Hornsby to convict me of two "absurd" claims that she has to know I do not make.

In chapter 11 of Act and Crime I defend the coarse-grained view of act-token individuation according to which when I kill Jones by firing a bullet, and I fire a bullet by depressing a trigger, and I depress a trigger by moving my finger, I do but one action, not four. In introducing this familiar identity claim about actions, I made clear that the identity claimed was between act-tokens but not act-types:

\[ T \text{he only acts there are bodily movements . . . .} \]
\[ . . . \ T \text{he identity here spoken of is an identity of act-tokens and not act-types. The exclusivity thesis cannot claim that killings as a type of action are identical to some discrete set of basic acts . . . .} \]

Rather, the claim is only that for each act of killing, there is a corresponding basic act of limb movement, and these two nominally distinct acts are in reality one and the same event.47

Reading any usage of me of things we do (like killings) to refer to types, Hornsby has me claiming a type-identity here: "A proponent of the so-called coarse-grained view does not advance Moore's absurd claim—that various different things done by a person are identical . . . ."48 The type identity claim of course would be an absurd claim, but no fair reader of Act and Crime could interpret the book to advance it.

The second example is Hornsby's reading of my "identity thesis" proper, viz., the thesis that each act of bodily movement, is identical to the causal sequence, volition-cause-bodily movement. Again I

45 Hornsby, supra note 19, at 1724 n.18.
46 Id. at 1722 n.11.
47 MOORE, supra note 1, at 110.
48 Hornsby, supra note 19, at 1724.
explicitly deny that this is a thesis identifying types of events. 49
This time Hornsby grudgingly allows that "Moore temporarily avoids
the confusion . . . where he is accusing his opponents of it." 50
Nonetheless, my type/token confusion is still "very evident" to
Hornsby, even here. 51 When I say that "[t]he identity of act-tokens
with movement-tokens is in no way affected by . . . [an] argument
against type-identities," 52 Hornsby insists that the "act-types"
(whose identity with bodily movements I deny) are for me particu-
lars, namely, act-tokens. 53 Hornsby thus has me saying that
arguments against token identities in no way affect token identities!

Hornsby fervently wishes to regiment philosophical usage in a
particular way. For my own part I think such regimentation is
unnecessary. Ambiguous words and phrases such as "action," "act,"
and "things we do" only need systematic, stipulative disambiguation
if the context of their usage on particular occasions does not make
clear which sense is meant. 54 Consider the reference of the phrase
"Hornsby's confusions" as it appears in the title of this Section. The
phrase as used is triply ambiguous, between: (1) referring to the
alleged "confusions" Hornsby attributes to me; (2) referring to the
confusions Hornsby suffers under when she attributes "confusions"
to me; (3) referring to the "confusions" Hornsby pretends to be
suffering under when she attributes "confusions" to me. Only
someone utterly lacking in subtlety (or humor) would demand a
stipulative disambiguation of what is meant, whereas I prefer leaving
it to the context of utterance to disambiguate the phrase.

In any case, even if Hornsby's regimentation were a good idea,
it is a ludicrous way to sell her proposal to me and other philos-
ophers to treat a book that has not adopted it (in its usages of
"actions" and "things we do") as if it had. Doing such an odd thing
will guarantee that "contradictions flow" like water. Such a river of
contradictions flows, of course, only if one is intent on misreading
whether type or token is meant by an author and only if one uses

49 See Moore, supra note 1, at 81.
50 Hornsby, supra note 19, at 1725 n.19.
51 Id.
52 Id.
53 Id.
54 See Michael S. Moore, The Semantics of Judging, 54 S. CAL. L. REV. 151, 183-87
(1981) (discussing the role of linguistic and nonlinguistic context in disambiguating
otherwise ambiguous expressions).
one's own artificial, stipulative vocabulary as the means to carry out that intent.

B. Basic/Complex Descriptions of Act-Tokens

My second "confusion" is with respect to the sorts of things that may be "basic" or "complex." The possibilities are three: (1) that act-tokens are basic or complex; (2) that act-types are basic or complex; or (3) that descriptions of act-tokens are basic or complex. Hornsby and I both think that the third is the right answer. What is basic or complex is a description of a particular event, namely, an act-token. This is the standard view in the philosophy of action, although it is often put in the idiom of an "action under a description" being basic or complex.\[55\]

I make this very plain in the footnote to which Hornsby alludes. I thus say that we shall provisionally think of "basic/complex" as applying to act-tokens, but that later we shall not do so: "The basic/complex distinction then becomes a distinction between two sort of description of acts, not between two sorts of action.... On this, see Jennifer Hornsby, Actions. For now, I adopt the more idiomatic terminology of basic versus complex actions."\[56\]

I should have thought the reference to chapter and verse of Hornsby's own adoption of the standard view would have forestalled Hornsby's misinterpretations. Determined to stick me with absurd and contradictory views, however, Hornsby first misinterprets and then brushes aside my footnote. She misinterprets the footnote by reading my phrase, "two sorts of description of acts," as referring to descriptions in the abstract, not as used on a particular occasion to refer to an act-token. As Hornsby puts it, "one has to have particulars [act-tokens] and things done [descriptions] simultaneously on the scene if one is to understand basicness."\[57\] That is of course exactly what I think, thought, and said. Hornsby, however, wants to read my footnote as attaching the basic/complex distinction "to descriptions in isolation"\[58\] of any particular act-token. Descriptions of action not used on a particular occasion to refer to an act-token—that is, descriptions "in isolation"—for Hornsby "correspond with" act-types.\[59\] So Hornsby wants to read me as

\[55\] For example, as in DONALD DAVIDSON, ESSAYS ON ACTIONS AND EVENTS 61 (1980).
\[56\] MOORE, supra note 1, at 79 n.5 (citation omitted).
\[57\] Hornsby, supra note 19, at 1723 n.15.
\[58\] Id.
\[59\] Id. at 1721 n.10 ("Things we do correspond one to one with descriptions of
attaching the basic/complex distinction to act-types—this despite my explicit statement that "[t]here is no type of act that is basic; only particular acts." Of course, since Hornsby generally is bound and determined to construe my reference to act-tokens to be "confused" references to act-types, riding roughshod on what I said here should present no particular problems for her.

Mostly, however, Hornsby wants to brush aside my footnote so as to attribute to me the view that basic/complex is a distinction applicable to act-tokens. For if she can stick me with this as my ultimate view, then "contradictions flow," as she happily reports. For example, "Assuming, as Moore does, that what is basic is not complex, it is very obvious that no complex action is the same as any basic one." Yet in chapter 11 Moore identifies every complex act-token with some basic act-token. Ergo, the guy must be a moron.

Hornsby completely missed my presentational strategy in writing Act and Crime. I could have chosen to write the book in a way that would have prevented Hornsby's supposed "confusions": I could have begun my analysis with my conclusion about what actions are and written the book entirely from that point of view. To be clear, it is worth seeing how such a book would have gone.

There is one metaphysical question asked about actions that dominates Act and Crime, and that is the question of what actions are. There are a limited number of well-charted answers to this question: (1) all events, including actions, are proposition-like entities or facts; (2) all events, including actions, are particulars that may possess many properties; or (3) all events, including actions, are neither propositions, nor particulars, nor properties or other universals, but are tropes (abstract particulars, or concrete universals). The Davidsonian tradition in the contemporary philosophy of action, which Hornsby and I share, plumps for (2) as the correct ontology for events generally and human actions specifically. Within that tradition, there are significant differences about what sort of events human actions are: (a) There is Hornsby's view,

actions (at least if it is allowed that acts can be typed as finely as descriptions of acts can be distinguished”). My disagreement with Hornsby's apparent predicate nominalism (as David Armstrong calls such a view in his A Theory of Universals) is not important here. But see MOORE, supra note 1, at 333-34.

60 MOORE, supra note 1, at 81.
61 Hornsby, supra note 19, at 1719.
62 See MOORE, supra note 1, at 65-67.
63 See generally DAVIDSON, supra note 55.
standardly called the "mental action" view, which regards some mental event or act (trying, willing, choosing, volition, etc.) as the event we refer to as an action; (b) There is Donald Davidson's view, which regards human bodily motion as the event we refer to as an action; (c) There is my view, which regards both volitions and bodily motions as parts of the complex event we refer to as an action; (d) There is the componential view of Judy Thomson and the late Irving Thalberg, which regards consequences of our willed bodily motions (such as deaths) also to be parts of actions.

Notice that proceeding in this way need make no use of a complex/basic distinction. To defend my view, (2)(c) above, only requires that we talk about actions, not about basic or complex ones. Why, then, did I not proceed in this straightforward way, eliminating a distinction that is not needed and that seems to have "confused" Hornsby? One of the aims of Act and Crime is to resuscitate what Herbert Hart called the orthodox criminal law theory of the act requirement. Such resuscitation requires fidelity to two bits of the history of criminal law theory: first, to the way in which Austin/Bentham/Mill/Holmes propounded this theory in the nineteenth century, and second, to the criticisms of that theory made by Hart and his followers in this century. Such fidelity to history in turn requires that one take seriously what it was about the orthodox view—as it was propounded by those holding it—that lead Hart et al. to reject it.

Hart distinguished two troublesome aspects of the orthodox view, its positing of volitions and its attempt to limit actions "properly so called" to bodily movements. I thus split into two separate theses, the "identity thesis" and the "mental cause thesis," what (on my ultimate view) is but one thesis, namely, that actions are volitions-cause-bodily movement ("VCM"). Since the objections to ontology (2)(c) above further subdivide between those thinking that no actions are VCM's and those thinking that some but not all actions are VCM's, I further split off an "exclusivity thesis" from

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64 See generally JENNIFER HORNSBY, ACTIONS (1980).
65 See DAVIDSON, supra note 55, at 61.
66 See generally MOORE, supra note 1.
68 See MOORE, supra note 1, at 44.
70 See id. at 100-01; see also ERIC D'ARCY, HUMAN ACTS: AN ESSAY IN THEIR
the identity thesis. This separation then required the defense of two seemingly separate identity theses: (1) the thesis defended in chapter 5 as the identity thesis proper (every act-token that those separating these theses would take to be "basic," such the moving of my finger as I write this, is identical to some VCM); and (2) the thesis defended in chapter 11 as the exclusivity thesis (every act-token that those separating these theses would take to be "complex," such as killings always are, is in reality only some act of moving one's body). In reality there is only one identity claim here, that every act-token is a VCM, but for purposes of separating this thesis into two subtheses I introduce the basic/complex distinction.

_Act and Crime_ is clear that these three separated theses are introduced in order to respond to the state of the debate in criminal law theory. From the point of view of the final theory of action developed by the end of the book—ontological view (2)(c)—the distinctions employed are rather artificial. Thus, in introducing the separation of the identity thesis from the exclusivity thesis, I say: "Although ultimately to defend one of these theses will be to defend the other, for ease of exposition it is helpful to examine them one at a time." And with regard to the separation of the mental cause thesis from the identity thesis: "Seeing the partial identity asserted to exist by the identity thesis alone reveals the rather artificial division between this thesis and the mental-cause thesis." I said this because there is only one thesis, ultimately, that I am defending here, which is (again) the thesis that every act-token is a VCM, nothing less (mental action theorists), nothing more (compositional theorists), and nothing else (everybody else).

What Hornsby fails to see is that my use of the complex/basic distinction is part of my attempt to defend my view on the metaphysics of action _in a way that fits the history just recited_. I thus at times pretend that the distinction is between act-tokens because that is how it would be regarded by those defenders and critics of the orthodox criminal law theory of action who _separately_ defend or attack one of the three (identity, exclusivity, mental cause) theses. Thirty years of the philosophy of action that followed Arthur Danto showed us why the distinction cannot ultimately be maintained in that way, but to speak to the concerns that caused critics and

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MORAL EVALUATION 9 (1963); J.L. Austin, _A Plea for Excuses, in Freedom and Responsibility_ 6, 7 (Herbert Morris ed., 1961)

71 _Moore, supra_ note 1, at 78.

72 _Id._ at 85.
defenders of the orthodox criminal law theory to divide their theory into these theses requires one to suspend what one knows.73

When I am speaking for myself in Act and Crime, and not within the mindset of the orthodox criminal law theorists and their critics, I use what Hornsby and I know: that the complex/basic distinction is a distinction between different descriptions used on some occasion to refer to one and the same act-token. For my own, developed view, there are only two places that I need a complex/basic distinction. One is to make clear the difference between the actus reus and the voluntary act requirements of the criminal law. Here I say that the voluntary act requirement is satisfied when a particular event-token has the properties required by a basic act description of that act-token, whereas the actus reus requirement is satisfied only if in addition the event-token has the properties required by some complex description contained in some statute in force at the time the act was done.74

My second need of the complex/basic distinction is in my asking what it is that complex descriptions of action might have in common.75 Recognizing that they will all presuppose the accuracy of some basic description, what else might these nonbasic, or complex, descriptions have in common in their ascribing of properties to some act-token?

In both of these contexts I do not know how I could have been clearer that I had dropped the pretense that the basic/complex distinction has to do with act-tokens rather than with descriptions of act-tokens:

Because the truth conditions of expressions using descriptions such as 'killing,' 'saying,' 'concealing,' and 'raping' include the existence of such extra properties, we are entitled to think of such descriptions as complex. A basic description, by contrast, ascribes only the property of bodily-movement-caused-by-a-volition, which is essential to the act being an act of any kind at all.76

Hornsby despair of finding any place in Act and Crime where I shift from act-tokens to descriptions of act-tokens as the proper locus for the basic/complex distinction: "[I]f it [the distinction] really were to undergo a change, we should expect to be aware of

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73 See id. at 79 n.6.
74 See id. at 170.
75 See id. at 189-237 (discussing unity in complex descriptions of act-tokens).
76 Id. at 169.
it when it happens; yet we read in vain to discover the transmutation.” Yet I do not think that I could have marked it any more clearly that in the beginning of Part II of *Act and Crime* just quoted.

Hornsby, however, cites part of the last quoted passage from *Act and Crime* and refuses to credit what it plainly says. This, because in chapter 11 I go back to a usage treating complex/basic as a distinction between act-tokens—which I do, but again, only to pick up some unfinished business from chapter 5 of Part I. The unfinished business is the defense of the exclusivity thesis in terms that would make sense to those who have defended or attacked it separately from their defense or attack of the identity and mental cause theses.

Hornsby’s basic mistake here lies in her not distinguishing my own use of the distinction from my use of it as a heuristic device to get at the orthodox theory and its critics. That is why Hornsby looks in vain for one point in *Act and Crime* where a shift in distinctions takes place and then does not revert. That is why Hornsby thinks that I oscillate uncontrollably between “a distinction... attaching to particulars in isolation, then to descriptions in isolation.” That is also why Hornsby attributes yet another contradiction to me:

> The announced change in the distinction is not all that is needed to remove Moore’s inconsistencies. However the term “basic” works, it cannot straightforwardly apply to any item that “complex” also applies to, given that no basic item is a complex one; it makes no difference to this point what sort of items are meant to be basic.

If Hornsby saw that in the mindset of those critics of the orthodox theory (who separately reject the mental cause, identity, and exclusivity theses), complex/basic is a distinction applied to act-tokens, she would see that we coarse-grained theorists would say (in this usage of complex/basic) that what is basic is also complex, and vice versa. If Hornsby saw that from the vantage point of our

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77 Hornsby, supra note 19, at 1720.
78 See id. at 1720 n.7.
79 See id. at 1720.
80 Id. at 1725 n.15.
81 Id. at 1720.
own completed (coarse-grained) theory of action, complex/basic applies to descriptions as used to refer to some act-token, she would see, indeed, that "nothing basic is also complex." And if Hornsby saw these two different usages of the complex/basic distinction, and that only one is my own, the other being a heuristic to understand others' views, she would have seen that there is no contradiction here.

C. Two "Confusions" or One Evasion?

Hornsby's preoccupation with my two "confusions" unfortunately deflected her from replying to the detailed criticism in Act and Crime of her arguments in her own book, Actions, for a "mental action" theory. She accurately gauges that my challenge to her was put in terms of "basicness":

We must deny . . . that there is any "good sense" to be made "of talking about an action as a person's contracting his muscles." In the ordinary case, where a person has not undergone special training, he does no contracting of his muscles as an action of his; rather he moves his arm, and there is no simpler or more basic action by which he performs such movement.

Whether this is so is thus the crux of the matter . . . . None of Hornsby's three arguments even touch this crucial issue.

Hornsby's response? "It is to be expected that my arguments would not touch this, because I do not think it makes sense: actions are not related by 'more basic' . . . ."

Yet from the point of view of someone who has not yet been convinced of the coarse-grained view of the act-token individuation that I argue for in chapter 11 and who thus still takes basicness to be about act-tokens, my way of putting the issue makes perfect sense. And to someone like Hornsby, or me ultimately, who refuses basicness as an attribute of act-tokens, it is easy to reformulate the issue: Are contractings, and movements, parts of actions (as I contend), or are they the effects of actions (as Hornsby contends)? Hornsby herself reveals that she sees this as the crucial issue, since she recognizes that in the book of hers that I was criticizing, Actions, she was giving "arguments . . . for thinking that bodily movements

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82 For my criticisms of Hornsby's arguments in her book Actions, see MOORE, supra note 1, at 97-102.
83 Id. at 102.
84 Hornsby, supra note 19, at 1745.
are not parts of actions." Since Hornsby has not supplemented those arguments in any way, her current machinations about confusions give me no reason to alter my original conclusion: "None of Hornsby's ... arguments even touch this crucial issue."

One final word, one that calls it as I see it: Hornsby's "confusions" are the product of a desire to keep the philosophy of action for those philosophers who specialize in it. "A little knowledge is a dangerous thing" is the tone set by this kind of turf protection. What Hornsby fails to see is that if we applied this protectionist attitude to her own (actually quite welcome) venturings into the criminal law, we would pronounce her to have butchered well-worn distinctions like that between special and general mens rea, interpret her in light of the standard meaning for the distinction, and then "discover" hundreds of confusions, contradictions, conflations, and absurdities in the claims manufactured by the infusion of our meaning into her statements. That being a shabby business, I refrain.

III. OMISSIONS: CONCEPTUAL AND METAPHYSICAL ISSUES

We may now leave behind general worries, either about my metaphysical program for the criminal law or about my heuristic strategy for presenting it, and get to more particular objections. Legal liability for omissions does not fit comfortably with the theory of action developed in Act and Crime. Predictably, a number of the commentators zeroed in on this fact in order to raise a number of problems for me. To keep some semblance of order here, it will be convenient to divide the problems into two groups. In this Section I shall deal with conceptual and metaphysical worries about omissions, raising questions of what omissions are or how they may be conceptualized most fruitfully. In the following Section I shall deal with moral and legal worries about what our responsibilities might be for omissions.

85 Id. at 1746 n.86.
86 MOORE, supra note 1, at 102.
87 Compare Hornsby's usage of the distinction between general/specific mens rea in Hornsby, supra note 19, at 1727-28, 1737, 1739, with the standard distinction invoked by these words in criminal law theory. See Sanford H. Kadish, The Decline of Innocence, 26 CAMBRIDGE L.J. 273, 273-75 (1968) (distinguishing special mens rea from two senses of general mens rea).
A. Omissions as Intentional Agency

A number of the commentators are tempted to conceive of omissions more narrowly than I do. I introduced my generic notion of an omission early in Act and Crime:

[O]missions are simply absent actions. An omission to save life is not some kind of ghostly act of saving life, and certainly not some ghostly kind of killing. It is literally nothing at all. An omission to save \(X\) at some time \(t\) is just the absence of any instantiation of the type of action, 'saving \(X\).'

