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## RETHINKING THE ACT REQUIREMENT

*Douglas Husak\**

Penal theorists seldom acknowledge that they are deeply divided about several basic questions involving the (so-called) act requirement in criminal law. The single matter on which they are virtually unanimous is that there *is* an act requirement in criminal law.<sup>1</sup> Apart from this superficial point of agreement, which particular issues are controversial and require further examination? In my judgment, four are prominent. First, commentators need to decide how the act requirement should be formulated. Second, they must provide an account of what acts are. Third, they should identify the precise connection between the act requirement and other requirements in criminal law—especially the culpability and voluntariness requirements. Finally, they must justify the act requirement, that is, defend the normative proposition that the criminal law should include it. Since each of these topics is unresolved, I regard the consensus about the act requirement as nothing short of remarkable. One wonders why theorists express such confidence that the criminal law should contain an act requirement when they are so confused about the four basic issues I have mentioned.

In *The Grammar of Criminal Law*,<sup>2</sup> the long-awaited sequel to *Rethinking Criminal Law*,<sup>3</sup> George Fletcher hazards positions on several of these controversies, many of which I take to be among the most difficult in all of criminal law theory. Like most commentators, however, Fletcher expresses no doubts that the criminal law includes an

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\* Professor of Philosophy, Rutgers University; Visiting Professor of Law, University of Michigan.

<sup>1</sup> American commentators, at least, express no reservations about the act requirement. See, e.g., JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 93 (4th ed. 2006); WAYNE LAFAVE, CRIMINAL LAW 195-202 (3d ed. 2000); MICHAEL S. MOORE, ACT AND CRIME (1993); PAUL ROBINSON, FUNDAMENTALS OF CRIMINAL LAW 250 (2d ed. 1995). A handful of British commentators, however, have been more skeptical. In particular, see Antony Duff, *Action, the Act Requirement and Criminal Liability*, in AGENCY AND ACTION 69 (John Hyman & Helen Steward eds., 2004); A.P. Simester, *On the So-Called Requirement for Voluntary Action*, 1 BUFF. CRIM. L. REV. 403 (1998).

<sup>2</sup> GEORGE P. FLETCHER, THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, INTERNATIONAL (forthcoming 2007) (manuscript on file with Cardozo Law Review.) [hereinafter GRAMMAR MANUSCRIPT].

<sup>3</sup> GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW (1978) [hereinafter RETHINKING].

act requirement.<sup>4</sup> I will discuss his views in the course of presenting my own thoughts about these questions. As we will see, my disagreements with Fletcher are substantial. I will conclude that commentators should suspend judgment about the act requirement, and probably reject it altogether. Although any reasonable person should be reluctant to challenge a principle that enjoys such wide support, unanimous assent and repetition are no substitute for analysis and argument. I believe we should be confused about what the act requirement *is*, and thus about whether to accept it. When we identify its underlying justification—which I take to be its supposed connection to a conception of criminal responsibility—an alternative principle may be more defensible than the act requirement. The normative work thought to be done by the act requirement may be accomplished more effectively by supposing that criminal liability requires *control*. Or so I will suggest.

## I. TWO FORMULATIONS OF THE ACT REQUIREMENT

Although virtually all commentators agree that an act requirement is central to Anglo-American criminal theory, they differ about how to formulate it. Any plausible interpretation, I assume, should construe this requirement as both descriptive and normative. It purports to describe accurately the great bulk of existing criminal law, while recognizing the possibility of a few exceptions. These possible exceptions, however, are suspect. On closer examination, either they are not exceptions at all, or else they involve a dubious use of the criminal sanction. The reason for this suspicion is because the act requirement also is normative: it simultaneously expresses a principle to which impositions of criminal liability ought to conform in order to be acceptable. At the very least, true deviations from this requirement—if they are permissible at all—need special justification. Beyond this single point of agreement, the issue becomes murky. In what follows, I will consider two possible formulations of the act requirement. Obviously, additional interpretations might be given. Since I am skeptical that a good argument supports the act requirement and will conclude that it probably should be rejected in favor of a competitive principle, I will not struggle to provide alternative formulations.<sup>5</sup> I

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<sup>4</sup> In fact, he regards skepticism about the act requirement as “surprising.” GRAMMAR MANUSCRIPT, *supra* note 2, at 389 n.5. This reaction is noteworthy, inasmuch as Fletcher has challenged conventional wisdom on many occasions. Consider, for example, his reservations about the “harm principle,” a principle I believe the majority of criminal theorists endorse. RETHINKING, *supra* note 3, at 404-08. Fletcher took issue with orthodox thinking about the harm principle. He might have taken the same approach to the act requirement in *The Grammar of Criminal Law*.