This I recognized to be a broad conceptualization of omissions. Fletcher\(^8\) and Hornsby\(^9\) wish to narrow it to willed (intended, chosen, etc.) refrainings, and perhaps, to willed refrainings when the actor could have prevented the harm and she knew that. That is, they wish to conceptualize, for example, an omission by \(Y\) to save \(X\) at \(t\) as the choosing of the nonsaving of \(X\) by \(Y\) at \(t\) where \(Y\) could have saved \(X\) at \(t\) and \(Y\) knew that.

There are three principal reasons offered for this narrower conceptualization of omissions. One is the unity possible within a theory of action if omissions too are conceived of in terms of willing. Then all acts, be they acts of commission or of omission, consist in an agent trying, choosing, intending, or willing that some state of affairs come into being or remain the same. Such a unified theory of action is of course the mental action theory favored by Prichard,\(^91\) Davis,\(^92\) Hornsby,\(^93\) and others.\(^94\)

The second reason offered for the narrower conceptualization of omissions is the apparent absurdity of my broader conceptualization. To quote Fletcher: "Dead men who do 'literally nothing at all' do not omit."\(^95\)

Third, it is claimed that the only interesting cases of omission are those where the "actor" has directed her mind to some threat-

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\(^9\) See Hornsby, supra note 19, at 1738-40.

\(^91\) See generally H.A. PRICHARD, MORAL OBLIGATION (1949).

\(^92\) See generally LAWRENCE DAVIS, THEORY OF ACTION (1979).

\(^93\) See generally HORNSBY, supra note 64.

\(^94\) See MOORE, supra note 1, at 95 n.46 (citing other unified theory mental action theorists and those such as Myles Brand and C.J. Moya who have discussed the theory).

\(^95\) Fletcher, supra note 89, at 1444.
ened state of affairs and to her capacity to prevent it, and where she chooses not to prevent it. As Fletcher puts it, "the only kind of omitting that is interesting is the kind in which human agency is assumed." And again: "Agency is built into the standard example of the bystander who lets the child drown. The example would not even be interesting unless we assumed that the bystander chose to remain motionless and that she had an unrestrained option to intervene and rescue the child."

None of these three reasons, as I now propose to show, go any distance towards justifying the narrower conceptualization of omissions over my broader notion. Consider the last point first, Fletcher's lack of interest in nonwilled omissions. If Fletcher is like the rest of us, he probably has two sorts of interests that are relevant here, explanatory interests and moral interests. That is, he seeks a conceptualization of omissions that is explanatorily interesting—because omissions (rightly conceived) explain things—and/or that is morally interesting—because omissions (rightly conceived) either capture a kind of moral responsibility, or they are the contrast case to something else that does capture a kind of moral responsibility.

Now consider two sets of omissions Fletcher finds interesting enough to mention them in his own article: (1) "failing to water the plant, when one reasonably expects the contrary, causes it to die," and (2) "the failure to register for the draft, or the failure to pay one's income tax." Fletcher finds the first explanatorily interesting, yet notice, there is nothing in the example to suggest a willed nonwatering of the plant. The person who watered the plant may simply have forgotten to water it. We expect that people who care enough for plants to own them will water them, and this expectation may make the omission to water explanatorily interesting to us—but not because there is any of Fletcher's "human agency" or "choosing" not to water the plant in the person whose omission Fletcher finds explanatorily interesting.

Fletcher finds the second set of examples morally and legally interesting because we can justly blame people for failing to pay their income or social security taxes and for failing to register for the draft. Yet we blame people for these omissions irrespective of

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96 Id.
97 Id.
98 Id. at 1448.
99 Id. at 1447.
any choice not to do so. "I forgot" is no excuse here, because such forgetting would be negligent. Negligent omissions are surely interesting to Fletcher, but not because there is any of Fletcher's "human agency" or "choosing."

The problem of negligent omissions plagues the first reason as well. Granting that we hold persons responsible for such items, the unified view of actions—as trying, willing, intending, agency, etc.—draws a blank in accounting for them. If omissions must be intentional in order to be omissions, we shall need another name for negligent omissions. In which event the supposed unity of acts and omissions—in terms of some common element of intentional agency—is illusory.

I should have thought all of this was perfectly obvious since Bentham, who recognized that we cannot at the same time conceptualize omissions as willed and also capture the class of things that holds our moral interest with this conceptualization. As I said in *Act and Crime* in discussing Bentham's rejection of Fletcher's and Hornsby's conceptualization: "As Bentham himself recognized, many omissions are not willed yet they are punishable.... Negligent omissions... are not willed omissions because one's mind was not directed to the situation calling for the action omitted."

Coming to the second reason, the supposed absurdity of dead men omitting, there is indeed something odd in the kind of usages Fletcher's example illustrates. It is not odd to say that we all omit to feed a given beggar in India, even though we do not know who he is or what his needs might be. It is odd to say that Caesar omitted to prevent the ascension of Hitler to power in 1933, or that after our own deaths we omit to treat our friends well. The difference is that in the former case we could prevent the starvation of the beggar, whereas in the latter cases dead persons can do no preventing because they can do no things at all. They lack, that is, any ability to cause anything, being dead and all.

Such an oddity has nothing to do with the presence of "human agency" or intention in the former cases and not in the latter, as Fletcher suggests. Willing, thinking, directing one's mind to it, and so on, are all completely irrelevant to the oddity to which Fletcher directs our attention. There is not much point to saying that dead

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100 See BENTHAM, supra note 37, at 72 n.1.
101 MOORE, supra note 1, at 24.
men omitted to do some particular type of act when we know, being
dead, they have (and will continue) to omit to do all types of acts.

We could treat this usage oddity as semantic, in which event we
restrict our concept of omissions to those noninstantiations of some
type of action by those who could have performed an act of that
type if they had chosen to do so. Or we could treat this usage
oddity as I do in Act and Crime, as only a pragmatic oddity.\textsuperscript{102}
Saying that a dead person omitted to save some child on a given
occasion is odd in the same way as it is odd to respond to the
question, "What caused the fire at the drugstore last night?," with
the answer, "The presence of oxygen in the air." Telling people
what we the speakers know they already know is pragmatically
deviant even if semantically impeccable.

Conceptualizing omissions my way will indeed mean that there
are "trillions of omissions on the part of each person at any
moment," as Hornsby notices.\textsuperscript{103} I do not see why that is a prob-
lem, so long as one recognizes that almost all of these omissions
lack the surprise that would make them explanatorily interesting
and lack the features of negligence, knowledge, or intention that
would make them morally interesting. And remember: One cannot
restrict omissions to those that are willed, chosen, intended, and so
forth, because that manner of conceptualization fails to include
omissions we do find to be morally and explanatorily interesting.
Hornsby recognizes this fact when she admits that she has no
conceptualization of omissions to give that is narrower than my
account and yet accommodates negligent and inadvertent omissions
as omissions.\textsuperscript{104} I still think my broader conceptualization is
preferable: the generic notion of an omission is simply the absence
of an action of a certain type, leaving more restrictive notions to be
carved out as our interests require.

B. Supposed Motionless "Actions"

A second set of concerns raised about my conceptualization of
omissions focuses on omissions as absences of bodily motions. This
is the objection of Corrado\textsuperscript{105} and Fletcher\textsuperscript{106} that motionless

\textsuperscript{102} See Moore, supra note 1, at 28 n.31 (explaining that I adopt the generic notion
of omission).
\textsuperscript{103} Hornsby, supra note 19, at 1739.
\textsuperscript{104} See id.
\textsuperscript{105} See Corrado, supra note 44, at 1538-41.
\textsuperscript{106} See Fletcher, supra note 89, at 1445, 1448.
states of a person, when willed by them, are actions on their part, and that therefore my notion of omissions is too broad in this respect too.

Before dealing with this objection, we need to clarify a preliminary point on which Fletcher, but not Corrado, seems curiously confused. Fletcher says that I have different "line[s] of thought" in my definition of omissions.\(^\text{107}\)

Fletcher thinks that my conceptualization of omissions as the absence of any willed bodily motions is different than my conceptualization of omissions as the absence of any act-token that instantiates the type of action omitted. The fact that I pointed out at the Symposium that this was a mistaken interpretation of me by Fletcher has resulted in his current, coy footnote, in which he declares: "Alas, we must go by the printed page and not by the preference of the author."\(^\text{108}\) By all means. The printed page to which I referred Fletcher during the Symposium was page twenty-eight of *Act and Crime*:

> An omission to save \(X\) at some time \(t\) is just the absence of any instantiation of the type of action, 'saving \(X\).’ On the metaphysical view of actions developed in [chapters 4 through 6], actions are event-particulars of a certain kind, namely, willed bodily movements. . . . An omission by \(A\) to save \(X\) from drowning at \(t\) is just the absence of any willed bodily movements by \(A\) at \(t\), which bodily movements would have had the property of causing \(X\) to survive the peril be faced from drowning.\(^\text{109}\)

There is no distinct concept of omissions here; only the plugging in of my positive theory of action to my generic notion of an omission to say what it is that is absent when an action is absent.

Fletcher's confusion here is more serious than just confusing species and genus. It also leads him to misunderstand the specific notion of omissions as the absence of willed bodily movements. Fletcher thinks that if there are willed bodily movements by \(A\) at \(t\), then there is no omission by \(A\) at \(t\). For example, "not voting is hardly the absence of bodily movement. One could be engaged in an infinite variety of activities in the time one should be voting.”\(^\text{110}\) Yes, but unless those activities instantiate the type of

\(^{107}\) Id. at 1444.

\(^{108}\) Id. at 1445 n.11.

\(^{109}\) MOORE, supra note 1, at 28.

\(^{110}\) Fletcher, supra note 89, at 1452; see also id. at 1448 ("[W]hether the mother remains motionless as her baby dies is totally irrelevant" to whether she omits to save
action in question, namely voting, one is still omitting to vote by my criteria for an omission. What Fletcher fails to put together is that it is the absence of willed bodily movements that instantiate some type of act V that is an omission to V; mere presence of bodily motions at the time in question is irrelevant.

I thought that I had made this relatively clear in Act and Crime. My example was the person, A, who omits to throw a rope to another, B, who is drowning. A dances a jig in celebration as B drowns. Is A now an actor? Yes, although plainly not a killer of B because A's dancing is not "causally relevant to B's death."112 Does the fact that A is an actor at t preclude A being an omitter at t? Not in the least. A omitted to will any bodily motions that were relevant to preventing B's death. He did not, for example, throw a rope to B. A therefore omitted to save B while A did something else, namely, dance. (To be blunt, I think I deserved a more careful reading here by Fletcher; and if he omitted to read this passage at all, it was an omission for which I cheerfully hold him fully responsible.)

Let us now come to the "motionless actor" objection proper. Consider first this proposed counterexample from Corrado:

Suppose . . . 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 . . . , am I not liable for killing her?113

I think the correct answer to this is plainly a "no." Corrado has not done anything by sitting motionless in the car with his hands on the wheel. (He may have trouble proving that he did nothing to cause his enemy's death, but it is, as Corrado said at the Symposium, his hypothetical, and we can know with the certainty of an omniscient novelist that Corrado did not move.)

Corrado apparently thinks that the motion of the car makes some difference here. Yet by hypothesis, the "driver" did nothing to start the car's motion. The motion of the car is irrelevant, as is the corresponding motion of the "driver" that is not willed or caused by him.114 Corrado no more kills in his hypothetical than

her baby).

111 See MOORE, supra note 1, at 29 (arguing that the mere presence of bodily motions at the time of an omission does not make it any less of an omission).
112 Id.
113 Corrado, supra note 44, at 1540.
114 As Aristotle noted long ago with his example of a man not acting when he is
he would if he were thrown off a cliff by the wind, his body landing on his old enemy and thereby causing the latter's death.

Corrado presents a variation of his motionless driver hypothetical where our sense of responsibility and of action is stronger:

I am driving down a long, straight highway; the car is on cruise control, and I am not moving the wheel .... 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. ... Thereafter I do not move, and the car runs over my old enemy, killing her.\(^{115}\)

Surely, Corrado concludes, he killed the woman, yet he, Corrado, was motionless.

Corrado anticipates most of the five things I want to say about this case. The first is whether the driver does kill his old enemy because the driver's earlier willed bodily motions in starting and driving the car caused the death in question. Corrado puts aside this anticipated response by me because there is no culpable mens rea existing in the driver at those earlier times, quoting me to the effect that culpable mens rea must be simultaneous with the wrongful action.\(^{116}\) This is true enough for the ultimate question of responsibility and liability, but it does not deal with the metaphysical question of action. For I do think that the earlier acts of driving are sufficiently proximate that they caused death, and therefore the driver did kill his old enemy. The intervening omission to turn does not alter that analysis.

But Corrado is right in his conclusion on liability: We cannot hold the driver liable for his earlier acts, because even though they were acts of killing, they were not caused or even accompanied by culpable mens rea. So consider, secondly, whether we should fudge this question in the way invited by the Model Penal Code.\(^{117}\) According to the Code, we only need find a larger "course of conduct" included in which is some willed bodily motion.\(^{118}\) We are thus invited to say that the whole sequence of starting to drive, driving, and then remaining motionless is one "course of conduct," that at some point during its happening a culpable mens rea arose,

Carried by the wind. See Aristotle, Nichomachean Ethics 52 (Martin Ostwald trans., 1962).

\(^{115}\) Corrado, supra note 44, at 1538.

\(^{116}\) See id. at 1538-39.

\(^{117}\) See Model Penal Code § 2.01 (1985).

\(^{118}\) Id. at 218 cmt. 1.
and that this larger whole both caused death and includes within it some willed bodily movements. This sloppy analysis, although common enough, is unacceptable because of its unprincipled mode of aggregation of actions into one "course of conduct." This accordion-like concept invites the kind of skepticism I explore briefly in *Act and Crime.*

Nor can one deal with Corrado's second kind of case with the third possibility here, the true doctrine of "embedded omissions" that I explore in *Act and Crime.* The Graham Hughes/Hyman Gross analysis would treat the absence of any movement turning the wheel as a circumstance in the presence of which the accused performs the (positive) action of driving. Yet Hughes and Gross cannot so analyze this case, because the acts of the driver are done before the relevant time during which the omission to turn occurs. One cannot thus treat the failure to turn as a circumstance in the presence of which positive actions are done. Only the effects of positive actions are continuing when the driver sees his old enemy in the road, and on my theory of action these effects (such as movement of the car) are no parts of the earlier acts of driving.

Fourth, in some of the cases Corrado imagines there may well be either the kind of displacement-refrainings or resistings that I explore shortly herein. These are cases where an actor either moves one part of the body in order to keep another still, or he resists an outside force that would move his body unless he exerts himself. In Corrado's hypothetical, however, he stipulates that he is only "lightly resting [his] hands on the wheel and failing to move them." That leaves only the fifth and last possibility for holding his "driver" for some form of homicide. This is the possibility I relied upon during the Symposium: the driver is liable, not because he intentionally killed his old enemy, but rather, because he innocently caused (by his earlier willed bodily motions of driving) a condition of peril for his old enemy that makes it his duty to rescue him. It is like lowering a safe over another that then breaks away: if I can

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119 Fletcher, for example, seems to buy into this way of thinking, although he wrongly thinks that I join him in it. See, e.g., Fletcher, supra note 89, at 1445 n.8.
120 See MOORE, supra note 1, at 35-37 (explaining that the act requirement is fulfilled only if one can find a voluntary act by the defendant accompanied at that time with the requisite mens rea).
121 See id. at 31-34 (explaining the Graham Hughes/Hyman Gross analysis).
122 See id. at 280-301.
123 Corrado, supra note 44, at 1538 n.30.
prevent the safe from falling by no more than flipping a safety catch, I surely am duty-bound to flip it. If I omit to flip the switch with a culpable mens rea, then I am liable for my omission. As I discuss such cases in *Act and Crime*, these are cases of true omission liability. They are not, however, counterexamples to my analysis of action.

Corrado objects that I cannot finesse his counterexample in this way. The creation-of-peril exception to omission liability
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.

But he did. His presence in the road is reasonable but that has no bearing on the *innocent* causation of the condition of peril exception. His victim may be unreasonable, and she may have contributed causally to her own peril, but that also does not take Corrado out of the exception. He put a force in motion that if he does not stop or redirect will kill. He thus has a duty not to omit to stop or redirect this force, which duty he culpably fails to fulfill.

Fletcher too seems enamored of supposed motionless actions.

His example:

Suppose that one of the guards at Buckingham Palace enters into a conspiracy with outsiders to kill the Queen. His signal to them about when they should bomb a certain portion of the palace is his remaining motionless an extra five seconds after the other guards begin to change their posture. . . . He contributes to her death by signaling that the bombing should proceed.

But this is easy for my theory. The guard caused the coconspirators to understand where the bomb should be placed by his earlier act of telling them where to place the bomb; his only caveat was that

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124 See *Moore*, supra note 1, at 34.

125 Corrado, supra note 44, at 1539.

126 Corrado makes two other worrisome points: (1) the punishment should be less if there is true omission liability than it would be for killing; and (2) true omission liability may not be as infrequent as I assume in *Act and Crime*. See Corrado, supra note 44, at 1539-40. In reference to (1), as I argue shortly in response to Freeman, some positive duties may be quite stringent, such as the duty to save one's own child. Stopping whatever we have put in motion from killing is surely also more stringent than our general moral duty to rescue strangers whom we have not imperiled. In reference to (2), I actually think that it takes considerable contrivance to manufacture counterexamples like Corrado's. Fortunately for my theory, the real world is not often so devious.

127 Fletcher, supra note 89, at 1447-48.
they were not to so place the bomb if he signaled them not to do so by moving with the other guards. The guard then omitted to so signal them by remaining motionless. The earlier act of speaking involved bodily motions, and thus was an action; when the speaking caused Austinian uptake with the coconspirators, it then became an act of communicating. The act done was not an act of signaling, as Fletcher believes, for that is precisely the kind of act he omitted to do by standing still. The earlier act of communication the guard did do is enough aid to make the guard liable even under traditional complicity doctrines, let alone under the more lenient Model Penal Code or Pinkerton doctrines of complicity.128

Fletcher elsewhere considers a variation on the Buckingham guard:

Tourists regularly pause and stare in wonderment at the motionless guards standing in front of Buckingham Palace. Standing without moving for a few minutes is a feat worthy of praise at least as much as doing a back flip off the diving board. And standing motionless on one's head is an even greater feat.129

Shortly before he gives this example Fletcher complains that I have given a "reckless summary of a complicated literature" on omissions.130 Yet if Fletcher had followed the cross-references I gave in that summary of that literature, he would have seen that both that literature and I had dealt precisely with his kind of case. In Act and Crime I quote Myles Brand, for example: "The policeman who keeps his arm at his side and does not shoot the fleeing youth refrains from shooting him. . . . Idiomatically, we would simply say that he refrains from shooting the fleeing youth by keeping his hand by his side. Refraining, then, is one type of action."131 In Act and Crime I also quote the case posed by Julia Annas: "[W]hat about omissions and cases where acting involves precisely not moving the body? Suppose the boy stands on the burning deck, whence all but he had fled? It is his standing which is his action, and this involves no bodily movement, unlike his coming to stand there."132

128 See Pinkerton v. United States, 328 U.S. 640, 645 (1946) (holding that coconspirator can be found guilty of all substantive offenses committed in furtherance of the conspiracy even if they were not directly involved in the commission of the substantive offense); MODEL PENAL CODE § 2.06 (1985) (defining the liability for the conduct of another).
129 Fletcher, supra note 89, at 1445.
130 Id. at 1444 n.6.
131 MOORE, supra note 1, at 88 (quoting Myles Brand, The Language of Not Doing, 8 AM. PHILO. Q. 45 (1971)).
132 Id. at 88 n.26 (quoting Julia Annas, How Basic Are Basic Actions?, 1978 PROC.
Fletcher’s hypothetical adds nothing to those of Brand and Annas, and so I shall simply repeat my reply to them, to Fletcher.

Briefly, I use another portion of the literature Fletcher would like to see used in a nonreckless way, an article by Bruce Vermazen. We should distinguish, Vermazen tells us, “resistings” and “displacement refrainings” from Brand’s more generic “refrainings.” “A resisting occurs when an agent’s body is about to be made to move by outside forces, but he keeps his body from moving by activating the appropriate muscles.” Fletcher’s example of standing on one’s head is a good example of resisting, where Vermazen and I would conclude there is an action. For in such cases the actor constantly adjusts his muscles in order to keep gravity from moving his body. As long as we “reconstrue ‘bodily movements’ to include muscle-flexings,” as we should in these cases where we use our muscles to resist an outside force, there is nothing inconsistent with my theory of action in concluding that such resistings are actions, not omissions.

A displacement refraining occurs when the actor keeps one part of his body from moving by moving another part of his body. Vermazen’s example: Andy, who is tempted by food in front of him, keeps himself from eating it by twisting the buttons on his vest (which keeps his hands occupied so that they cannot reach for food). A more common variation: Alice lights up and smokes a cigarette in order not to eat. There is obviously no problem for my theory of action in concluding that actions occur in such cases even as one is omitting to do certain other actions.

About Brand’s and Annas’s examples of refrainings more generally, as about Fletcher’s Buckingham Palace guard, my conclusion in *Act and Crime* still stands: “[S]uch refrainings are not actions.” Standing still may become so difficult physically that it is like standing on one’s head, in which case it will become a resisting and thus, on my account, an action; yet as Annas’s example of the boy “frozen” to the desk illustrates, one usually stands still and in standing still does nothing at all.

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135 See id. at 88-89 (relying on Bruce Vermazen, Negative Acts, in Essays on Davidson: Actions and Events (Bruce Vermazen & Merrill Hintikka eds., 1985)).

134 Id. at 87 (quoting Vermazen).

135 Id. at 88 n.24.

136 See id. at 87.

137 Id. at 88.
A third set of worries about my conceptualization of omissions stems from my denial that omissions cause anything. Recalling my view that omissions are "literally nothing at all," I defend Julie Andrews's view in *The Sound of Music*: "Nothing comes from nothing, and nothing ever could."

Among the Symposium participants only George Fletcher appears to challenge this aspect of my theory. Unfortunately Fletcher merely contents himself with asserting what I deny. Fletcher asserts, "But surely, unexpected nonmotion could be the cause of death." Fletcher recognizes that I think the opposite: "Moore says that he has an argument against omissions as causes, but I find no case against the plausible position of Hart and Honoré that failing to water the plant, when one reasonably expects the contrary, causes it to die."

Fletcher did not look very hard. In *Act and Crime* I address six separate arguments against any notion of causation that would allow omissions to be causes. Since Fletcher did not find those arguments, or in any case does not address them, I shall not repeat them here. About examples like failing to water the plant, notice that Fletcher's use of "causes" here need mean no more than the counterfactual: in the possible world where we do water plants, then, all else being equal, they do not die. This is a true causal generalization connecting actions of watering with states of continued plant life. It is this generalization, and not some causal relation between a particular omission to water and the death of some plant, that we invoke when we loosely talk of omissions causing things to happen.

Fletcher does better with his legal observation that when our criminal system does hold omitters liable, it sometimes does so under statutes prohibiting killings, maimings, and the like. Since on my own showing these verbs of action require a causing of death for their correct application, our law must presuppose that

138 Id. at 28.
140 Fletcher, *supra* note 89, at 1448.
141 Id. (footnote omitted).
142 See MOORE, *supra* note 1, at 267-76.
143 See Fletcher, *supra* note 89, at 1450.
omissions can be causes. Fletcher is right about our law; our law is simply wrong about the metaphysics, as is Fletcher.\footnote{See MOORE, supra note 1, at 267-76 (arguing that omissions cannot be causes).} Anglo-American criminal law cannot make omissions be causes when they are not. It can only require those who apply it to come up with some substitute for causation in the case of omission liability; and this we easily do with the counterfactuals mentioned earlier.

\section*{D. Killing/Letting Die and Act/Omission}

Finally, there are a host of interesting thoughts introduced by Frances Kamm's article\footnote{See F.M. Kamm, \textit{Action, Omission, and the Stringency of Duties}, 142 U. PA. L. REV. 1493 (1994).} that promise to supplement my act/omission distinction with other distinctions she finds to be morally salient. Kamm agrees with my conceptualization of the act/omission distinction: "[A]n act is a willed movement, an omission is a nonact of a particular sort, and . . . omissions do not cause events."\footnote{Id. at 1495.} Kamm focuses on the morally salient act-type killing, to supplement the act/omission distinction with two other distinctions.

The first is the distinction between killing and letting die. This distinction is drawn with the aid of two background distinctions: (1) where the act is the original cause of death versus where the act only removes a defense against some force that will actually cause death unless the defense remains in place; and (2) within the removal-of-a-defense-against-death cases, where the actor removes a defense he himself was providing versus where the actor removes a defense independent of any that he was providing.\footnote{See id. at 1497-98.} A killing is an act that either is an original cause of death or is a removal of a defense against death that was being enjoyed by the victim independently of any provided by the actor.\footnote{See id. at 1498.} A letting die, by contrast, occurs when the actor's act is not an original cause of death and is only the removal of a defense against death that had been provided by the actor herself.\footnote{See id.}

Kamm's second distinction is within the class of killings and, indeed, within that subclass of killings that are killings because each is an act that is an original cause of death. Within this subclass
Kamm wants to distinguish some killings that "have practically the same moral weight as the letting die by actively terminating aid," because such killings only cause the death of someone who was dependent upon the actor for some defense against an otherwise naturally occurring death.\(^{150}\) For example, the person providing another with life support stabs him rather than terminating the life support and letting nature take its course.

Kamm recognizes that these two distinctions have some affinities with the "relativized baseline test" I put aside as a test of act versus omission.\(^{151}\) For both the letting die and the lesser wrong killings analogized to letting die do no more than return the victim to the status she would have been in absent the actor's initial help. My refusal to use the relativized baseline test as the basis for drawing the act/omission distinction does not mean I reject the moral force of Kamm's distinctions. On the contrary, I agree with Kamm on the moral force of the distinctions; the only question is how to conceptualize that moral difference.

Kamm and I also agree that the act/omission line is not to be conceptualized in this way. Where we disagree is whether the cases she calls letting die are not cases of killing. I think that they are killings, only killings of such lesser wrong that they (along with Kamm's original cause killings of dependents) are eligible to be justified much more easily than are ordinary killings.\(^{152}\)

To see this alternative conceptualization of her cases, think first of a quite different sort of case, one like Bernard Williams's case of "Jim."\(^{153}\) In my variation, the actor, "Jim," is confronted with a macabre choice: if he selects one innocent villager out of fifteen assembled before a firing squad, that one will be shot but the rest will live; if Jim makes no selection, all fifteen will be shot. I am a deontologist about killings, so that one has an agent-relative moral duty not to kill.\(^{154}\) Nonetheless I think Jim ought (or is at least permitted) to make his selection, for by doing so he is not killing. His act of selection is certainly an act; it enables another to kill; but

\(^{150}\) Id.

\(^{151}\) MOORE, supra note 1, at 27.

\(^{152}\) I explain the idea of killings, torturings, and other wrongful acts being "less wrong" when done in certain circumstances, and being thus more eligible for a consequentialist override of any agent-relative prohibition, in Michael S. Moore, Torture and the Balance of Evils, 23 ISR. L. REV. 280, 315-27 (1989).


\(^{154}\) See generally Moore, supra note 152.
the act is not a killing because it is not the proximate cause of
dead.\footnote{See id. at 311-12.} Between that act and the death that it enabled inter-
vened the free, informed voluntary choice of the captain of the
squad to kill.

Since killings are acts causing deaths, Jim does not kill.
Therefore his act of enabling death does not violate the agent-
relative prohibition against killing. But can we say the same of
Kamm's cases of letting die? When we turn off the respirator of the
patient whom we ourselves are keeping alive with it, and the patient
dies, there is no "break" in the "causal chain" between our act of
flipping off the switch and the patient's death. We therefore kill the
patient just as surely as does an intruder who does the exact same
sort of action with the same sort of result.

We thus must locate the moral force of Kamm's letting die/
leaving distinction elsewhere. I would locate it as a partial exception
to the moral norm against killing.\footnote{See id. at 302-05, 310-11.} When all in a lifeboat will
die anyway, it is permitted to kill one in order to save the rest.
When a flood comes down a canyon, it is permitted to kill the
occupants of a farm by removing a dike that would have protected
them, if that was the only way to save all in a village from death in
the flood. These are the well-known "already dead" and "distribu-
tion" exemptions,\footnote{Id.} relieving us from the rigors of deontology so
as to permit killings to be justified by sufficiently good conse-
quences.

What such exemptions show us is not that these acts are not
killings. Rather, they show us that such acts are sufficiently less
wrong that good consequences—consequences which would not
justify ordinary killings—may justify these kinds of killings. Such
lessened wrongness also attaches to Kamm's cases of letting die and
of killing of dependents. Given this lesser wrongness, such killings
are much more easily justified by good consequences than are
ordinary killings. This is why I said in Act and Crime that any
relativized baseline conception of the act/omission distinction "can
be used to smuggle notions of justification in" as supposed
differences in action.\footnote{Moore, supra note 1, at 27.} I still think it preferable to keep this
differential for potential justification out in the open, which

\footnote{Id.}
requires that acts of letting die be recognized for the killings that they are.\textsuperscript{159}

IV. OMISSIONS: NORMATIVE ISSUES

A. The Variability of Wrongness and Liberty Limitations in Particular Cases

Samuel Freeman and George Fletcher introduce a pair of difficulties that, while distinct, share a common solution. Freeman’s point has to do with the lesser wrongfulness of violating our positive duties to act, or not to omit, as compared to the greater wrongfulness of violating our negative duties not to act.\textsuperscript{160} Freeman concedes (at least arguendo) that in any pair-wise comparison, a negative duty might be more stringent than its positive counterpart—the duty not to kill is more stringent than the duty to prevent loss of life—yet he denies that all negative duties are stronger than any positive duty: “Many failures to improve the world enormously outweigh in moral heinousness many acts that make it worse.”\textsuperscript{161} Freeman’s example: It is more wrong to let a stranger’s child drown when she could be saved at no risk and minimal effort than it is to steal the child’s purse.\textsuperscript{162}

By this observation, Freeman means to question one-half of my justification for not punishing most omissions on retributive grounds. I argue that while some failures to act are wrongful, they are not nearly as wrongful as their counterpart evil actions, so that the demand for punishment and retributive justice is less strong in the former cases than in the latter.

Fletcher questions the other half of my account of why we by-and-large do not punish omissions, even when these violate a moral duty and are therefore wrongful.\textsuperscript{163} The other half of my account

\textsuperscript{159} I am unclear whether Kamm wishes to call duties not to do original cause killings of dependents and not to let die (where such duties exist) negative or positive. I suspect that she thinks that it violates a positive duty to let die and that it violates a negative duty to kill dependents (in those situations where such duties exist); whereas I think all killings—which include many of Kamm’s letting die cases—violate a negative duty, if they violate a duty at all. We probably disagree about where the negative/positive line is most fruitfully drawn even though we may have no disagreement about the relative moral stringency of any of these moral duties.

\textsuperscript{160} See Freeman, \textit{supra} note 3, at 1462-64.

\textsuperscript{161} Id. at 1463.

\textsuperscript{162} See \textit{id}.

\textsuperscript{163} Fletcher, \textit{supra} note 89, at 1450-51.
is a liberty argument: A law that (positively) coerces the doing of some action takes away more liberty than does a law that (negatively) coerces the not-doing of some action. Fletcher accurately gauges the intuition behind this idea: on an opportunity-set conceptualization of liberty, a requirement to do some act A effectively prohibits one from doing acts B, C, D, and so on, whereas a requirement not to do some act A only prohibits one from doing A.164

Fletcher raises two objections to this intuition. First, "[w]hether a demand or a prohibition is more noxious depends on the content of that which is demanded or prohibited."165 Fletcher opines that prohibiting certain sexual practices (such as sodomy) may be more liberty-limiting than requiring the use of condoms.166 Second, whether liberty is taken depends on the actor's wants. Not being able to do acts one has no desire to do does not take away any liberty.167

Fletcher's second point rejects the opportunity-set notion of liberty, so I shall reserve my consideration of it until later. Freeman's point and Fletcher's first point can be combined to articulate a single objection: some omissions may be sufficiently wrong, and the liberty diminished by a positive requirement that such actions not be omitted may be sufficiently small, that a retributivist ought to urge the punishment of such omissions. My general observations about differentials in wrongness and liberty may well be correct, and yet together they will not justify a blanket policy of not punishing omissions.

One might agree with Freeman's point that some violations of positive duties are morally worse than some violations of negative duties, and one might agree with Fletcher's point that some affirmative requirements impinge liberty less than some negative prohibitions. There would then be a theoretical possibility that we should criminalize more omissions than we currently do. Yet one would want to see the examples. Freeman's example that the wrongness of omitting to save the child is greater than the wrongness of stealing the child's purse will not do because the liberty differential is still there. It diminishes liberty less to prohibit theft than it does to require lifesaving activities. Fletcher's example

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164 See id. at 1451.
165 Id. at 1450.
166 See id. Freeman raises a similar objection to my claims about liberty. See Freeman, supra note 3, at 1479.
167 See Fletcher, supra note 89, at 1456.
comparing the liberty diminished by a prohibition of sodomy versus a requirement of condom usage will not do because the wrongness differential still exists. From the moral viewpoint (that I do not share) that regards “deviant” sexual practices as wrong, these acts will be much greater wrongs than the omission to wear a condom in “nondeviant” sex. On such a view of morality, acts of sodomy should be punished, and the omission to use a condom should not, because of this differential in wrongness—even conceding Fletcher his desired reversal of the normal liberty differential between the negative prohibition and the positive requirement.

Aside from waiting for better counterexamples—ones where the wrong to omit is serious and the diminishment of liberty by the positive requirement is minimal—there is something else that needs to be said here that was not said in Act and Crime. Frances Kamm gets at this with her observation that “there are cases in which a negative duty is more stringent than a comparable positive duty, even though failing to perform the negative duty would make the world better. For example, I must not euthanize someone against his will even though death would be in his interest.”

Kamm is surely right to separate the stringency of moral duty from the degree to which nonfulfillment of a duty will make the world better or worse. Good or bad consequences are not the measure of the stringency of an agent-relative duty. We should also separate, as Freeman does not, stringency of moral duty from the moral heinousness of the character of the person violating the duty. Beneficently motivated killing can violate a very stringent moral duty and yet evidence a not-so-heinous character in the killer.

Kamm thus rightly focuses on the stringency of moral duty to the exclusion of these consequentialist and characterological considerations. Kamm’s explanation for the differential stringency of negative over positive duties is in terms of rights-based (as opposed to only rights-correlated) duties. Negative duties are grounded in the right of each person to “a certain sort of inviolability of the person” whereas positive duties are not. Positive duties may have correlative rights in the victims of their violation, but they are not rights-based duties.

Although I find Kamm’s suggestion interesting and worth pursuing, my own explanation for the differential in stringency

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168 Kamm, supra note 145, at 1495-96.
169 See id.
170 Id.
between negative and positive duties is different. Consider three duties: (1) the (negative) duty not to kill; (2) the (positive) duty to prevent the death of one’s own child; and (3) the (positive) duty to prevent the death of a stranger-child. Freeman is right that I am not enough of a libertarian to deny that we have each of these moral duties.\(^{171}\) I do deny that the third is an agent-relative obligation, whereas the first plainly is. We ought not to kill even in situations where our doing so would prevent more killings by ourselves or others in the future; yet one cannot say the same of when we ought to prevent the deaths of strangers. If we confront one stranger-child in the water needing rescue, we are surely entitled not to save her if, by swimming to a larger group of drowning children, we can save them. Our duties not to omit are consequentialist (or “agent-neutral”) in their nature. Such duties are, for that reason alone, not among the stringent duties we call “deontological” or “agent-relative” duties, and the wrong of violating such duties is correspondingly less.

Some positive duties nonetheless may approach the stringency of negative duties in that such positive duties are plausibly thought to be agent-relative. The second duty above, the duty to save one’s own child, is such a duty. I take it that we at least have an agent-relative permission to favor our own child over another—or even over several others—equally in need of rescue.\(^{172}\) But we also have an agent-relative obligation to save our own child even if doing so means we cannot rescue some number of others, and this agent-relative obligation to rescue compares favorably (in terms of stringency) with the agent-relative obligation not to kill. Might not I be obligated to kill an innocent if doing so was the only way to save my child? (Even if this last question is to be answered negatively, the difficulty of answering it indicates the near parity in stringency of the two duties.)

In any case, the distinction between agent-relative and agent-neutral duties at least explains the across-the-board greater stringency of all negative duties versus (almost) all positive duties. It may also explain why some positive duties are nearly as stringent

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\(^{171}\) See Freeman, supra note 3, at 1461-64.

as their negative counterparts, a moral fact recognized by our criminalizing omissions that violate such stringent positive duties.

B. Liberty as a General Freedom to Act

In addition to their questioning of the differential amount of liberty taken away by criminalizing positive duties as opposed to negative ones, Fletcher and Freeman also question the opportunity-set notion of liberty that makes sense of such quantification. Fletcher's objection, as we have seen, depends on his thesis that liberty is want-relative in the sense that someone must want to do some action \( A \) before coercion against \( A \) limits that person's liberty.\(^7\) This is surely wrong. Think of the old conundrum about false imprisonment: If the victim does not know of the confinement because she never desires to leave the room, has she been confined?\(^4\)\(^7\) Surely the answer is yes, for the wrong of confining another and the loss of being confined are objective matters that do not depend upon the subjective state of mind of the victim. Happy slaves are still slaves. They may not want to do anything other than what they must do, but they are still slaves because they are not free.