<sup>5</sup> A third interpretation construes acts not as the object but as a “condition” of liability.

invite commentators who are more persuaded that criminal law contains an act requirement to devise a version that is preferable to those I canvass below.<sup>6</sup>

The first formulation of the act requirement is the most simple: criminal liability is and ought to be imposed *for* an act. In other words, nothing but an act is or ought to be the proper *object* of criminal liability. This formulation, although certainly straightforward, is almost certainly false—both descriptively and normatively. Often, the objects of criminal liability are not acts, and there is no good reason to suppose that criminal liability should not be imposed for anything else. Crimes of possession provide the most obvious (but not the only) basis to deny that criminal liability need be imposed for an act. According to Marcus Dubber, New York State contains over 150 possession offenses, ranging from minor violations to the most serious category of felony punishable by life imprisonment. These include possession of a toy gun, graffiti instruments, public benefit cards, credit card embossing machines, gambling records, usurious loan records, obscene materials, eavesdropping devices, noxious materials, and a host of others.<sup>7</sup> Several of these offenses, of course, are enormously controversial on normative grounds.<sup>8</sup> Still, many crimes of possession—such as that proscribing the private possession of nuclear weapons—seem clearly justifiable. In any event, no one should say that the state of possessing something—like a weapon or controlled substance—*is* an act. If criminal liability is imposed *for* the state of possession—as seems undeniable—criminal liability is not always imposed for an act. If the act requirement should be construed to hold that only acts are and ought to be the objects of liability, it unquestionably is false both descriptively and normatively.

If the act requirement is to be preserved, it must be given a different interpretation. The difficulty, of course, is to formulate the act

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Many of the necessary prerequisites for impositions of liability—sanity and maturity, for example—cannot be construed as what liability is imposed for. Perhaps acts are comparable; criminal liability may require an act in much the same way that it requires the capacity to be responsive to reasons. This interpretation may preserve the truth of the act requirement. Without refinement or qualification, however, it is too weak to be interesting or important. Surely it is true that one must be capable of performing an act to be eligible for criminal liability, but much the same could be said for the capacity to breathe. For earlier thoughts, see DOUGLAS HUSAK, *PHILOSOPHY OF CRIMINAL LAW* 102-03 (1987).

<sup>6</sup> According to one commentator, the requirement should be formulated as follows: “A person is not guilty of an offense unless her conduct, which must include a voluntary act, and which must be accompanied by a culpable state of mind (the *mens rea* of the offense), is the actual and proximate cause of the social harm, as proscribed by the offense.” DRESSLER, *supra* note 1, at 101.

<sup>7</sup> See Markus Dirk Dubber, *The Possession Paradigm: The Special Part and the Police Power Model of the Criminal Process*, in *DEFINING CRIMES: ESSAYS ON THE SPECIAL PART OF THE CRIMINAL LAW* 91, 96-97 (Antony Duff & Stuart Green eds., 2005).

<sup>8</sup> See DOUGLAS HUSAK, *OVERCRIMINALIZATION* (forthcoming 2007).

requirement so that it is plausible both descriptively and normatively. This much is common to any suitable candidate: *some* act is required for criminal liability. But whatever the act required by the act requirement is, it need not be that *for* which liability is imposed. What, then, *is* the relation between the act and the object of liability that will satisfy the act requirement? The act and the object of liability must stand in *some* appropriate relation, but what is the nature of this elusive relation? I will call possible answers to this difficult question attempts to specify the *appropriate relation* between the act and the object of liability that must obtain in order to satisfy the act requirement. Unless this appropriate relation can be explicated with some degree of precision, I daresay that commentators will not know what they are talking about when they affirm (or deny) that criminal law includes an act requirement.