Freeman has a more interesting basis for rejecting any opportunity-set notions of freedom.\(^1\)\(^7\) Freeman shares with Ronald Dworkin (and many other nonlibertarian, egalitarian liberals) the rejection of any value to the natural liberty to do whatever one might wish:

[\textit{Surely there is nothing intrinsically valuable about the natural liberty to do wrong . . . . To assign intrinsic value to natural liberty as such would imply that legal restrictions per se diminish this intrinsic value and that there is ethical loss with the imposition of any legal restriction. But what could that loss be in the case of legal restrictions on clearly unjust or evil conduct?\(^1\)\(^7\)}]

Freeman thus rejects my idea that there is value in our natural liberty even when we exercise it so as to "make the wrong choice."\(^1\)\(^7\) Rather, Freeman thinks that there are only basic

\(^{173}\) See Fletcher, \textit{supra} note 89, at 1451.

\(^{174}\) Prosser's answer (even in torts, where there must be a compensable injury) was "no." See generally William L. Prosser, \textit{False Imprisonment: Consciousness of Confinement}, 55 COLUM. L. REV. 847 (1955).

\(^{175}\) See Freeman, \textit{supra} note 3, at 1484-86.

\(^{176}\) Id. at 1486.

\(^{177}\) MOORE, \textit{supra} note 1, at 57.
liberties, those more discrete rights such as the right to speak freely, to think, and to worship as we please, and the like.\textsuperscript{178}

This is doubtlessly not the place to launch a defense of this well-worn question in political philosophy. Freeman is accurate in gauging what view of liberty underlies my brief references to liberty in \textit{Act and Crime}.\textsuperscript{179} For I do think that there is value in each of us having the natural liberty to do what we please, including the liberty to violate Freeman's "perfect duties" (that is, to make the wrong choice).\textsuperscript{180} This liberty is the basis of the right of each citizen to be free from legal coercion not exercised for legitimate reasons; the correlative duty of each legislator being to enact criminal laws only in pursuit of those reasons. Those legitimate reasons for criminal legislation include punishing culpably done wrongs, but the good of punishing culpable wrongdoers must outweigh the bad of coercively interfering with choice.

It is a mistake to confuse this right to natural liberty with the much narrower, but much more powerful, right to noninterference with certain sorts of decisions. What we think or say, what religious experiences we value, what sexual practices we admire, and whether we decide to have children, are part of what makes us who we are. They are aspects of a more powerful basic liberty that is easily confused with the broader but much weaker natural liberty. If one distinguishes these two different liberties, then one can agree with Freeman that "however this list of basic liberties is drawn up in the end, it will not include a liberty to violate perfect moral duties."\textsuperscript{181} It will not, because the choices that can violate such duties are not the sort of self-defining choices protected by the more basic right to liberty. Freeman thus attributes a view to me that I do not hold insofar as I am said to think that "inchoate 'liberty' itself is an intrinsic good worth protecting whatever the costs."\textsuperscript{182} The basic liberty to define oneself may be so worth protecting, but a general, natural liberty certainly is not. But that is not to say that the general, natural liberty is not valuable at all.

Why is there any value in a natural liberty that includes a liberty to do wrong? Why should we be free of legal coercion when what we are coerced to do is our own perfect duty? Consider Freeman's

\begin{flushleft}
\textsuperscript{178} See Freeman, \textit{supra} note 3, at 1485.
\textsuperscript{179} See \textit{id.} at 1486.
\textsuperscript{180} \textit{id.} at 1488.
\textsuperscript{181} \textit{Id.}
\textsuperscript{182} \textit{Id.} (emphasis added).
\end{flushleft}
own example, Kant's imperfect, ethical duty of beneficence. Suppose that those of us who could easily afford it were under a duty to give a portion of our income to the poor. As Freeman notes, Kant wished "to make it a matter of an individual's discretion to choose when to fulfill this duty and whom one should benefit as a result." After all, to be coerced into giving is hardly to give at all, and in any case, a coerced "giving" is not nearly so virtuous as a voluntary giving. Is not this concern perfectly general: whenever the law coerces, it cuts into the possibility of freely chosen good. The value of natural liberty lies in the possibility of autonomously chosen good, recognizing that the price a legal system pays for such a possibility is a matching possibility of a greater number of unmet duties.

C. Legality Worries About Omission Liability

George Fletcher raises a little noticed problem about criminal liability for omissions that is not addressed in Act and Crime, which is that Anglo-American penal codes do not always spell out what it is one must not omit to do. Homicide statutes prohibit acts of killing, for example, but there is no analogous statute criminalizing failures to save another when that other dies but could have been saved. Rather, our criminal codes rely on the simple statutory prohibition on killing, together with the case law defining when there is a duty to prevent death, in order to criminalize omissions to save.

Fletcher finds there to be a "wholesale breach of legality in the judicial development of duties that supplement the law of homicide." There are actually two legality worries here. The one apparently troubling Fletcher is the existence of nonstatutory law that spells out when there are affirmative duties to prevent harms such as death which one is statutorily prohibited from actively causing (such duties exist for parents, undertakers of rescue, culpable or innocent causers of the condition of peril, and the like).

There is also another legality worry about the present criminalization of certain omissions, which stems from the metaphysical fact that an omission to save, even when a death ensues, is not a

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183 Id. at 1476.
184 See Fletcher, supra note 89, at 1450.
185 Id.
killing. 186 Statutes prohibiting killings thus do not command acts of saving lives any more than those prohibiting burnings, maimings, or kidnappings command acts of burn-prevention, disfigurement-prevention, or asportation-prevention. It is only because courts analogize the failure to save a life that could have been saved, to killing, that allows them to punish omissions to save life under our homicide statutes. This smacks of “crimes by analogy,” one of the practices frowned upon by the doctrine that there are no common law crimes. 187

Given the moral and metaphysical views presented in Act and Crime, the second of these legality worries would seem more serious than the first. Not only are omissions to save not killings, but acts that are killings are the more serious moral wrong, even when saving is obligatory and not merely supererogatory. The enactment of omission statutes would thus be desirable for two reasons: (1) such statutes would command actions (prohibit omissions) that now are punished despite not being anywhere by statute required; and (2) such statutes would attach lesser penalties to the omission to save than to active killing, a lesser punishment juries and judges now typically give anyway but without statutory guidance or authorization.

D. Demonstrating the Comparative Strengths of Negative Versus Positive Duties: Kamm’s Post-Efforts Test

Frances Kamm agrees with me that negative duties are more stringent than positive duties, and she sees that I support this common conclusion with what she calls a defeasibility test. 188 Kamm helpfully seeks to supplement my use of a defeasibility test with what she terms her “post-efforts” test. 189 What this test asks is what efforts would be morally appropriate to require of someone in order to prevent a harm he has either begun to cause by his action or begun to omit to prevent by his inaction.

Kamm actually relies on two different ways of applying her test. The first asks what the actor or omitter should feel compelled to do in order to correct or prevent the harm. Kamm’s example: The would-be killer who had almost drowned a baby should have to offer

186 See MOORE, supra note 1, at 267-78.
187 On legality, analogy, and common law crimes, see id. at 240.
188 See Kamm, supra note 145, at 1494.
189 See id. at 1501.
her life if doing so (for example, by giving her last breath underwa-
ter) would revive the submerged infant; yet the would-be omitter to
save a drowning baby should not have to make this kind of sacrifice
in order to save the life she previously had omitted to save.

Kamm's second application of the test is ask what we could
properly do to the actor/omitter after she has started to act or omit.
To use her example again: We may kill a person who is drowning
a baby in order to prevent the baby's death whereas we may not kill
an omitter even if that will save the baby she is omitting to save (for
example, by giving an incentive to the person standing next to her
not to continue to omit to save the baby). From both of these sorts
of applications of her test Kamm concludes that killings are worse
than omissions to save.

I have two worries about the post-efforts test. My first worry
corresponds with Kamm's third-person application of the test. There is a gap between both preventative and corrective justice, on
the one hand, and retributive justice on the other. As the literature
on moral luck rather abundantly illustrates, we often have
preventative and corrective duties that have a different character
than the duties giving rise to retributive deserts. I may have reason
to prevent, correct, and regret harms that I have caused or am
innocently causing, but that does not mean that I should be
punished for such innocently caused harms. I may have no
retributive desert even though I have strong preventative and
corrective duties.

My second worry corresponds to Kamm's first-person applica-
tion of her test. Here, we are testing retributive desert, because we
are asking what we may do to someone who is killing/omitting to
save in order to get her to stop/start. My fear is that we are not
testing anything but pure retributive intuitions about comparative
deserts: we may do more to prevent the would-be killer's killing
than we may to induce an omitter to save a life because killing a
killer is less wrong than killing an omitter; but this last is only
true because killers have greater moral deserts than omitters. Yet
this conclusion was the "direct intuition" about just deserts that the
post-efforts test was to supplant or at least supplement.

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190 Reviewed and discussed in Michael S. Moore, The Moral Significance of
Wrongdoing, 5 J. CONTINUING LEG. ISSUES (forthcoming 1994).

191 This goes back to my earlier discussion, see supra note 152, of how some
killings, although wrongful, can be less wrongful from even an agent-relative view of
morality.
I say all of this rather provisionally because I welcome all the help I can get in arguing for the difference in moral stringency between positive and negative duties. Perhaps Kamm's post-efforts test can be reformulated so as to avoid these difficulties, or perhaps these are not real difficulties, in which case hers is a welcome addition to my more familiar defeasibility test.

V. CONCURRENCE OF ACT, CAUSE, AND KATZ

Leo Katz in his contribution to this Symposium restricts his focus to the relationship between the voluntary act requirement and the other elements of the prima facie case for criminal liability. In Act and Crime, I defend the standard view of that relationship: the accused's voluntary act must simultaneously exist with, and in some cases be caused in the right way by, his culpable mens rea, and that act must itself cause some legally prohibited result. Leo Katz disagrees. He denies that the causal linkage of mens rea-voluntary act-prohibited result is sufficient for even prima facie criminal liability (prima facie liability is liability without considering excuses or justifications typically raised by the defenses); and he denies that the extent of blameworthiness is governed by this relationship.

Katz presents fourteen alleged counterexamples to my concurrence principle. I am confident that not a one of Katz's cases is a true counterexample to my principle. I cannot go through them all in any great detail. I shall thus discuss the first of Katz's examples, show the various reasons making it not a true counterexample, and then show how these reasons equally well handle all the rest of Katz's examples.

Katz's first example is that of Alex and Bruce: Alex outruns his companion, Bruce, so that the bear eats Bruce rather than Alex. Alex performs a number of voluntary acts in running. He does so knowing that the bear will kill Bruce so long as Alex runs faster than Bruce. His voluntary acts in some sense are causally related to Bruce's death at the paws of the bear (if Alex did not run, and Bruce did, Bruce would still be alive). Thus, Katz concludes, this is

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193 See MOORE, supra note 1, at 35-36.
194 This is one of what Katz calls the "ducking" cases. See Katz, supra note 192, at 1516-18.
"a pretty unequivocal illustration of an act that proximately causes harm but does not entail liability."\(^{195}\)

Yet this is not a counterexample to my concurrence principle, for four reasons. First, in some of the “ducking” cases the one who ducks (or runs) is not the proximate cause of the harm because the free, voluntary act of a third party intervenes. This might be true of the bear in the above hypothetical. It is certainly true of other of Katz’s ducking cases, where Alison either switches briefcases or covers her official U.S. government seal, with the desired result that another (Beatrice) is killed by terrorists. The terrorists intended to kill, meaning (on virtually anyone’s notion of an intervening cause) that Alison did not proximately cause death (that is, she did not do the legally prohibited action of killing).

Even if we thought that both Alex and Alison were prima facie liable, they are not actually liable because they were justified or excused by one defense or another. This means that their ultimate non-liability is not a counterexample to my concurrence principle, which only states a sufficient condition for prima facie liability. Each of the next three reasons raises one such possible defense.

Consider first the consequentialist version of the balance-of-evil defense. Alex’s loss of life would be as great an evil as the loss of Bruce’s life, and \textit{mutatis mutandis} for Alison vis-à-vis Beatrice. As is well known, sometimes one can justify otherwise prohibited killings by balancing lives. This is permissible either: (a) when the killing is not your project but is someone else’s; or (b) when the killing is done only by redirecting a force already in motion from its natural victim to another.\(^{196}\) Bernard William’s example of the first is where you are requested to decide who will be shot, but you do no shooting; and in default of a choice by you, all will be shot.\(^{197}\) Judy Thomson’s example of the second is where a flood will engulf an entire village, killing all of its inhabitants, but you may prevent that by redirecting the flood onto one farm, killing only its inhabitants.\(^{198}\)

Katz’s “ducking” cases fit both of these exemptions from the rigors of deontology, permitting consequentialist justifications to operate. Of course, Alex is trading one life for one, as is Alison. The evils thus are evenly balanced. One might well think, however,

\(^{195}\) Id. at 1518.

\(^{196}\) See Moore, \textit{supra} note 152, at 302-15.

\(^{197}\) See \textit{SMART} & \textit{WILLIAMS}, \textit{supra} note 153, at 98-99.

\(^{198}\) For citations and discussions, see Moore, \textit{supra} note 152, at 304-05.
that such a defense ought to be governed by a tipping principle: when the evils are even, the accused does no net evil by killing.

Katz anticipates the possibility of consequentialist justifications here. He therefore alters his example:

[S]uppose that Alison had known she would only be mishandled by the terrorists (perhaps because one of them knows her) but that Beatrice would be killed. She too would still have been entitled to duck (which in this case, of course, means covering her suitcase with an Air Libya sticker).199

This eliminates even a parity between the evil caused and evil averted, and so no consequentialist justification is possible.

Yet this variation reveals the presence of two more defenses lurking to relieve duckers from ultimate liability. One might have (as libertarians in particular often do) what is sometimes called a rights-based view of justification.200 On this view we each have an agent-relative permission not to balance evils but to prefer ourselves to others on certain occasions, (for example, a person otherwise unable to prevent a crotch grope except with the use of deadly force may use that deadly force against the would-be groper.)201 One might also think that we each are entitled to favor our own life (or the lives of those near and dear to us) over the lives of others, when someone must die. On such non-consequentialist versions of justification, we are justified in ducking.

Alternatively, we often excuse people who do a greater evil in order to avoid a lesser one.202 Such people are not justified on consequentialist grounds and they may not be justified on rights-based grounds. The instinct for survival or the fear of loss of one's own life or bodily integrity may be such that we find it understandable that one could not be a moral hero. Running from a bear as fast as one can is surely one such example.

These four reasons recur to remove any sting from many of Katz's examples. Certainly the tale of the sailor and his daughter (Katz's second example)203 offers all four possibilities, being another sort of ducking case. Sometimes what saves the individual

199 Katz, supra note 192, at 1518.
200 See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 182 (1987). Such rights-based conceptions of justifications are really agent-relative permissions to do acts that do not maximize good consequences.
202 On necessity as an excuse, not as a justification, see Michael S. Moore, CAUSATION and the EXCUSES, 73 CAL. L. REV. 1099, 1102-03 (1985).
203 See Katz, supra note 192, at 1518-19.
from ultimate liability is the agent-relative justification for his action (the third of the possibilities mentioned above). Thus, Daniel Drew (Katz’s fourth example)\textsuperscript{204} is entitled to leave a slip of paper that others can “take advantage of” only if they are willing to trade on confidential information. Lincoln (Katz’s fifth example)\textsuperscript{205} is entitled to state the literal truth even though he knows it will mislead his audience, given his agent-relative permission to speak freely in the political arena. Given these justifications for conduct, these situations can hardly be counterexamples to my thesis about prima facie liability.\textsuperscript{206}

In two of Katz’s examples, the third and the sixth, it seems that Katz is just wrong in denying that there is prima facie liability. Ethelbert, the would-be rescuer in Katz’s third example who begins to rescue his old enemy, “sloughs him off, as it were, and swims back by himself.”\textsuperscript{207} If sloughing him off is an act, as Katz says it is, then Ethelbert is liable for homicide. That Ethelbert fits Kamm’s category of a letting die (or perhaps of an original cause killing of a dependent)\textsuperscript{208} does not matter. As I argued earlier,\textsuperscript{209} these are killings, and all Kamm’s categories do make killers eligible for consequentialist justification. Ethelbert has no such justification, so he is not only prima facie liable, but is ultimately liable as well.

Likewise, Veronica, Katz’s sixth example,\textsuperscript{210} is liable for mayhem in taking the drug prior to conception in order to cause the child she (conditionally) intends to conceive to be born without an index finger. Surely we are past the conceptual problem that she need not have conceived the child at all, so she can conceive it in any shape she pleases—the old “greater power includes the lesser” fallacy. Surely we are also past the old notion that she cannot owe

\textsuperscript{204} See id. at 1519-20.
\textsuperscript{205} See id. at 1520. Alternatively, some may think that Lincoln did wrong, but if that is so, he is still not a counterexample.
\textsuperscript{206} Notice that sometimes such justifications do not make their appearance as defenses. At such times, these justifications appear as either the absence of mens rea (for crimes of negligence and recklessness, which require unjustified risk-taking) or as the absence of actus reus (where we say that an act that literally violates some statute does not in law violate such statute because it was justified). On both points, see Moore, supra note 152, at 284 n.4. When justifications operate in these latter two ways so as to defeat the prima facie case, they still present no counterexample to my concurrence principle. Remember that that principle requires concurrence of mens rea and actus reus, and where one or the other is absent, there is no concurrence.
\textsuperscript{207} See Katz, supra note 192, at 1519.
\textsuperscript{208} See supra text accompanying notes 145-52.
\textsuperscript{209} See supra text accompanying notes 156-59.
\textsuperscript{210} See Katz, supra note 192, at 1521.
a duty to the unborn or unconceived. Why then does Katz think that this is "a strong example of an act... proximately causing harm but not constituting a crime"? Presumably because Katz thinks she is justified by an agent-relative permission: she is justified because she will only take the drug if she will conceive, which she will only do if conceiving a finger-defective child is the moral thing to do (which Katz thinks it is because such a minor defect should not bar conception). Whereas I think she would be justified in conceiving at \( t_2 \), knowing of the defect, but that she is not justified at \( t_1 \) in taking the drug in order to cause the defect.

With this sixth example, Katz is really letting the cats out of the bag. All of the examples in his paper from here on share a common form: the agent seeks to find a permissible route to an outcome that is legally prohibited unless justified. Such agents either try to find some agent-relative permission or excuse for their action, in which case they are not ultimately liable because they are either justified or excused; or they seek to remove their actions sufficiently so that they are not the proximate cause of the legally prohibited state of affairs, in which case they are not even prima facie liable. Sometimes they fail in their manipulative attempts, and therefore are ultimately liable, despite what Katz says. All of Katz’s remaining examples fit into one of these three possibilities, none of which are problematic for my concurrence principle.

Septimus, the surgeon, curious about what it would be like to operate drunk, is not liable. First, he was not the proximate cause at \( t_1 \), when he got himself intoxicated, because of the coincidence of a patient’s needing him, and although his drunken acts at \( t_2 \) were the cause of the patient’s injuries when Septimus operated, he was justified in operating (even when drunk) because no one else was available. Obediah, the Charles “Death Wish” Bronson of dog-haters, is liable at \( t_1 \) for provoking the dog to attack him so that he could defensively kill it at \( t_2 \); the dog’s provoked response is not an intervening cause, and Obediah’s justification at \( t_2 \) for shooting the dog in self-defense is not a justification at \( t_1 \) for provoking the dog so as to kill him. (Nor is Obediah justified at \( t_1 \) by retrieving the toy, since the manner of retrieval—"sudden, startling, and aggressive"—was not necessary.

\[ \text{Id.} \]
\[ \text{See id. at 1521-22.} \]
\[ \text{See id. at 1522.} \]
\[ \text{Id.} \]
to retrieve the toy and was only done to provoke the dog.) The Patty Hearst-like heiress\footnote{See \textit{id.} at 1522-23.} is not liable, because her acts at $t_1$ of releasing her bodyguards do not proximately cause her bank robbery at $t_2$. If Katz succeeds in eradicating the intervening acts of the kidnappers or their agents in his more fanciful variations of this case,\footnote{See \textit{id.} at 1525 n.36.} then the heiress may have proximately caused her own "duressed" bank robbery and is liable. Katz thinks not, I gather, because he thinks the heiress is legally privileged to release her bodyguards for any reason. If Katz were right about this, then she would be justified at $t_1$ and would not be ultimately liable (even though the concurrence of voluntary act, mens rea, and causation at $t_1$ would make her prima facie liable).

Mathilda, who refuses to learn CPR in order not to save her husband,\footnote{See \textit{id.} at 1523.} did not cause anything, proximately or otherwise, by her omission. While she had a duty not to omit to save him if she could do so at $t_2$ (when he suffers a heart attack), she has no duty to learn CPR at $t_1$. Even though the act omitted at $t_1$ could have saved him, let us suppose, absent the duty there is no liability. She no more has to learn CPR than she has to become a doctor in order to jump on Macauley's train to Meerut.\footnote{See \textit{MOORE, supra} note 1, at 55.}

Alaric, another Machiavellian dog-killer,\footnote{See \textit{Katz, supra} note 192, at 1523.} has engineered his justified killing of the dog at $t_2$ in a sufficiently roundabout way that I doubt that his walking around the neighborhood is the proximate cause of the dog's death. He is not liable. (And if I am wrong about this, then he is liable, but he is still not a counterexample.) Ulysses, the last of Katz's curious drunkards,\footnote{See \textit{id.} at 1523-24.} is liable (as Katz admits) because his drunken acts of violence cause injury. His voluntary intoxication is no excuse under present law. Katz would change this, excuses him if he was: (1) cautious at $t_1$ about where and when he got drunk, and (2) so drunk at $t_2$ when he hit the visitor that he did something he would not have done sober. Even with law that Katz would prefer, why would this prima facie liable, but ultimately excused individual, present a counterexample?

Katz's regular trolley, regular surgeon, and twisted trolley scenarios in part III of his article all have to do with when conse-
sequential justification is permissible: It is permissible when the force (original trolley) is redirected and not when one originates the force that kills (surgeon, twisted trolley). It is also permissible when one redirects force with the knowledge that this is the only way to kill one to save five since they may not be saved later (original trolley redux). So what? In all variations there is prima facie liability because of the concurrence of voluntary act, causation of death, and mens rea, even if ultimate liability varies because of the presence or absence of a balance of evils justification.

Katz has forgotten his hope of criticizing my concurrence principle; instead, he has focused on the development of an insight that motivates his forthcoming book. Katz is interested in the path-dependence or formalism of agent-relative morality and of the criminal law that often mirrors that morality. He is thus fascinated by examples of manipulated justification and manipulated excuse. He has convinced me that these examples form the basis of a marvelously interesting book. These examples, however, have very little to do with my concurrence principle. The overlap of the two topics is found in their common focus on the question of the actor's liability. About this issue: I sometimes think there is no prima facie liability because of the lack of a proximate causal connection between the earlier manipulative act and the ultimate harm; I sometimes think there is no ultimate liability because, while there is a proximate causal relationship, there is a justification for so acting at that earlier time; sometimes I think there is a proximate causal relationship and that there is no justification for so acting, leading to ultimate liability. In the first set of cases, Katz often disagrees with me about proximate causation; in the third set of cases he often disagrees with me about the availability of some unspecified agent-relative permission to do the earlier manipulative act, even when done with the intent to kill, maim, and so forth. In neither of these classes of cases should our disagreement (about whether causation or justification is present) be mistaken for a disagreement about the concurrence principle. And even in the second set of cases, where we agree that there is no ultimate liability, our disagreement is about the meaning of the concurrence principle, not about its truth. I construe the principle such that it is not

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violated by cases where the defendant was justified whereas Katz construes the principle differently.

At the very end of his piece Katz hints at the system with which he would replace the concurrence principle. The idea seems to be that an actor should get credit if, after his initial act is done with culpable mens rea, he seeks to prevent those effects that will make that act wrongful and illegal. For example, the defendant starts a boulder rolling toward his old enemy in order to kill him but then has second thoughts and seeks, unsuccessfully, to stop the boulder. Katz is right about where "the Moorean approach" goes in such cases: this is a murderer, and the early onset of remorse does not change that fact in the least. Katz might wish to reform the law here to provide for a partial defense of abandonment; but whether there were such a defense is of course irrelevant to the truth of the concurrence principle, which only deals with prima facie liability.

VI. TESTING THE VOLITIONAL VERSION OF THE VOLUNTARY ACT REQUIREMENT: SOMNAMBULISM, HYPNOSIS, AND DISSOCIATED STATES AS ACTIONS?

Stephen Morse and Bernard Williams examine my theory of action by exploring its implications for the criminal law's voluntary act requirement in certain problem cases. These cases are somnambulistic behavior, behavior under or due to hypnosis, and what Morse more generally characterizes as behavior performed when the "actor" is dissociated in some way. The concerns of Morse and Williams are rather distinct, so I shall consider each separately.

A. Macbeth, Caligari, and Williams

In applying my theory of action to these problem cases in chapter 10 of *Act and Crime*, I am not seeking to answer the question of whether these are actions so much as I am illustrating the questions we should ask in order to determine whether these are actions. Although Williams believes that these behaviors are actions and I do not, our main disagreement is about the kinds of arguments that are persuasive here.

Consider four arguments, the first being the argument from ordinary usage. In *Act and Crime*, I urge that the idiomatic usage of the ordinary verbs of action to describe somnambulistic behavior is

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222 See Moore, supra note 1, at 256-57.
not a strong basis for the conclusion that these behaviors are actions.\textsuperscript{223} I attribute the contrary view about the persuasive power of ordinary usage to Herbert Hart, Douglas Husak, and Bernard Williams.\textsuperscript{224} Williams now agrees that "this would not have been much of an argument" and disclaims having made it.\textsuperscript{225} This is fair enough, but Williams then goes on to attribute a form of a linguistic argument to me.\textsuperscript{226} I am supposed to think that we can distinguish between literal and metaphorical uses of action verbs (because we can distinguish "actions" predicated of a human body from actions predicated of a person), and on this usage basis tell whether some behavior is really an action or only looks like an action but is not. Williams then points out that it is difficult, if not impossible, to separate English predicates into person-applicable predicates and body-applicable predicates. In addition, predications of somnambulistic behavior seem "to be paradigmatically the kind of predicate that is applied to a person."\textsuperscript{227} For these reasons, "[i]t is only if we have already decided that there is something peculiar about these predications that we would start to look in that direction."\textsuperscript{228}

I agree with this last thought of Williams. It is only because we have other grounds for thinking that somnambulistic behaviors are not actions that we have reason to explain away ordinary usage with something like my literal/metaphorical usage distinction. I did not think there was any positive argument to be made either way from these or any other facts of usage of action verbs.

So Williams and I apparently agree that ordinary usage cuts no ice one way or the other about how to classify these problematic kinds of behaviors. What, then, are better arguments here? Williams's discussion introduces three other sorts of arguments. The first certainly sounds like an argument from usage. It has to do with how we should describe what Caligari and Cesare do when Caligari directs the somnambulistic Cesare to stab the town clerk with a dagger, and the town clerk dies. Williams's description is that Cesare "kills (as we would naturally put it) the town clerk with a dagger."\textsuperscript{229}

\textsuperscript{223} See id. at 252-53 & n.11.
\textsuperscript{224} See id.
\textsuperscript{225} Williams, supra note 2, at 1664.
\textsuperscript{226} See id. at 1665-66.
\textsuperscript{227} Id. at 1666.
\textsuperscript{228} Id.
\textsuperscript{229} Id. at 1670.
Williams argues for this characterization thusly: The town clerk was stabbed with a dagger. Caligari did not stab him with a dagger, although we might say that Caligari brought about the town clerk’s death by a stabbing. Therefore, there being only two possible stabbers on these facts, it must have been Cesare who stabbed the town clerk with a dagger. Since Cesare’s stabbing of the town clerk with a dagger resulted in the town clerk’s death, Cesare killed the town clerk with a dagger.\footnote{239}{See id. at 1670-71.}

There are two ways to complete this argument. One is the direction taken by Morse, who urges that the killing by Cesare was an action of his, albeit one for which he will most likely be excused.\footnote{231}{See Morse, supra note 18, at 1650.} The other is Williams’s direction:

We should not have to struggle with these difficulties. Cesare . . . stabbed the town clerk. But he did it when he was asleep. . . . Whatever the best description, we can see how it is on these facts that Caligari is guilty of murder with respect to these deaths and Cesare is not, but that is not because no stabbing . . . was done by Cesare.\footnote{232}{Williams, supra note 2, at 1671-72.}

Williams does not quite say that Cesare’s stabbing and killing of the town clerk was an action, for he recognizes that there are “various dimensions in which what is done may fall short of the paradigm of fully voluntary action,”\footnote{233}{Id. at 1072.} and somnambulism presumably shares some such dimensions.

In criminal law, we cannot afford Williams’s nonchalance about this question. Whether Cesare acts or not matters (1) to whether Caligari can be charged with murder himself, or only as an accomplice to Cesare’s murder, and (2) to whether the prima facie case for murder can be made out for Cesare. Williams doubtlessly thinks of these as criminal law-driven distinctions only, and the lawyers will just have to work it out in light of the criminal law’s distinctive purposes.\footnote{234}{See supra text accompanying notes 2-18.} I, on the other hand, take the criminal law’s distinctions here to be one of the criminal law’s attempts to cut nature at the joints—the \textit{metaphysical} question of whether Cesare performed an action determining the \textit{legal} question of which theory of liability is appropriate for Caligari and Cesare.
Morse’s alternative completion of the argument, while tempted by Williams’s kind of metaphysical agnosticism, nonetheless takes a position on somnambulism, viz., it is action and, therefore, if there is no liability for Cesare, it is only because he is to be excused. Morse thus forces us to confront how Cesare’s stabbing could not be an action. Notice that one should get off Williams’s chain of inferences right from the start: just because the town clerk was stabbed with a dagger does not mean that someone stabbed him with a dagger. Imagine that a dagger is negligently left on a window sill and it falls and stabs the town clerk below. He was stabbed and killed with a dagger, but no person performed the act of stabbing. 

Imagine a variation on the scene depicted in a film about the never caught mass-murderer in Texarkana: A trombone player is stabbed to death by a knife attached to the trombone, the trombone itself worked by an elaborately contrived machine turned on by the killer. The victim was stabbed with a dagger, but we may think that the killer did no stabbing. Thus, to prosecute someone for killing the town clerk by stabbing, we need not find a stabber, only a killer. Caligari did kill the town clerk: his acts of directing Cesare caused the town clerk’s death. 

Cesare, on the other hand, did no killing and did no stabbing (even though Cesare’s body was causally implicated in a stabbing and a killing)—indeed, Cesare the person slept through the whole nasty business! At the very least, there is nothing in this little story that argues against this last characterization. We are still left looking for arguments one way or the other. 

A second additional argument might be based on the behavioral facts about these cases that are so very striking. As I note in Act and Crime, somnambulistic and hypnotic patterns of behavior are so responsive to the environment, so seemingly intelligent, that these cases tempt one to conclude that such behaviors are really actions persons perform. Williams is also impressed by this behavioral fact and at times seems to think it sufficient for the conclusion that somnambulistic behaviors are actions: 

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235 Morse, supra note 18, at 1650.
236 As Williams recognizes, see id. at 1671 n.23, I am probably more lenient than most in relieving ordinary English verbs from any very severe means-restrictions as part of their semantics. See Moore, supra note 1, at 235-38. Even so, the window-sill and “trombone”-playing killers from the text need not do acts of stabbing in order to cause both a stabbing and a death.
237 See Moore, supra note 1, at 225-35.
238 See id. at 249.
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 ... 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?  

This sounds like the Gilbert Ryle of 1949, who thought that all there was to mind and action was behavior and dispositions to behavior. Against those who would attribute hidden, internal causes for such patterns and dispositions, Ryle was prone to parody. Against the internal cause view of, say, mental disease, Ryle urged that we would not be able to tell on such a view whether “the inner lives of persons who are classed as idiots or lunatics are as rational as those of anyone else. Perhaps only their overt behavior is disappointing . . . .”

Ryle was wrong, and so is Williams to the extent he shares the argument. We have as good a reason to suppose that human actions form a natural kind of event as we do for mental diseases, physical diseases, intentions, species, elements, and other objects of scientific theorizing. Such natural kinds, including human action, may well have a hidden nature, so that surface indicators such as behavioral patterns and dispositions may well be misleading about certain examples. My theory of action provides a theory about that hidden nature in terms of volitions. To argue that behavior patterns and dispositions are sufficient for there to be human actions is to assume that a natural kind theory of action such as mine is false. Assumptions are not arguments, however, and until my theory is falsified, it is not much of an argument for somnambulistic behavior being an action to say that they sure do look like actions.

Perhaps Williams could be interpreted as suggesting that such intelligent and environmentally responsive patterns of behavior are possible only if such behaviors are caused by volitions—in which case he would be using my theory to argue that somnambulistic and like behaviors are really actions. So construed, Williams would have to

239 Williams, supra note 2, at 1667.
240 See generally GILBERT RYLE, THE CONCEPT OF MIND (1949). Ryle realized that a behaviorist interpretation of him was not strictly accurate, but that it was close enough to be a harmless misreading.
241 Id. at 21.
confront two points I make in *Act and Crime*. The first is that quite intelligent and responsive routines are guided by initiating and correcting states that are *subpersonal*, that is, no person ever has access or direct control over such states.\(^{242}\) We know that this is true at some level of guidance for the most conscious and voluntary of actions; there is no reason why it might not be true at all levels of guidance for certain sorts of behavior such as somnambulism. The second point is that when we are asleep we lack the consciousness that marks the divide between the personal and the subpersonal.\(^{243}\) Williams would have to argue that there is some other divide besides consciousness, but it is unclear what that would be.

Since this is more Morse's line of attack than Williams's, I shall defer discussion of it until the next Section. Williams tells us that somnambulistic behavior is "purposive," or "explained by reasons,"\(^{244}\) and this is the last argument of his that I shall consider.

Williams's main reason for his apparent conclusion (despite his occasional metaphysical agnosticism) that the somnambulistic behaviors of Lady Macbeth are actions, stems from his view that her behaviors are "purposive," that they have an "intentional contour," that "they are explained by the kinds of reasons by which they would be explained if she were awake," that she did what she did because of her "aims" while asleep.\(^{245}\) As Williams concludes: "[H]er actions are purposively the same as actions that she might have performed when awake, and the same with respect to the reasons that we could ascribe to her. . . . [A]ctions of this kind have an intentional or purposive aspect."\(^{246}\)

I would of course agree that if Lady Macbeth acted purposely, or acted for a reason when she wandered about asleep, then she did act. Anything that is both F and G is certainly an F, no matter what the predicate represented by F might be. That of course is not Williams's point. He must see for Lady Macbeth's behavior while asleep an explanation by reasons, and from that he concludes that these must have been actions, because only actions are explained by reasons.

\(^{242}\) See MOORE, *supra* note 1, at 152-53.
\(^{243}\) See *id*.
\(^{244}\) Williams, *supra* note 2, at 1664.
\(^{245}\) *Id*.
\(^{246}\) *Id*. at 1664-65.
The question is thus whether her sleep behaviors are explained by reasons. This is not nearly as simple a question as Williams seems to think. First, we must distinguish justifying reasons from explanatory reasons. Lady Macbeth could have "had a reason" for opening the door in the sense that she had good reason to do such a thing. Notice that in this justificatory sense of "reason," she could also have "had reason" to open the door even while lying in bed fast asleep. For instance, there was a fire and to survive it was necessary to open the door to ventilate the room. Only explanatory reasons are of course relevant to assessing whether her opening the door was an action.

Next, notice that not all desires that causally explain behaviors are explanatory reasons. For example, my desire to beat someone in chess causes my heart rate to go up; my desire to get out of prison causes me to rattle the bars in my cell window in frustration; my nighttime desire to wake at a certain time the next morning causes me to wake at that time. Such "mental cause" explanations do not provide reasons for action. Typically lacking are both a means/end belief accompanying the desire, such as a belief that if I rattle the bars in my cell window I might escape, and any executory intention or volition whereby I exercise my agency in response to such desires. The desires simply cause the behaviors, and, as the above examples illustrate, such genesis in desire in no way guarantees that the behaviors are actions.

Behaviors can thus be desire-responsive without being actions. This is true even when the behaviors seem cleverly to find their way to satisfying the object of the desire which produces them. Suppose, for example, that Freud's explanation of dreams was true: every dream represents the fulfillment of a desire, and dreams are caused by such desires. Freud dreamt that a real-life patient of his, Irma, was improperly injected by a fellow doctor, Otto, who in waking life had reproached Freud for his failure to cure Irma. Freud recalled that he was irritated with Otto and disappointed in himself; he thus wished for exoneration and for revenge. Suppose that the dream indeed depicts the fulfillment of Freud's wishes for exoneration and for revenge, and suppose further the dream with

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247 I mention these in MOORE, supra note 1, at 256. They are explored at greater length in MOORE, LAW AND PSYCHIATRY, supra note 8, at 15-18, 291-301.

that content was caused by these desires. Does this suggest that Freud's dreaming was an action of his—a kind of play put on for his own enjoyment while he was asleep, there not being much else to do? Not in the least. The desire for revenge and for exoneration may have caused the dream, and the dream cleverly responds to these desires by depicting their satisfaction, but Freud did no action in dreaming.249

The same is true of somnambulistic behavior. There may well be desires causing these behaviors. Such behaviors often cleverly respond to desires by delicate maneuvering and adjustment, and yet such behaviors are not actions because they are not the execution of such desires by an agent forming the appropriate intentions or volitions. If I am wrong about this, as I admit in Act and Crime I could be,250 it will be because there are such executing intentions and volitions despite the agent's lack of consciousness. That, as I also say in the book,251 would be to use my theory of action, not to argue against it.

B. Morse on Dissociated "Actions"

Although sharing some of Bernard Williams's doubts about the ability of any metaphysics to answer the question of whether somnambulistic behavior is really an action, Stephen Morse is, like Williams, also prepared to go some distance down my road to see what there is to see. Morse begins his discussion "undecided about [the] issue" of whether somnambulism is an action252 and ends his discussion "still undecided."253 Nonetheless, he helpfully probes my argument that somnambulistic behaviors are not actions.