What might this appropriate relation be? A clue may be derived from the way possession offenses are treated within the Model Penal Code. Possession offenses are not regarded as counterexamples to the act requirement; they are only counterexamples to the supposition that the act requirement should be construed to hold that acts must be the objects of liability. The Code provides that “[p]ossession is an act . . . if the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession.”<sup>9</sup> Taken literally, this provision is nonsense. The state of affairs in which I possess my socks is not an act, and this state is not magically transformed into an act simply because I procured my socks knowingly. Nor does my state of possessing my socks become an act simply because I have been aware of my control over them for a sufficient amount of time to be able to terminate my possession. I have not been performing continuing acts of possessing each of the socks in my dresser since the moment I knowingly acquired them several years ago. No state of mind or passage of time can perform the alchemy needed to convert non-acts into acts. Thus I conclude that the foregoing provision from the Model Penal Code should not be construed literally. It should not really be interpreted to specify the conditions under which the state of possession *is* or *becomes* an act. Instead, this provision should be interpreted to specify the conditions under which the state of possession becomes compatible with the “act requirement.” If I am correct, the treatment of possession offenses in the Model Penal Code suggests a second and more plausible candidate for how the act requirement should be formulated.

In order to reconcile the act requirement with the imposition of liability for non-acts, the Model Penal Code contains what I take to be a

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<sup>9</sup> MODEL PENAL CODE § 2.01(4) (1962).

second formulation of the act requirement. The Code provides: "A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable."<sup>10</sup> This second formulation of the act requirement differs from the first, deleting the "for" relation between the required act and the object of liability that is central to the earlier account. In its place, the Code substitutes the "based on" and "includes" relations. Thus this formulation answers our difficult question by specifying the appropriate relation between the act and the object of liability as the "based on" and the "includes" relations. But exactly what does "basing" liability on conduct that "includes" a voluntary act mean? These terms are notoriously cryptic, and questions abound. Are these relations identical or different? That is, can liability be based on a voluntary act that is not included in it? Or does every case in which liability is based on a voluntary act include that act? Unless these relations can be clarified so that such questions can be answered, this version of the act requirement will turn out to be unintelligible.

Notice that the Code does not say that liability must be based on a voluntary act, or based on conduct that *is* a voluntary act. Liability need only be based on conduct that "includes" a voluntary act. I confess that I am baffled about how to understand this "includes" relation. In some contexts, this relation is straightforward. Many acts are complex composites of smaller acts and omissions. Consider a given fight between two boxers: for example, the famous "rumble in the jungle" heavyweight championship between Mohammad Ali and George Foreman in Zaire on October 30, 1974. Clearly, the act referred to as "the rumble in the jungle" includes innumerable actions and omissions within its scope. The fighters weaved, bobbed, rested, punched, ducked, and the like. The sense in which the act of fighting includes these acts and omissions is both temporal and spatial. Ali and Foreman ducked *while* they were fighting; their weaving occurred *where* they were fighting. Perhaps the "includes" relation in the Model Penal Code's formulation of the act requirement should be understood similarly—like the sense in which the act referred to as "the rumble in the jungle" includes both the act of punching and the omission of resting.

If we accept that criminal liability need only be imposed for conduct that includes a voluntary act, and explicate the sense of "includes" as both spatial and temporal, we will be able to recognize what is unsound about the following argument. Suppose a driver spots a pedestrian he would like to injure crossing the road in front of him.

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<sup>10</sup> *Id.* § 2.01(1).

He fails to apply his brakes, and his car runs over the victim. When he is prosecuted, he alleges that his failure to apply the brakes is an omission, and he had no duty to the pedestrian not to injure him by omission. Obviously, this argument is silly. But what exactly is silly about it? The answer is not that the failure to apply the brakes must be categorized as an action. Even if construed as an omission, this failure occurred within the larger complex act of driving. Like a prizefight, the act of driving includes many acts and omissions within its scope. A driver who injures a pedestrian in the course of the complex act of driving cannot defend himself on the ground that the injury was caused by an omission.

As the Commentaries make relatively clear, the main point of this second formulation of the act requirement—which permits liability to be imposed for conduct that “includes” a voluntary act—is to allow punishment in what might be called “culpability in causing” cases: situations in which a nonvoluntary act is preceded by a culpable voluntary act that causes it.<sup>11</sup> Consider, for example, a defendant whose car swerves out of control and kills several pedestrians during an epileptic seizure.<sup>12</sup> Unquestionably, the seizure itself is involuntary. Still, liability under a negligent driving statute might be reconciled with this formulation of the act requirement if the offense is construed to include the prior failure to take medication that would have prevented the subsequent seizure. Respondents report varying intuitions about whether and under what conditions liability is appropriate in such cases. Some go so far as to doubt that these cases admit of a principled solution at all,<sup>13</sup> especially when a statute imposes strict liability.<sup>14</sup> For present purposes, the important point is that this latter sense of “includes” is almost certainly *not* the sense involved in the prizefight or brake cases I have described. Many culpability-in-causing cases invoke a sense of “includes” that is neither temporal nor spatial. Unlike the fighters or driver who fails to brake, the epileptic omits to take his medication *prior* to the time he begins to drive, and he omits to take his medication at a place *other than* where he is driving. To impose liability on the epileptic, the sense of “includes” in this formulation of

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<sup>11</sup> See Paul Robinson, *Causing the Conditions of One's Own Defense: A Study of the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1 (1985).

<sup>12</sup> The most celebrated such case, applying a statute proscribing the negligent operation of a vehicle resulting in death, is *People v. Decina*, 138 N.E.2d 799 (N.Y. 1956). A closely related but slightly distinct problem arises in trying to hold Dr. Jekyll liable for the subsequent nonvoluntary homicidal acts of the monstrous Mr. Hyde.

<sup>13</sup> See Mark Kelman, *Interpretive Reconstruction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981).

<sup>14</sup> Efforts to base liability on a prior *culpable* act strike some theorists as especially problematic when the offense is an instance of strict liability. See Larry Alexander, *Reconsidering the Relation Among Voluntary Acts, Strict Liability, and Negligence in Criminal Law*, 7 SOC. PHIL. & POL. 84 (1990).

the act requirement must be construed differently from the familiar sense in which the act of fighting includes the acts of punching and the omission of resting, or the act of driving includes the acts of steering and the omission of failing to brake. I admit that I have little idea how to explicate this different (nontemporal and nonspatial) sense of “includes.”<sup>15</sup>

In what follows, however, I will confine my focus to the “based on” relation between liability and act. Regardless of how this relation might be understood in other contexts, it should help to explain how the draftsmen of the Model Penal Code believed that crimes of possession could be reconciled with the act requirement. As we have seen, when liability is imposed for a state of possession, the act requirement is said to be satisfied when the possessor either (a) knowingly procured or received the thing possessed or (b) was aware of his control thereof for a sufficient period of time to have been able to terminate his possession. Let me hazard an interpretation. The possession section contains two disjunctive clauses, each describing an act on which liability for possession might be based. The first of these clauses, (a), refers to procurement or receipt. Procurement or receipt of something, I assume, is an act. When this act is performed knowingly, it provides the act on which liability for possession can be based. Liability is *for* possession, which is *not* an act, but such liability satisfies the act requirement nonetheless, because it is “based” on something that *is* an act: procurement or receipt. So far, my interpretation seems sensible.<sup>16</sup> Matters become a bit more complex when we turn to the second clause in the possession section—the alternative description of the act on which liability for a crime of possession might be based. Liability for a crime of possession may satisfy the act requirement when (b) the possessor is aware of his control over the thing possessed for a sufficient period of time to be able to terminate his possession. The referent of this latter clause—the failure to terminate possession—is, I assume, an omission. When this omission is performed over a suitable period of time, with awareness of the nature of the thing possessed, it constitutes the omission on which liability for possession can be based. Again, liability is *for* possession, which is *not* an act, but such liability satisfies the act requirement nonetheless, because it is “based” on prior conduct (that is, an act or omission).<sup>17</sup>

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<sup>15</sup> For further thoughts about this question, see Douglas Husak & Brian McLaughlin, *Time Frames, Voluntary Acts, and Strict Liability*, 12 LAW & PHIL. 95 (1992).

<sup>16</sup> Still, one should wonder why the act requirement is satisfied when the act of procurement is performed culpably (in this case, knowingly) but not otherwise. What does culpability have to do with action?