Morse begins by rejecting my challenge to the readers of Act and Crime to come up with a theory of action alternative to my volitional theory.254 He chooses to assess my theory as applied to sleepwalking and other dissociated behaviors.255 Morse examines two sorts of evidence in assessing the application of my theory to somnambulism: "the evidence from phenomenology and behavior."256

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249 See id. at 47-59.
250 See MOORE, supra note 1, at 259.
251 See id.
252 Morse, supra note 18, at 1642.
253 Id. at 1651.
254 See id. at 1644.
255 See id.
256 Id. at 1645-46.
Behaviorally, Morse thinks that the evidence points to a volitional causation of sleepwalking movements, that is, that "[t]he sleepwalker's behavior strongly suggests that a true intention caused the goal-directed bodily movements." Morse is advertting to the same behavioral facts that impress Williams and, indeed, all of us about this class of behaviors: the responsiveness to the environment and the seeming pursuit of ends and goals. Everyone should admit that at least some somnambulism behaviorally looks just like (volitionally guided) actions. Therefore, Morse's inference is that they are volitionally guided behaviors, or (on my theory) actions.

Morse recognizes that I am not without a nonvolitional explanation for these behavioral facts: "It may well be that subpersonal agencies within us are achieving quite complex functions in these . . . kinds of case[s]." Morse, however, raises two doubts about my nonactional explanation of the behavioral facts. First, he asks what further account I can give to "suggest that subpersonal proto-actions are another natural kind" in addition to the natural kind I posit human actions to be. He also asks what reason is there to think "that nature has endowed us with functional subpersonal bare intentions to execute more general but still subpersonal intentions?"

Take the second of Morse's points first. Let us first be clear about what needs explaining. I would not say that there are "subpersonal bare intentions" or "more general but still subpersonal intentions." What I would say is what I said in *Act and Crime*: In the case of somnambulism there are "volition-like states [that] execute certain of our background states of desire, belief, and general intention." I eschew the idea of subpersonal mental states of intention, desire, or volition, because if they were only subpersonal, they would not be mental states of intention or of anything else. Mental states are states of whole persons.

This bit of precision matters because now what needs explaining can be easily explained. The reason we have to think that some truly subpersonal states guide sleepwalking behavior is because such states do the micro-guiding of behavior when we perform normal waking actions. In somnambulism, however, what is missing are the

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257 Id. at 1646.
258 MOORE, supra note 1, at 257.
259 Morse, supra note 18, at 1645.
260 Id.
261 MOORE, supra note 1, at 257.
personal executory states of volition that would make such behavior action. What (at least sometimes) is not missing are the desires of the sleepwalker. These are not subpersonal desires or intentions, as Morse attributes to me, but the desire of the sleepwalker in the full sense of the word desire. Given the complexity, responsiveness, and intelligence of certain somnambulistic behavior, it is reasonable to hypothesize that some of the sleepwalker’s desires and general intentions are causing the movements and that the movements are micromanaged by the same executory machinery (at the subpersonal level) that micromanages our normal waking movements. That, at least, is my alternative hypothesis explaining the behavioral facts to which Morse adverts.

This answer to Morse’s second point also goes a long way towards answering his first point. What Morse demands is that I come up with some hidden nature to somnambulistic behaviors that show them to be a natural kind in the same way that I point to volitions as the hidden nature of that natural kind we call human actions. Moreover, Morse demands that I come up with a second hidden nature for this second natural kind. This demand is part and parcel of Morse’s and Williams’s assumption that my natural kind analysis of action cannot countenance fuzzy edges and scalar phenomena.262

Yet the account that I give here is intended to capture the close analogousness we all feel between sleepwalking and waking-walking (that is, walking when that is an action). Sleepwalking shares some of the same goals and desires of the whole person as waking-walking; it also shares the same executory machinery at the subpersonal level. It thus looks a lot like action, much more so than reflex reactions, because it is a lot more like action than any reflex reactions. Nonetheless, sleepwalking is not an action so long as it is not volitionally caused, which on the evidence it does not appear to be.

Morse also questions whether the evidence from phenomenology evidences a lack of volitions in somnambulism. At one point Morse analogizes sleepwalking to highway hypnosis and other forms of habitual behavior that I concede to be actions. The phenomenological evidence, Morse thinks, is equally lacking in both cases: “[T]he sleepwalker cannot tell you about her phenomenology while she is dissociated, but neither can the admittedly volitional person

262 See supra text accompanying notes 14–19.
performing habitual action on 'automatic.'

Yet surely there is still a difference between the two classes of cases. The driver "on automatic" can quickly turn his attention to what he is doing if the need to do so arises, while the sleepwalker has no conscious attention to turn onto the details of his movements. Also, the driver "on automatic" often can remember what he was doing if asked soon afterwards, whereas the sleepwalker more typically has no remembered phenomenology to report upon wakening.

At another point in his discussion of the phenomenological evidence for the lack of volitions in somnambulism, Morse focuses on memory. He posits that "[m]ost dissociation cases, such as sleepwalking and fugue states generally, surely involve dynamically unconscious states." The states Morse has in mind are not volitions, however, but only "the agent's general intention to kill, assault, or the like." Since Morse also thinks that "[t]here is no reason to believe that unconscious agents might not recapture their general intentions if exposed to various forms of psychological methods," he concludes that "[o]n Moore's own account, unconscious agents may act." I would get off this train of inferences before it leaves the station, for I do not think that most dissociated states involve dynamically unconscious intentions. The dynamically unconscious is composed of those repressed mental states that Freud told us could be recaptured in memory only by the extraordinary efforts of free association, transference, or some other extraordinary memory-jogging technique. As I have argued elsewhere in detail, I do not think these sorts of unconscious mental states underlie much behavior (and certainly not all behavior, as Freud thought).

Thus, if Morse were arguing that there are unconscious intentions of the kind I call volitions, I would simply disagree on the evidence. Rarely if ever does psychoanalytic or any other memory-jogging practice recover a memory of volitions and action (as opposed to wish and desire). One of the examples I gave in Act and Crime was the sort of phenomenal evidence Freud produced to transform his accidental knocking of an inkwell into the action of

263 Morse, supra note 18, at 1646.
264 Id. at 1650.
265 Id.
266 Id. at 1651.
267 See Moore, LAW AND PSYCHIATRY, supra note 8, at 249-383; Michael S. Moore, Mind, Brain, and Unconscious, in MIND, PSYCHOANALYSIS AND SCIENCE 141, 159-62 (Peter Clark & Crispin Wright eds., 1988).
executing" the inkwell; Freud remembered his desire for a new one, but he did not remember executing that desire into the movement that fulfilled it.268

This disagreement is somewhat idle, however, given what Morse actually appears to be arguing. For Morse is not saying that there are unconscious volitions, only unconscious general intentions. These, he thinks, are sufficient to warrant the conclusion that an unconscious agent acts. They are not, however. Recall that in my account of somnambulism, there are desires and general intentions that are not dynamically unconscious—they are fully accessible to the sleepwalker when he is awake. That these nonrepressed desires and intentions get fulfilled by somnambulistic behaviors does not make those behaviors actions. A fortiori, that dynamically unconscious desires and general intentions get fulfilled by somnambulistic behaviors would not make such behaviors actions either. In either case, the volitions that execute such desires and general intentions are needed.

Despite these points and counterpoints, it remains true that the behavioral and phenomenological evidence is far from conclusive on the question of whether somnambulistic behaviors are actions. Missing is a third sort of evidence that is crucial here: physiological evidence showing what brain structures are needed to perform the functions that volitions perform. Despite the studies on the supplementary motor area of the brain referred to in Act and Crime,269 our knowledge of the underlying structure is sufficiently scanty that: (1) the basic question of "[w]hether volitions exist is thus very much an open, scientific question,"270 and (2) "[w]e at present do not know enough . . . about the modes of initiation of [somnambulistic behavior] to resolve the issue definitively one way or the other."271 This is why I said earlier that epistemically I am in agreement with Morse and Williams about the lack of any certain answer here.272

Despite the caution, I do go on in Act and Crime to give two reasons for placing our "bets in the direction chosen by the American Law Institute's Model Penal Code: bet that such movements are not volitionally caused, and therefore are not

268 See MOORE, supra note 1, at 251-52.
269 See id. at 163 n.126, 165 n.130.
270 Id. at 165.
271 Id. at 259.
272 See supra text accompanying notes 18-20.
The first of these reasons stems from the best theory we have about self-boundaries, one in terms of consciousness: "Consciousness seems essential as part of our self-boundaries, so that if we (our conscious selves) are asleep or are otherwise not active, then we don't will anything." Morse questions this argument in three ways. First, I do not "adequately defend why the ability to be aware of one's volitions . . . is required for action or personhood." Second, my criterion is degree-vague because I do not "indicate how much consciousness is necessary." Third, while according to Morse too "[c]onsciousness does seem part of our self-boundaries . . . this does not entail that the unconscious agent's movements are not actions." Yet one can assess the force of all three of these points only if presented with an alternative theory of how we demarcate the line between the personal and the subpersonal. Absent such an alternative theory, my defense of consciousness is like Churchill's for democracy: not perfectly satisfactory, perhaps, but better than any other that has been suggested. What else marks the boundary between our selves and those somatic processes that we never control directly, if it is not consciousness?

Morse voices a fourth rejoinder to my self-boundaries argument and along the way has some fun using one of my well-known thought experiments against me. Morse performs a "Moorean thought experiment about what emotional reactions a properly moral agent would and should have if, like Mrs. Cogdon, while sleepwalking, she ever so effectively axe-bludgeoned her daughter to death." Supposing that a properly constituted Mrs. Cogdon would and should feel guilty, Morse infers that therefore she would be guilty of something. He further infers that the something she would be guilty of is something she did, namely, kill her daughter while she was asleep.

Mrs. Cogdon does have something to feel guilty about, but it is not a supposed action she did while asleep. She should feel guilty for being the kind of person who so hates her daughter, or is so jealous of her, that she wishes her dead. We each have a responsi-

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273 MOORE, supra note 1, at 259.
274 Id. at 257.
275 Morse, supra note 18, at 1644.
276 Id.
277 Id. at 1647.
278 Id. at 1646.
bility for our character, and Mrs. Cogdon has some lousy aspects to hers about which she should feel guilty. Yet our responsibility for character is not to be confused with the kind of responsibility the criminal law cares about, which is responsibility for our actions. Guilt and felt guilt for bad character is thus quite compatible with Mrs. Cogdon not having performed an action when she axed her daughter to death.

It is also true that Mrs. Cogdon may feel guilt beyond that guilt she feels for that part of her character comprised of her jealous emotions and wishes. Something with which she was intimately related, namely, her own body, was causally responsible for the death of her daughter. She could feel bad about that. But then, many of us feel bad when things less intimately connected to us than our own bodies are the instrumentalities of others' misfortunes. When our children or our dogs hurt others, we often feel badly too, even when there was no active supervision of them on our part.

My second reason for betting that somnambulistic behaviors are not actions is that the lack of consciousness while asleep prevents the resolution of conflicting desires and intentions, and this resolving function is one of the crucial functions distinctive of volitions. Perhaps because Morse finds this second reason to be "even more promising," he assembles a phalanx of arguments to defeat it. First, Morse argues, resolution of conflict cannot be essential to the existence of volitions. This, for two reasons: (a) Even when there is conflict (as in cases of extreme emotional disturbance) and even when there is no resolution of that conflict because the agent's emotions seal off his restraining desires, still there is volitional action, and (b) conflict of desires or of intentions is not ubiquitous, yet even where conflict is lacking we often have volitions and actions. For both of these reasons, the conflict-resolving function cannot be essential to volitions. Second, Morse argues that I have not specified how many such desires must

279 See Michael S. Moore, Choice, Character, and Excuse, 7 SOC. PHIL. & POL'Y 29, 40-41 (1990) (distinguishing responsibility for character from responsibility for action and arguing that morally we have both kinds but that legally we both do and should recognize only the latter kind of responsibility).

280 See id. at 46-47.

281 See MOORE, supra note 1, at 258.

282 Morse, supra note 18, at 1647.

283 See id. at 1649-50.

284 See id. at 1648.
be sealed off before the conflict-resolving function should be said to be absent.\textsuperscript{285} Third, he states that the unavailability of some desires/intentions sounds like an excuse—a kind of ignorance or lack of opportunity excuse—not negation of volition and action.\textsuperscript{286} Fourth, there is some kind of conflict-resolving function going on even in somnambulism because “the dissociated agent is not ‘paralyzed’ by conflict”\textsuperscript{287}—he walks in his sleep, for example. Such nonparalyzed responsiveness to an end at the very least, it is argued, implies a resolution of conflict about the various means that might be used to satisfy that end.\textsuperscript{288} Moreover, such nonparalyzed responsiveness does resolve the conflict of ends because “the countervailing considerations are not obliterated, but simply out of concurrent awareness.”\textsuperscript{289}

Morse’s degree-vagueness point (the second above) is only moderately worrisome. Some substantial amount of one’s desires and intentions must be accessible to an actor before he can be said to resolve the conflict between them with a volition, and when we are asleep only a few are.\textsuperscript{290} Morse’s third point (about how this looks like an excuse) is also not worrisome. Lack of volition in general does look like an excuse,\textsuperscript{291} so its excuse-like appearance here should come as no surprise.

Morse’s first and fourth points are more troublesome. They reveal that much more needs to be said to render plausible my conflict-resolving function for volitions. With regard to the ubiquitousness of conflict, I do think, unlike Morse, that conflict in our desires is always present because to satisfy any one desire is always at the cost of not at that time satisfying some other desire. As I put it in Act and Crime: “Unless I am an obsessional neurotic about keeping my hair trimmed (to a degree never observed even in mental wards), I desire not only a haircut; I desire many other things as well, the attainment of which can conflict with my getting

\begin{footnotes}
\item[285] See id.
\item[286] See id.
\item[287] Id.
\item[288] See id.
\item[289] Id.
\item[290] Morse puns my requirement that a “fair sample” of such desires be accessible before the conflict-resolving function can be said to be performed, taking “fair” to be normative (and thus fitting of his “normative” theory of coercion). See id. at 1648. My use of the word “fair” was not normative, but referred only to a substantial sampling, as in “fair-to-middlin.”
\item[291] See Moore, supra note 202, at 1107-08.
\end{footnotes}
a haircut on any given occasion."\textsuperscript{292} Our desires are, for this reason, always prima facie desires only, which is why we need those "all-out" propositional attitudes of volition and intention.

With regard to the impassioned killer who acts despite not being able to access his restraining desires, I doubt that either Morse or I believe that such individuals lack access to a fair sample of their desires and intentions as they decide what to do.\textsuperscript{293} For me, this doubt springs from my sense that those "carried away by their own emotions" typically allow themselves the luxury of "letting go." A bad temper for such people is like a well-known negotiating technique whereby one refuses to consider various things that should reasonably restrain one. Sleepwalkers and other dissociated individuals, however, do not have that control over the accessibility of the full range of their desires and intentions. They are thus more likely candidates for persons who lack the resolving functions served by volitions and intentions than are those who are "overcome" by emotion.

Morse's fourth point claims too much in the way of conflict resolution for such dissociated persons. That they do not suffer a paralysis of indecision is of course true, for their desires do issue in their somnambulistic behaviors. Yet a paralysis of indecision is only one way that conflicts of desires and intentions can fail to be resolved. Another and more relevant way is for a desire or intention not to have any input into a decision, for a desire or intention so excluded is not resolved but "lives on." Morse's point that there is at least a resolution of conflicting means by somnambulists, even if not of ends, does not help. The selection of means always involves trade-offs against other ends that certain means will frustrate, and it is precisely conflict with those other ends that is not resolved by any "decisions" made while asleep. Morse's point that conflict with these ends has been "resolved, albeit on 'thin' grounds" (because such ends are "not obliterated"),\textsuperscript{294} is not true. Ignoring certain desires or intentions is not the same as considering them and either rejecting them or integrating them into one's decision about what to do. The conflict-resolving function of

\textsuperscript{292} \textsc{Moore, supra} note 1, at 139.

\textsuperscript{293} Such doubts are expressed by each of us. \textit{See} Stephen Morse, \textit{Psychology, Determinism, and Legal Responsibility, in The Law as a Behavioral Instrument} (1986); \textsc{Moore, supra} note 279, at 38-39.

\textsuperscript{294} \textsc{Morse, supra} note 18, at 1648.
volition is not performed simply by behavioral output satisfying one pole of desires in conflict.

Each of these points deserves greater consideration than I have been able to give them here. I suspect that with such greater consideration Morse and I would be able to truly resolve any conflict that has remained, fusing our two sets of conflicting beliefs into one coherent set. But that is because we are not dis-associated—that is, we communicate with each other regularly—allowing our conflict-resolution function to operate smoothly.

VII. VOLITIONS AS THE ESSENTIAL BEGINNINGS OF ACTIONS

A. Volitions in Analyses of Action

A number of the commentators have doubts about volitions as the unique instigators of actions. Some, such as Robert Audi, see clearly that I have two different needs for volitions in Act and Crime: (1) to give an analysis of what actions are partly in terms of volitions; and (2) to complete the rational explanation of the changes we effect in the world by our actions. For the first need, I use volitions to demonstrate the nature of the natural kind, human action; this theory about action’s essential nature is as close as I come to analyzing (or defining) the concept of human action. For the second need, I use volitions to complete the causal chain that begins with belief/desire sets, proceeds through more general intentions, and then proceeds through those less general intentions I call volitions to the bodily movements and their effects in the world. Volitions for the second need are part of my explanation of human behavior, a role independent of any they play in analyzing action.

Separating these two needs for volitions in my theory is important because some worries about my volitional theory go only to my use of volitions in the analysis of action, not to my use of them in explaining behavior. Jennifer Hornsby, for example, concludes that “volitions must . . . be viewed as figments, filling an imagined lacuna.” She finds volitions unnecessary, however, only because she sees my introduction of volitions as a substitute for another definition of action (namely, her own in terms of the things

296 Hornsby, supra note 19, at 1732.
people do intentionally) that makes no mention of volitions.\(^{297}\) Such satisfaction with alternative ways of defining the kind, action, do not of course touch upon the question of whether volitions have explanatory roles.

My main concern here is with the explanatory role of volitions, since that was the concern of most of the commentators. Still, it is worth pausing long enough to say why Hornsby’s kind of definition does not obviate the need for volitions even if we restrict ourselves to an analysis of action. Hornsby’s definition of action is: “an action is a person’s doing something intentionally,” or, as she alternatively rephrases it, “an action is a person’s doing something in attempting to do something.”\(^{298}\) These definitions are harmless enough, but they do not tell us very much. They are part and parcel of the older, ordinary language style philosophy that produced “conceptual analyses” like, an action is intentional when “a certain sense of the question, ‘Why?’ is given application.”\(^{299}\)

This playing around between near synonyms does not tell us much, which is why it is relatively harmless. One of the harms that it cannot do is to rule out theories about the nature of the kind of thing to which words like “action” refer. While ordinary language philosophy has historically enjoyed a curious kind of satisfaction with analyses like Anscombe’s and Hornsby’s, science has demanded more. We need to know what sort of things actions are, not just how native English speakers use “action,” “intentionally,” “attempt,” “try,” and “why.” Volitions may not be the right answer, but no amount of discovery of near synonyms for “action” can show that the question to which volitions purport to be the answer is a question that need not be asked.