<sup>17</sup> “Conduct” is the generic term the Code employs for acts and omissions. See MODEL PENAL CODE § 1.13(5) (1962).



Of course, we still need to know *why* the particular acts or omissions described by the Code provide the conduct on which liability for a crime of possession may be based. The Code simply stipulates that an act of knowingly procuring a thing, for example, stands in the appropriate relation to the state of possession to render liability for the latter compatible with the act requirement. But why should this be so? An example (or even two examples) of when the requirement is satisfied is a far cry from a general analysis of the “based on” relation. We still lack an understanding of this relation, and thus of the act requirement itself. Let me provide two examples to illustrate what I take to be the central difficulty.

Suppose the state enacted a statute that punished someone for a given evil thought—say, the thought that the Brooklyn Bridge should be destroyed during morning rush hour. This statute, I assume, would violate the act requirement as anyone purports to construe it. Suppose, however, that a clever commentator argued that the statute did not violate the act requirement after all. Admittedly, the object of liability is a thought, which is not an act. But the act requirement is not violated by this statute, according to this train of thought, because liability could be “based on” conduct that *is* an act. Liability might be based on participation in a terrorist training program, for example—which unquestionably is a voluntary act the person had the power not to perform. What exactly is wrong with the argument of this clever commentator? The only way to demonstrate the error in his reasoning is to explicate the “based on” relation to show that the act of participating in a terrorist training program does not stand in the appropriate relation to the object of liability (the evil thought) to satisfy the act requirement. In the absence of this explication of the “based on” relation, the act requirement may be compatible with punishment for thoughts.

A second example reveals a related difficulty. Consider two persons—Dave and Eric—in possession of marijuana. Dave’s acquisition of marijuana was performed knowingly; Eric’s was not. Dave deliberately bought a substance he knew to be marijuana; Eric bought a substance he reasonably believed to be oregano, which, much to his surprise, turned out to be marijuana. The state seeks to impose liability for possessing a controlled substance on both Dave and Eric, and the question is whether liability would be compatible with the act requirement. I assume that the second formulation of the act requirement would allow liability to be imposed on Dave, but not on Eric. Despite the important difference between Dave and Eric, however, the mode of acquisition performed by Eric is no less of an act than that performed by Dave. *Both* Dave and Eric came in possession of marijuana by acting. Clearly, it would be unfair to impose liability

on Eric. But our willingness to punish Dave but not Eric has nothing to do with a difference in whether they acted. The obvious objection to punishing Eric is his lack of culpability, not his lack of action. But what does the presence or absence of culpability have to do with the presence or absence of action? In short, the Model Penal Code provision governing possession does not tell us *why* liability satisfies the act requirement when it is based on some acts but not others. Thus I do not believe that the Model Penal Code provision about possession goes very far in explaining the nature of the appropriate relation that must obtain between the object of liability and the act that is needed to satisfy the act requirement. It simply offers the name of a relation—the “based on” relation—without telling us what it means or how it should be interpreted.

Let us now consider (b), the second disjunct in the possession provision, which I described as somewhat more complex than the first. This clause is a bit more complex because it makes clear that liability for a crime of possession need *not* be based on an act in order to satisfy the act requirement. The act requirement may be satisfied when liability for a crime of possession is based on an *omission*. According to the Code, an omission is not an act, but a “failure to act.”<sup>18</sup> Thus it is somewhat misleading to say that the Model Penal Code contains an “act requirement.” It is more accurate to say that the Model Penal Code contains a “conduct” requirement, that is, an “act or omission requirement.” Liability for a crime of possession satisfies the conduct requirement when it is based on an act or omission. Although I believe this conclusion is of crucial importance for any theorist who hopes to gain a deep understanding of the nature of the (so-called) act requirement, I will neglect it in my subsequent discussions. I will continue to suppose we are trying to formulate something that should simply be called the “act requirement.”

## II. EXAMINING FLETCHER’S THEORIES ON THE ACT REQUIREMENT

I have made only modest progress in suggesting how the act requirement should be formulated. Perhaps Fletcher has some useful suggestions about how these difficulties should be solved. Surprisingly, however, in his chapter titled “The Act Requirement,” Fletcher refers to neither of the two formulations of the act requirement I have discussed.<sup>19</sup> Nor does he suggest a third version he argues to be

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<sup>18</sup> *Id.* § 1.13(4).

<sup>19</sup> I describe this failure as surprising, since Fletcher previously has expressed sensitivity to the complex issues raised by inquiring what criminal liability is *for*. See George P. Fletcher, *What Is Punishment Imposed For?*, 5 J. CONTEMP. LEGAL ISSUES 101 (1994).

preferable. As a result, it is hard to know exactly what he takes the act requirement to be, or whether his interpretation of it is similar to or different from various alternatives. The two most helpful quotations that provide a clue to Fletcher's intentions are as follows. First, he writes: "[N]o one can commit a crime without engaging in action."<sup>20</sup> Later, in assessing whether the absence of bodily motion can amount to action, Fletcher asks "whether remaining perfectly still can satisfy the first requirement of criminal liability—namely, the phenomenon of engaging in human action . . . ."<sup>21</sup> Neither quotation is clear about the nature of the appropriate relation that must obtain between the object of liability and action in order to satisfy the act requirement. Since Fletcher declines to offer a canonical formulation of the act requirement, it is difficult to know exactly what he accepts, much less to assess his reasoning. Unfortunately, my subsequent remarks may miss their targets because of my uncertainty about how Fletcher construes the act requirement itself.<sup>22</sup>

Perhaps I am putting the cart before the horse. Arguably, attempts to formulate the act requirement are best postponed until we understand what acts *are*. Only then can we hope to decide whether and in what respect criminal liability might require an act. How should we begin to grasp the nature of human action? The most basic matters are undecided. Is the question of whether an agent has acted solely a matter of fact, or is the issue partly normative? Fletcher contends "the only way to proceed is philosophically—to engage in an effort to understand the boundaries of the concept of action as it functions in the culture of crime and punishment."<sup>23</sup> Fletcher certainly is correct to infer that we get little help understanding the act requirement by attending to positive

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<sup>20</sup> GRAMMAR MANUSCRIPT, *supra* note 2, at 389.

<sup>21</sup> *Id.* at 394.

<sup>22</sup> I would like to comment briefly on Fletcher's claim that acts are essential to criminal law for an altogether different reason than the act requirement: acts are essential in our thinking about self-defense. He states "the kind of aggression that triggers a right to self-defense also presupposes a human act." *Id.* at 394. Philosophers frequently describe fanciful cases in which innocent victims are threatened by agents who are not acting: a fat man who falls down a narrow well and could be cushioned by the prospective victim standing below, who will die from the impact. The victim happens to possess a ray-gun that can vaporize the falling threat. *See, e.g.,* Jeff McMahon, *Self-Defense and the Problem of the Innocent Attacker*, 104 ETHICS 252 (1994). Fletcher believes the victim is not justified in blasting the falling aggressor, although his act may be excused as a blameless concession to human frailty. After all, between two innocent persons, why should law or morality prefer one to the other? Despite the difficulty in answering this question, no one should be too confident about how such bizarre cases should be resolved. The intuitions of respondents are all over the place, and are entitled to very little credence. If our morality contains an agent-relative permission to favor our own interests (and those of our families and friends) over those of strangers, the prospective victim is permitted (and therefore, I think, justified) in firing away. In my judgment, cases of inactive aggressors provide too insecure a foundation for constructing a theory about the significance of human action to the law of self-defense.

<sup>23</sup> GRAMMAR MANUSCRIPT, *supra* note 2, at 390.

law. The act requirement has not played a major role in Anglo-American judicial reasoning. Almost never do courts find a statute defective because it fails to satisfy the act requirement. *Robinson v. California*<sup>24</sup> is the single case (in the United States) cited by Fletcher to support the apparent commitment of Anglo-American jurisprudence to the act requirement. But alternative interpretations of *Robinson* have been provided—some by Fletcher himself.<sup>25</sup> In any event, the act requirement—like many of the principles venerated by criminal theorists—has been developed by commentators rather than by courts.