B. Volitions in Explanations of Behavior

Most of what Bratman, Audi, Corrado, and Hornsby have to say about volitions goes to their explanatory role, so I shall devote the rest of my discussion to that. As Bratman notices,\(^{300}\) my argument for volitions was in two steps. First, I argued for the distinctiveness of intention from both wants and beliefs;\(^{301}\) second, I argued for

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\(^{297}\) See id. at 1731-32.

\(^{298}\) Jennifer Hornsby, On What’s Intentionally Done, in ACTION AND VALUE IN CRIMINAL LAW, supra note 40, at 55, 60; see also Hornsby, supra note 19, at 1727.

\(^{299}\) ANSCOMBE, supra note 40, at 9.

\(^{300}\) See Bratman, supra note 40, at 1706.

\(^{301}\) See MOORE, supra note 1, at 137-49.
the view that general intentions were not enough to explain actions but that much more concrete intentions—"volitions"—were also needed. All of the commentators zeroed in on the second of these steps, either leaving the first for another occasion or explicitly agreeing with it.

1. Audi's Alternative Action Elicitors

Of the rich array of considerations offered here, let me pick but a few for comment. Consider first Robert Audi's suggestion that volitions may not be explanatorily necessary. Audi acknowledges that there must be some kind of "action-elicitors" that are caused by more general intentions and which in turn cause bodily movements. Sometimes it is plausible, he thinks, that these action-elicitors are events matching my description of volitions, but generally Audi would substitute nonvolitional items as the more likely candidates for the job of getting us moving: either perceptions, thoughts, decisions, a change in the balance of motivational forces, the overcoming of inertia, or the striking-as-desirable-for-its-own-sake the doing of some action. This seemingly more heterogeneous list of action-initiators is part of what Audi terms his "guidance and control model" for explaining behavior. This model is said have two differences with my "executive thrust model" of volitions: (1) Audi's model posits a release of energy, as from a compressed spring, whereas mine has the volition communicate its energy, as in the firing of a bullet, and (2) Audi's eliciting events need have no Intentional content "given that the relevant intentions and other attitudes already have content sufficient to direct the action."

Audi's general temptation is a very old one. It is the same temptation as gave rise to William James's ideomotor theory of

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302 Id. at 149-55.
303 See Bratman, supra note 40, at 1706. I am currently uncertain as to Audi's views on this. In writing Act and Crime, I assumed Audi was a reductionist about intention, reducing it to a combination of beliefs and desires. See ROBERT AUDI, INTENDING, IN ACTION, INTENTION, AND REASON 56 (1993). Now, however, in both his present contribution and in chapter 3 of Action, Intention, and Reason, Audi seems more sympathetic to the distinctiveness of intention.
304 See Audi, supra note 295, at 1690-93.
305 See id.
306 Id. at 1696-701.
307 See id. at 1698.
308 Id.
action, according to which action-initiators are "images" of actions.\textsuperscript{309} The temptation stems from a perceived greater respectability within psychology for cognitive than for conative mental states. The temptation is thus to replace thrusting things with seeing and releasing things. The temptation is succumbed to by some physiologists as well, who can imagine volitions as vetoers of actions even if they cannot imagine them as initiators of actions.\textsuperscript{310} Yet the temptation is one to be resisted. As Myles Brand has noted, "it is a deep insight of folk psychology that action is initiated only by events with non-cognitive, motivational features."\textsuperscript{311} Our phenomenology, at least since Plato, has suggested to us that the states that move us to action are quite different than the states that represent the world to us as we wish or believe it to be. While our phenomenology could certainly be wrong about this, we have every reason to place our bets with it until science shows us that we should not.

Leaving Audi's general model for his more particular list of six substitutes for volitions, I find the list problematic first because of its very heterogeneity. As Audi himself has recently noticed: "[O]ne powerful reason to adopt a volitional theory [is that] it supplies a causal factor which \textit{genetically unifies} actions in terms of a common kind of origin, even if not necessarily its ultimate origin, in the psychology of the agent."\textsuperscript{312} Audi's six different factors do not have this virtue, as he would no doubt acknowledge.

Audi's list also seems to take at face value the idiomatic things people often say when referring to action-elicitors. He is here unwilling to regiment these seemingly diverse sayings by a common referent. If we were to so respect idiomatic usage about the practical syllogism, it would, I suspect, usually be said to have only one premise. For rarely do we explain why we went downtown by saying both, "because I desired to buy some groceries \textit{and} because I believed that, if I went downtown, I would buy some groceries." More idiomatic is: "because I wanted some groceries" or "because I believed that groceries were easily available there." More idiomatic still would be to report facts, not desires or beliefs, as in: "because a new grocery store opened up down there." The diversity

\begin{itemize}
  \item \textsuperscript{309} See \textit{Moore}, \textit{supra} note 1, at 146-47, for citations and discussion.
  \item \textsuperscript{310} See Benjamin Libet, \textit{Unconscious Cerebral Initiative and the Role of Conscious Will in Voluntary Action}, 8 \textit{BEHAVIORAL \& BRAIN SCI.} 529, 529 (1985).
  \item \textsuperscript{311} \textit{Brand}, \textit{supra} note 40, at 176.
  \item \textsuperscript{312} \textit{Audi}, \textit{supra} note 303, at 79.
\end{itemize}
of items cited as reasons in idiomatic, everyday discourse should not discourage us from unifying our motivational analysis in terms of our standard, two-premised practical syllogism. The same is true for what we casually say about immediate action elicitors.

2. Bratman's Rationality Constraints on What Can Be an Intention

Bratman's disagreement with me is a narrow one. He and I agree on what he accurately labels as the "distinctiveness of intention" from desire and beliefs. We also agree that some action-initiators are necessary if the execution of our more general intentions into the appropriate bodily movements that execute them is not just magical. I think we also agree that these action-initiators are mental states—what Bratman calls "executive representations," or elsewhere "endeavorings"—and not merely sub-personal routines of our central nervous system. Where we disagree is on whether these action-initiators are a species of intention or not.

Bratman recognizes that I might argue for characterizing volitions as intentions on what he calls the "simple view" that to intentionally do A is to intend to do A. Such an argument would go like this: Any bit of behavior, to be an action at all, must be intentional under some basic description like "moving one's fingers"; yet if I intentionally moved my fingers, then (on the simple view) I intended to move my fingers; since such intent has the same object and function as what I call "volitions," we have every reason to identify such intent with volitions. Bratman then seeks to undercut the simple view and thus, this easy route to justifying my categorization of volitions as intentions.

Yet I do not rely on the simple view to argue that volitions are a species of intention. For one thing, if one has decided, as Bratman and the criminal law have, to call actions done knowingly as having been done intentionally, then one certainly does not want the simple view. I may know that my act of freeing some prisoners will have the side consequence of killing some guards, but I do not intend to kill the guards. (However, in such cases we may not be prepared to say we killed the guards, either intentionally or

315 Bratman, supra note 40, at 1715.
unintentionally, in which event this argument against the simple view will not work.)\textsuperscript{316}

Bratman's real complaint against the simple view lies elsewhere. Bratman rejects the simple view mainly because it would require abandonment of one or both of two constraints on the rationality of intentions that Bratman finds his planning theory of intentions cannot do without. The first is that intentions must be consistent with beliefs: I cannot rationally intend $A$ while believing $A$ is impossible. The second is that intentions "agglomerate": If I intend $A$, and if I intend $B$, then (if rational) I intend $(A$ and $B)$.

My own view of these rationality restraints on intention is that their plausibility varies with the level of generality of the intentions under view. Since Audi sees the same point, let me use his words. With regard to intention/belief consistency: "What Moore could say, then, is that while long-range, future-directed intentions, the kind most important in planning, must meet the relevant belief condition, bare intentions, the kind plausibly identified with volition, need not."\textsuperscript{317} And with regard to intention agglomerativity:

\begin{quote}
[C]onjunction [of intention] is to be expected above all when there is some occasion to get the two objects of the propositional attitude in question before the mind at once, and this is less likely with a momentary state than with a long-term one, such as an intention to pay a bill, or to educate one's children.\textsuperscript{318}
\end{quote}

The point is that it is the planning function of intention that drives Bratman to his two restrictions, yet these restrictions are less and less necessary to successful planning as intentions become more and more specific. There is no reason anywhere up or down this scale to deny the honorific, "intention," to those states that together execute belief/desire sets.

To some extent Bratman already must recognize this possibility of successful planning despite failures of agglomerativity and of intention/belief consistency at some level, for he concedes that executive representations, or what I call volitions, do execute more general intentions into the bodily movement programs that satisfy them. He also concedes that agglomerativity and intention/belief consistency.

\textsuperscript{316} The argument against the simple view from side effects would not work because, if we would not say about such side effects, "x caused them intentionally" then the plain fact that x does not intend to cause side effects presents no counterexamples to the simple view.
\textsuperscript{317} Audi, supra note 295, at 1681.
\textsuperscript{318} Id. at 1683.
consistency do not hold for these executory states. So planning obviously succeeds despite the failures of these least general executory states to conform to his two rationality constraints. All he need recognize now is that some degree of these failures could also be true of more general intentions, even if to a lesser degree as the intentions become more general (and thus, more central to planning).

3. Corrado on the Superfluity of Requiring Volitions for Liability

Corrado thinks that framing the voluntary act requirement of the criminal law in terms of volitions adds nothing to what is already required by the criminal law mens rea requirements. As he puts it, “[t]he requirement that there be a willing or volition . . . is entailed by mens rea.”

I am unsure what Corrado wishes to argue here. Does he want to say that the voluntary act and mens rea requirements are one and the same requirement? Or does he want to say that the requirement that there be a voluntary act is superfluous because all crimes require mens rea, and if the mens rea requirement is satisfied then the voluntary act requirement must be satisfied too? And under either of these readings, is it my volitional interpretation of the voluntary act requirement that causes it to be identical or redundant to the mens rea requirement, or are the two requirements so related even under alternative interpretations of the voluntary act requirement? The answer to this latter question will determine whether Corrado is criticizing my volitional account, or whether his observations are about criminal law doctrine more generally. I am more interested in the argument if it is directed against my volitional interpretation of the voluntary act requirement, so I shall so construe it.

I find very curious what Corrado means by “the mens rea requirement.” He apparently thinks that crimes of general intent, specific intent, recklessness, negligence, and strict liability all have a common mens rea requirement: “[T]he act must be intentional

319 Corrado, supra note 44, at 1544 (emphasis added) (footnote omitted). Elsewhere Corrado says that the requirement that there be a volition “is not independent,” but follows from mens rea. Id. at 1533. He also says that “there is no separate requirement of a volitional act,” because it “duplicates” the condition already secured by mens rea, and that “there is no independent volition requirement.” Id. at 1546.
under some description, or there cannot be a conviction. I take the need for that to be a mens rea requirement.” Thus all crimes, in this sense, are crimes having as their mens rea the requirement of intention.

Corrado is insistent that his identity/redundancy point hinges on this sense of the mens rea requirement. But if this is what Corrado means by mens rea, it is very easy to show an identity between his “mens rea requirement” and the voluntary act requirement under any interpretation of the latter. For Corrado’s supposed mens rea requirement is just another way of stating the voluntary act requirement. Intentionality in Corrado’s sense is a criterion for action itself, as Donald Davidson and, more recently, Jennifer Hornsby have shown. As Davidson used to put it, an agent will have acted “if and only if there is a description of what he did that makes true a sentence that says he did it intentionally.”

The voluntary act requirement is, of course, duplicative of the mens rea requirement when the latter is construed to be no more than the requirement that an action have been performed. However, mens rea does not mean “that an action have been performed.” Like Humpty Dumpty, Corrado can of course mean what he pleases by “mens rea,” but he cannot make the phrase mean what he pleases. The phrase means something quite different than what he means by it. “Mens rea” means some mental state of intention or belief having as its object a particular description of an action (not any description), or that substitute for true mental states we call negligence.

Consider the mens rea requirements of intention or belief, where presumably Corrado’s point is strongest. Imagine three criminal prohibitions: assault with intent to kill, knowing importation of a controlled substance into the United States, and reckless (or “depraved heart”) murder. The voluntary act requirement requires that the accused intends that his body move at all; the mens rea requirements would be, respectively, that the accused: intends his movements to cause death, believes that the goods he is transporting are controlled substance and that his movements will cause them to cross the border into the United States, or believes

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320 Id. at 1545.
322 See Hornsby, supra note 298, at 55-60.
323 DAVIDSON, supra note 55, at 46.
that his movements substantially risk death. Such intentions or beliefs required to satisfy the mens rea requirements of such statutes do not have at all the same objects as do the intentions (or volitions) to cause bodily movements (which is what the voluntary act requirement requires on my interpretation).

Since all of this was gone into in some detail in Act and Crime,\textsuperscript{524} I am loath to interpret Corrado only to be making the point he seems to say he is making. Perhaps he should be interpreted to be saying that mens rea means the requirements of intention, belief and negligence just illustrated, but that if this (admittedly distinct) requirement is satisfied so too must be the voluntary act requirement. Yet this latter point does not address my volitional interpretation of the voluntary act requirement specifically; it purports to apply to that requirement generically, however interpreted. Moreover, this point is obviously false, insofar as it applies to crimes of negligence and strict liability (where there is no mens rea requirement of intent or belief). The only way that Corrado can hide the obvious falsity of this second interpretation of his thesis is by going back to the first interpretation, where he pretends that the mens rea requirement for crimes of negligence and strict liability require that the act be intentional under some description. Yet again: It is not the mens rea requirement of negligence or strict liability that requires this, it is the voluntary act requirement.

Even with respect to crimes requiring intent or belief for their mens rea, the second interpretation of Corrado’s thesis is false. As I argued in my discussion with Morse, it may sometimes be true that somnambulists have desires and general intentions and their sleep-behavior is responsive to those mental states. Thus, some somnambulists may satisfy a mens rea requirement of intent or belief, yet what such somnambulists lack is what the act requirement requires: those volitions that execute their desires and intentions into actions.

4. Some Objections Not Here Reconsidered

These four objections of Hornsby, Audi, Bratman, and Corrado to volitions do not exhaust all the worries they have raised about

\textsuperscript{524} See MOORE, supra note 1, at 172-73.
such items in this Article. Audi, for example, also worries whether volitions are as relevant to responsibility as I claim, proposing long-term intentions and wants as more relevant to responsibility because more constitutive of who we are.\footnote{Audi, supra note 295, at 1703.} Hornsby also voices her doubts that the subpersonal science will turn out in a way that verifies the existence of volitions.\footnote{See Hornsby, supra note 19, at 1735 n.53.} Both Hornsby and Audi voice what Audi calls the "phenomenological objection" to volitions, namely, there do not seem to be enough of them around in our experience to do the work I demand of them.\footnote{See Audi, supra note 295, at 1684-86; Hornsby, supra note 19, at 1734-35.} And Corrado raises his Chisholm-inspired incompatibilism to raise doubts about the need for a volitional account when a requirement that the choice be free would do the trick.\footnote{See Corrado, supra note 44, at 1554.} I have said pretty much what I had to say to each of these points in Act and Crime.\footnote{See also Moore, supra note 202.} In any case, I do not wish to abuse the invitation of the editors, which is no doubt quickly approaching its limits.

VIII. GOLDMAN, TROPES, AND FINE-GRAINED ACTION INDIVIDUATION

Alvin Goldman was the only one of my commentators to tackle the difficult problem of action-individuation, both as a metaphysical matter and with regard to the law's need to deal with this issue.\footnote{See Goldman, supra note 36.} Like me, Goldman finds the metaphysics of action to be of relevance to legal issues. More specifically, we both think that the metaphysics of action individuation has some bearing on the criminal law doctrines dealing with the spatiotemporal locations of criminal acts and on those doctrines dealing with double jeopardy. Since Goldman's metaphysics differs considerably from mine, his

\footnotesize{\begin{itemize}
\item See Audi, supra note 295, at 1703.
\item See Hornsby, supra note 19, at 1735 n.53.
\item See Audi, supra note 295, at 1684-86; Hornsby, supra note 19, at 1734-35.
\item See Corrado, supra note 44, at 1554.
\item Namely: (1) that long-term intentions are no doubt more relevant to responsibility for one's character, but character-responsibility is not the relevant kind of responsibility for punishment, see MOORE, supra note 1, at 52-54; (2) that it is an open question how the science of the subpersonal will turn out, although I am probably more optimistic about that science matching the concepts of the folk psychology than is Hornsby, see id. at 130-33, 163-65; (3) that the phenomenological evidence for volitions is better than Audi and Hornsby allow if one takes preconscious mental states and mental states needed to learn routines into account, see id. at 150-55; and (4) incompatibilist metaphysics cannot replace anything because it is false, see id. at 73-77. See also Moore, supra note 202.
\item See Goldman, supra note 36.
\end{itemize}}
clear and succinct paper provides an instructive contrast to the approach taken in *Act and Crime*.

Goldman's is a single-instance trope metaphysics for all events, human actions included. Tropes are instances of properties. Of some white dog, we should distinguish: (1) the object-particular, the dog, which exemplifies whiteness; from (2) the abstract universal, whiteness, which all white things share; from (3) the abstract particular or property-instance, or "trope," which is the particular instance of whiteness that this dog possesses. An event-type such as killing is for Goldman an abstract universal, whereas an event-token such as Jones's act of killing Smith yesterday is an instance of the universal, killing. The "fineness of grain" of Goldman's metaphysics comes from his insistence that an event is only a single property-instance, not a constellation of such instances. Thus, what my "coarse-grained" metaphysics would identify as one event, his would identify as being as many events as there are properties instantiated. The act-token, Jones killing of Smith yesterday, is different than the act-token, Jones moving his finger on the trigger, Jones firing the gun, Jones shooting Smith—even though Jones killed Smith by (what I would call) one single act having all of these properties.

In *Act and Crime* I recognized that I could not hope to deal adequately with all the arguments, pro and con, raised by the literature on the fine-grained versus the coarse-grained versus the moderately fine-grained views. Goldman helpfully remedies this deficiency (at least as seen from his side of the street). I shall again eschew dealing with the full range of arguments that Goldman addresses. In particular, I shall not respond to the "by-relation" or the "adverbial modifiers" arguments. This, not because these are not important arguments, but because they are sufficiently complicated issues that a great deal needs to be said, not all of which I at present know that I want to say. So I shall restrict myself to the issues Goldman raises in response to arguments of mine in *Act and Crime*. These are fruitfully grouped into three sets of issues, separately discussed below.

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331 *See Moore, supra* note 1, at 68-69. *See generally Keith Campbell, Abstract Particles (1990).*

332 On single-instanced versus multiple instanced trope accounts of events, see *Moore, supra* note 1, at 369-70; Goldman, *supra* note 36, at 1569.

333 *See Moore, supra* note 1, at 297.
A. The Problem of Causes and Effects

Like most arguments on this issue, the arguments Goldman advances from causal relations involving events appeal to the Indiscernability of Identicals Principle, which states that identicals share all the same properties. Goldman and I both explicitly assume that the Indiscernability Principle cannot be questioned for extensional contexts and that statements of causal relations are extensional. Thus, the problem Goldman puts to me: An act that on my coarse view is but one act-token nonetheless seems to have different causal properties, depending on how it is described. Two of Goldman's examples:

(a) Ned's playing the piano both puts Dolly to sleep and wakes Molly up. These being but three different ways of referring to a single act-token on my view, then if it is true that Ned's playing the piano caused Molly to wake up, then it must also be true that Ned's putting Dolly to sleep caused Molly to wake up. Yet, Goldman concludes, Ned's putting Dolly to sleep did not cause Molly's awakening, and therefore these are not merely different descriptions of one and the same act-token; since they have different effects, they must be different act-tokens.

(b) Dretske's car moving down the highway has a number of different aspects: it is moving, it is moving at 63 mph, and it is moving in a certain direction. All just one event on my coarse view. Yet what aspect of this event we use to describe it makes a difference as to the truth of what caused it: Dretske's "heavy foot is responsible for the speed, the dirty carburetor for the intermittent pauses, and the potholes in the road for the teeth-jarring vertical component of the movement." Goldman thus concludes that these cannot be descriptions of one event, but must refer to separate events, for each has a different cause.

My general response in Act and Crime to this problem was to say that the events in such examples do have the same effects and causes, no matter how such events are described; but that some descriptions will sound odd because of redundancy: to say that Jones's killing of Smith caused Smith's death is pragmatically odd

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\textsuperscript{334} See id. at 283 n.9.  
\textsuperscript{335} See id.; Goldman, supra note 36, at 1573 n.23.  
\textsuperscript{336} See Goldman, supra note 36, at 1564-65.  
\textsuperscript{337} See id. at 1567 (quoting Fred Dretske, Explaining Behavior 30 (1988)).
because we already know that Smith's death occurred by the way the act of Jones is described in the subject of the sentence (as a killing of Smith). To repeat in the predicate information already contained in the subject of a sentence always sounds odd.\textsuperscript{338}

Goldman accurately points out that this explanation does not work for his piano example or for many other examples. So Goldman issues me a challenge: "[N]o appeal to repetition can explain the oddity in question. Of course, Moore may not restrict pragmatic oddity to repetition, but he does not identify any other source of pragmatic oddity that would cover the present case."\textsuperscript{339} Supplying such a source will be my present task.

Causal talk like saying, "Ned's playing the piano caused Molly to wake up" or "Dretske's heavy foot caused his car to move at 63 mph," is fraught with ambiguity. When we use "cause," we may mean to describe singular causal relations between event-tokens or we may mean to describe causal generalizations relating event-types.\textsuperscript{340} Since on my coarse-grained view we individuate types very differently than tokens, things will sound very odd if we mean token but are taken to mean type.

Take Dretske's car moving down the highway. There is only one event-token here, on my view. Therefore, anything that causes that event-token under one description of the latter also causes it (that same event-token) under any other. Dretske's heavy foot, his dirty carburetor, and the potholes all cause one event-token, the movement of his car at that time. What makes it sound odd to say things like, "Dretske's lead-footing the accelerator caused the teeth-jarring motion," is the way we pick out the motion event. By picking it out with the description, "teeth-jarring motion," we may easily be taken not to be referring to the event-token of movement; rather, we may seem to be (and in fact, usually are) referring to properties of one event-token as we explain with a causal generalization another property of another event-token. And it is just false that the type of event constituted by the property, depressed accelerator, causally explains the type of event constituted by the property, teeth-jarring vertical moving. There is no true generalization connecting these two types of events.

This explanation also fits Goldman's first kind of example. Ned's putting Dolly to sleep does cause Molly to wake up. We can

\textsuperscript{338} See MOORE, supra note 1, at 289 n.19.
\textsuperscript{339} Goldman, supra note 36, at 1565-66.
\textsuperscript{340} See, e.g., Audi, supra note 295, at 1694.
remove any oddity by disambiguating the expression to make clear we are referring to act-tokens and the singular causal relations between them, not act-types and the causal generalizations that hold between them. "The act which caused Dolly to go to sleep also caused Molly to wake up," does not sound odd at all because we have made clear that we are talking about an act-token doing some singular causing. The original way of putting it does not get rid of this ambiguity, so we could be taken to mean: "It was a property of Ned's act, namely, that it put Dolly to sleep, that causally explains another property of Ned's act, namely, that it woke Molly up." And this would be a peculiar thing to say since, on Goldman's stipulated facts, it is obviously false.

My account here of course relies on there being a distinction between statements describing singular causal relations between event-tokens and statements giving causal explanations in terms of true generalizations holding between event-types. Part of what determines whether such a distinction is viable is what one takes singular causal relations to be, if they exist at all. The analysis given in *Act and Crime* rejects the counterfactual interpretation of causation.  

One reason to do so is precisely because such an analysis, which is very popular, elides the distinction between singular causal relations and causal generalizations. Counterfactuals are usually taken to deal with types of events, here asking, if an event of one type did not occur, would an event of some other type also not have occurred? Such an analysis of causation does not allow me my distinction, which is (another) good reason to reject it.

If we recognize the distinction and the latent ambiguity it infuses into many causal statements, then we have a ready explanation for Goldman's apparent counterexamples. Make clear that what is wanted in such examples are explanations (and thus,  

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341 See Moore, *supra* note 1, at 268-75.

342 If counterfactuals are not taken to be about types, but were taken to be about tokens, then they would not be extensional. See Michael Moore, *Foreseeing Harm Opaquely*, in *ACTION AND VALUE IN CRIMINAL LAW*, *supra* note 40, at 143, 143-45; Davidson, *supra* note 55, at 157.

343 Dretske is plain that it is explanation that interests him:  

[W]hen the business at hand is explanation . . . there may be a variety of different things to explain about any given piece of behavior. Breathing is one thing; breathing deeply, in a person's ear, and when the person asked you to stop, are all different things and may, accordingly, all have different explanations.  

Dretske, *supra* note 237, at 30. As long as we take "things to explain" to be aspects or properties of act-tokens (or Hornsby's "things done"), and not separate act-tokens,
generalizations about types), and we coarse folks would not say all the odd things Goldman attributes to us because they are obviously false. But make clear that what is wanted in such examples is not explanation but singular causal relations, then we coarse folks will say all the odd things Goldman wants us to say, but they won’t sound odd any longer because everyone will be clear about what is meant.

Goldman has partially anticipated my response here, insofar as he foresees that “the coarse-grained approach can say that there is but a single event which has many aspects or facets.”

Goldman urges that this won’t help because the coarse-grained approach will still need some finely individuated “facet-instances” to both cause and be caused by other “facet-instances,” or tropes. The facets themselves, which are abstract universals, will not do, “for properties themselves do not participate in causal relations.” Since we thus need property-instances to stand in these causal relations, we might as well call these finely individuated things “event-tokens.”

What Goldman overlooks (or perhaps rejects) is the difference between the causal generalizations used in giving causal explanations and statements of singular causal relations. Armed with that distinction, we have no need of any finely individuated things to stand in singular causal relations; rather, all we need are the properties themselves and the types they constitute to make true our causal generalizations. So armed, all we now need is to keep clear what we are talking about when we talk about events, causes, and effects: Are we talking about singular causal relations or causal generalizations? Where we are clear, we will not sound odd.

B. The Spatiotemporal Locations of Actions

Goldman remarks that I “might be surprised to find a fine-grained theorist willing to yield ground on the spatiotemporal questions” of action location. I am. Goldman is right that it never occurred to me that tropists about events would take what he

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Dretske is surely correct about the possibility of separate explanations for separate “things.”

Goldman, supra note 36, at 1572.

Id. at 1573.

At least to other metaphysicians. I think Freeman thinks we all sound pretty odd. See supra text accompanying notes 36-37.

Goldman, supra note 36, at 1583.
calls the "short view" of when and where such events occur. Being surprised in this way does not leave me feeling as though I had gained some ground, however, as Goldman suggests. Rather, I feel a bit like the French in 1939, who having built a very nice wall of defenses then saw the Germans disdain any frontal assault in favor of a flanking maneuver. It is only small comfort that Goldman thinks it was a "reasonable" wall to have built, given the deployment of enemy forces at the time it was built.

I am intrigued by Goldman's suggestion that a property instance theory of events can adopt the short view of spatiotemporal location for events. This means that Goldman thinks that when Jones kills Smith by moving his (Jones's) finger at $t_1$, which causes an arrow to hit Smith at $t_2$, which causes Smith to die at $t_3$, the killing trope occurs only at $t_1$ and not over the interval, $t_1 - t_3$, nor at $t_2$ alone.

It is not clear how we locate tropes. Goldman suggests that "the temporal span or duration of an act-token [property-instance on his view] must be the period over which the agent exemplifies the act-type in question." For killings, we thus should ask when does the "agent exemplify the act-type of killing." Yet my sense is that Jones becomes a killer of Smith only when Smith dies, for unless Smith dies, Jones is no killer. Jones by his act at $t_1$ can become a killer at $t_3$ if Smith dies then, but how can Jones be a killer at $t_1$ with no dead victim?

Another way to raise this query is by imagining that Jones moves his fingers at $t_1$ which causes the striking of Smith with the arrow at $t_2$, but that Smith does not die. If everything is the same in this revised scenario except for Smith's death at $t_3$, do we want to say that Jones exemplifies killing at $t_1$ but that it was a defeasible exemplification in the sense that, when it becomes clear that Smith will not die from the arrow, Jones will cease exemplifying the act-type of killing?

My own coarse-grained metaphysics of events allows me to adopt the short view here without difficulty. Jones's act of killing is done once he moves his fingers at $t_1$. Jones becomes a killer, and his act acquires the property of being a killing, only when Smith dies at $t_3$. Goldman cannot say this, because for Goldman there is no

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548 Id. at 1581.
549 Id.
550 Id. at 1582.
551 Id.
552 MOORE, supra note 1, at 285-86.
one act of Jones that can later acquire the property of being a killing; the trope of being a killing is, on Goldman's fine-grained metaphysics, the act, and such a trope of killing cannot itself later acquire the property of being a killing.

Perhaps Goldman should retract his linkage between when an exemplifying of killing takes place with when an instantiation of killing takes place. Goldman, like most tropists, thinks that there is a "subtle but important distinction... between exemplifying a property and being an instance of, or case of, a property."\(^{355}\) Objects like Jones exemplify properties like killing, whereas tropes are the instances of the act-type, killing. Goldman could then say that Jones exemplifies killing when he becomes a killer (which is at \(t_3\) when Smith dies), but that Jones's act of killing (which is a trope) instantiates killing only at \(t_1\). This would give Goldman the short view of actions, in other words, without having to say that actors are killers before anyone dies.

The problem with this move is that if one divorces the locations of property instances from the locations of objects exemplifying those properties, I do not know how one could locate tropes at all. Take the white dog of my earlier example. We cannot use whiteness to give location to this instance of whiteness, because whiteness is an abstract universal. If we give up the object exemplifying whiteness, the dog, as our locator, how could we assign the whiteness-instance possessed by the dog any location at all? If the whiteness trope does not come into existence only when the dog begins to exemplify the property of being white, I would not know how to locate the trope temporally. The same quandary would beset any attempt to divorce the temporal location of killing instances from the exemplifying of killing done by people like Jones. But again, Jones exemplifies killing only when Smith dies.\(^{354}\)

\(^{355}\) Goldman, supra note 36, at 1568.

\(^{354}\) I have put aside Goldman's argument from a killing being a causing of death, and a causing of death taking place when the actor does the moving that causes the death. See id. at 1582-83. I do not think one gets much mileage out of "causing" here, any more than Corrado does in his worries about whether a "causing can be an event" and whether causings can "cause other events". Corrado, supra note 44, at 1533 n.22. This, because of a triple ambiguity about "causing" in these contexts. In "When did Jones causing Smith's death take place?," we could be using "causing" to refer to: (1) the act-token of Jones, which on my theory is when he moved his body at \(t_2\); (2) the ending of the causal process, that is, at death at \(t_3\); or (3) the entire process during which the causing did its work, \(t_1 - t_2\). See Moore, supra note 1, at 288. Given the nuanced meaning suggested by exactly how one phrases and emphasizes the question (a feature Goldman also notices, see Goldman, supra note 36,
C. No Double Jeopardy for the Same Tropes?

Goldman is fascinated as am I about the intersection of action theory with the double jeopardy requirement of criminal law. He seeks to suggest how his different metaphysics of actions yields a more comprehensible legal requirement than my coarse-grained view.

On my metaphysics of action there are two distinct questions that must be asked and answered in any double jeopardy case: (1) is the defendant who has performed one (coarse-grained) act-token nonetheless guilty of several offenses (i.e., prohibited types of actions); and (2) has the defendant who is guilty of but one offense (again prohibited type of action) nonetheless guilty of having done that offense more than once. In my schema, one must individuate types of actions (offenses) to answer the first question, and one must individuate offense-tokens to answer the second question.

Goldman's fine-grained metaphysics may make it seem as if there is only one question to ask here, which is: How many offense-tokens did the accused do? Since an offense-token for Goldman is an instance of the conjunctive property described by each criminal statute, an accused who at $t_1$, $t_2$, and $t_3$ does some driving, and who does so on each occasion while drunk, unlicensed, and in an overweight vehicle, is guilty of nine offense-tokens (three instances of three offenses).

Yet the unitary nature of the question asked by Goldman's metaphysics is illusory. Notice that the individuation of tropes depends partly on the individuation of the properties of which they are instances: different property, different trope. Therefore Goldman's trope individuation question has to ask and answer just the question I raised in chapter 13 of Act and Crime, which is, how do we individuate universals for double jeopardy purposes? Goldman begins where I began in Act and Crime, thinking that each distinct statute describes a distinct property (and thus, there will be a distinct instance of each property for Goldman). Yet this won't do, the most obvious reason being that this fine-grained an individuation of properties would allow multiple prosecution and punishment of lesser included offenses. Goldman seeks to

at 1582-83) there is little meat for argument for anyone out of these usages.

See Moore, supra note 1, at 318-24.

See id. at 328, 333-37; Goldman, supra note 36, at 1584-85.

See Moore, supra note 1, at 335-36.
accommodate this lesser-included-offense sense of "same offense" with his notion of an act-tree.\textsuperscript{358} (An act-tree for Goldman is that structured set of tropes that collectively is what we coarser types think is one act-token.)

This response by Goldman will not work. Goldman's act-tree notion answers a different question than the "same offense" question asks, even when that latter question is restricted to lesser included offenses.\textsuperscript{359} When we ask in the abstract whether assault with a deadly weapon is or is not a lesser-included offense of armed robbery, we are asking a question having nothing to do with Jones's or any one else's particular actions. We are asking a question of property (or type) individuation: Are these types of offenses related in a way that for double jeopardy purposes they should be treated as one type? Whether a set of property-instances are all nodes on one act-tree cannot help with this double jeopardy question; for the structure of each act tree is a question wholly dependent on the peculiarities of each particular (coarse-grained) act there is. An instance of armed robbery by Jones at $t_1$ will be part of one sort of act-tree, and an instance of armed robbery by Smith at $t_2$ will be part of another sort of act-tree. Nothing in either of these trees will help us to decide the abstract question about the types, armed robbery and assault with a deadly weapon.

So not only is there a disguised property individuation question contained within Goldman's approach to double jeopardy, his metaphysics gives him no better resources with which to answer it than are available to his coarser colleagues. We all have to individuate properties as best we can, even if some of us are doing so in order then to individuate tropes. My own approach to property individuation for double jeopardy purposes is what I call the individuation of morally salient act types.\textsuperscript{360} It is a mode of individuation of properties no less available to Goldman's than to my own metaphysics, so I commend it to him.

Goldman's fine-grained metaphysics also does not obviate the need for asking my second sort of double jeopardy question. Indeed, Goldman's metaphysics and mine ask exactly the same sort of second question here: Once we have individuated the relevant properties (offense types), how many instances of them did the

\textsuperscript{358} See Goldman, supra note 36, at 1584-86.

\textsuperscript{359} Offense types that are the same for double jeopardy purposes are not limited to lesser included offenses. See Moore, supra note 1, at 346-49.

\textsuperscript{360} See id. at 337-55.
defendant do? Moreover, Goldman’s metaphysics give him no more resources than mine give me. This, for two reasons. First, because the “unit of offense” question here is exactly the same for both Goldman and me. Over a fourteen day drive, how many instances of “joy-riding” did the defendant do? Goldman’s act-trees, and the tropes they are composed of, here can do no work for him, for what he needs is a principle of individuating whole act-trees, one from the other. How many acts of driving were begun by these basic acts? How many tropes are within the tree of each of these basic acts, or whether we identify all such tropes with their generating basic act, are idle questions here, in the sense that the answers just do not matter to the individuation question asked.

It is easy to parody the difficulties of the trope theorist here. As one such theorist admits, “continuous, gradual change gives anyone trying to count tropes a headache, but what is perhaps worse, plain stolid uniform unchangingness yields problems too.” The parody would be unfair because the tropist is here no worse off than is the coarse-grained colleague. Their metaphysical difference make no difference here, for both must divide continuous swatches of behavior like driving into one, several, or many instances.

The second reason Goldman’s metaphysics give him no leg up here is because the best interpretation of double jeopardy requires a principle of instance-individuation that is not purely metaphysical. As I argue in chapter 14 of Act and Crime, the principle wanted here is not one counting act-tokens as such, be they tropes or coarse act-tokens; wanted is a count of instances of distinct moral wrongs, because only this count determines desert and proportionate punishment. (I call this “wrong-relative act-token individuation.”) And while an extremely fine-grained tropist might have some metaphysical differences with me even while sharing this approach, as I understand Goldman’s current metaphysics I see no difference. If unconsented-to kissing is wrong, and John causes just one contact between his lips and Mary, both Goldman and I count there to be just one instance of such wrong despite different descriptions of

561 In Goldman’s older terminology, the relevant individuation question here is one about compound actions, and being fine-grained or coarse-grained about complex actions is idle here. See Alvin Goldman, A Theory of Human Action 28, 34-37 (1970) (“[T]here is no minimal (or maximal) temporal length for a unit of action.... [A]ny shortest unit... is quite arbitrary. Acts of this length could be subdivided into their temporal parts....”).
562 Campbell, supra note 304, at 140.
that instance (such as, John kissing Mary, doing so tenderly, on the check, furtively, etc.)

**AFTERWORD**

As anyone knows who has finished a book-length treatment on any topic, usually the last thing the author wants to do is return right away to that topic. Until I received the papers in this Symposium I assumed that this would be true of me with respect to the philosophy of action. Each of the papers was sufficiently challenging and interesting, however, that this general truth was not here true at all. These papers have rekindled my interest in the philosophy of action and the criminal law, and I hope they have a like impact on outside readers of this Symposium.

It has been a pleasure to respond to each of the comments by this group of distinguished commentators. I hope that they have enjoyed the exchange as much as have I. I owe each of them a debt of gratitude for their willingness to go after some part of Act and Crime with which they disagreed. I am aware of the compliment contained even in the most critical of such efforts, and I thank each of them for it.

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563 Compare Moore, supra note 1, at 370-72 with Goldman, supra note 36, at 1570 n.17.