Fletcher's reference to philosophy suggests that we should begin our inquiry with a conceptual analysis of human action. Perhaps the most sophisticated philosophical analysis of action will enable us to understand what acts are, and thus will help us to decide whether or not to accept something called the act requirement. Any such analysis, I would expect, would draw heavily from ordinary language, since the concept of action is familiar to speakers of English. But the final part of the foregoing quotation dispels this impression. Here, Fletcher indicates that we must be sensitive to how the concept of action "functions in the culture of crime and punishment." The tension between the first and second parts of this quotation is evident. I see no reason to suppose that philosophers have any special insights into the culture of crime and punishment. Ordinary language may be of limited assistance here as well. According to some commentators, the concept of action as used by criminal theorists is unlike that explicated by philosophers, so philosophical analysis will be unhelpful in our efforts to understand it.<sup>26</sup> Perhaps they are correct. If so, however, I urge criminal theorists to stop talking about an act requirement. Suppose we hold that the sense of act as used in the act requirement deviates from that in ordinary language and is unlike the concept explicated by philosophers. How is this position different from admitting that the criminal law does not really contain an act requirement after all, but rather contains a technical requirement that misleadingly shares a name with a term in ordinary English?

Fletcher himself does not expressly indicate that the concept of action, as understood by criminal theorists, is different from its meaning to philosophers or to speakers of ordinary English. Language, he maintains, offers clues about the nature of action itself. He contends "[t]he notion of speaking and communicating meaning by

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<sup>24</sup> 370 U.S. 660 (1962). Admittedly, the law of inchoate offenses—especially attempt—frequently struggles in its efforts to preserve the act requirement.

<sup>25</sup> See the attempt to explain *Robinson* on jurisdictional grounds in *RETHINKING*, *supra* note 3, at 426-33.

<sup>26</sup> This claim is defended by Jennifer Hornsby, *Action and Aberration*, 142 U. PA. L. REV. 1719 (1994).

speaking . . . provides us with the proper take on the theory of action.”<sup>27</sup> Our ability to speak meaningfully, and to recognize meaningful speech in others, inspires what Fletcher calls his “communicative theory of action.”<sup>28</sup> The basic idea is that we come to understand whether persons are acting in much the same way that we come to understand whether persons are communicating. “The place to begin is not with the actor’s intention but with the way in which we, as observers, understand whether motion or nonmotion constitutes action.”<sup>29</sup>

Fletcher introduces four hypothetical cases in the course of motivating his communicative theory of action. Because I will refer to these examples frequently, it is best to give them a name. I will call them the “troublesome cases”: examples in which it may be unclear whether liability (were it to be imposed) would satisfy the act requirement. Since these troublesome cases play a central role in Fletcher’s communicative theory as well as in my reservations about it, they should be presented in full:

- A. The guards at Buckingham palace stand motionless for ten minutes at a time, then they march a few steps and return to their motionless position.
- B. A psychiatrist listens to his patient expatiate at length about his problems. At a certain point the patient asks the psychiatrist a question. The doctor sits there passively, refusing to answer, waiting for the patient to say something else.
- C. Students find the professor’s lectures so thrilling that they are transfixed. They do not make a sound. They [sic] not twitch or move. They merely listen.
- D. A Sunday actor dresses up like a statue in the park and assumes exactly the same pose for a half-hour at a time. A hat in front of the actor signals a desire for contributions.<sup>30</sup>

None of the persons described in these troublesome cases moves his body, but Fletcher is confident that each of them acts nonetheless. He claims “[t]he observer of these events understands that the actor is acting in much the same way that a listener understands language. Words do not convey meaning in the abstract but only in the context of human interaction. The same is true of events that we understand to be actions.”<sup>31</sup> He concludes: “It is hard to see what could be gained by denying these motionless actions are anything but actions.”<sup>32</sup>

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<sup>27</sup> GRAMMAR MANUSCRIPT, *supra* note 2, at 406.

<sup>28</sup> Sometimes he refers to his theory as a “humanistic approach to the concept of action.” *Id.* at 409.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 394-95.

<sup>31</sup> *Id.* at 410.

<sup>32</sup> *Id.* at 395.

In what follows, I will make five observations about Fletcher's treatment of these troublesome cases, and about his communicative theory of action generally. First, I have already argued that liability need not be *for* an act in order to satisfy the act requirement. The object of liability need only stand in an appropriate relation to an act (even though the nature of this appropriate relation remains mysterious). Therefore, Fletcher need not have adopted his controversial position about these troublesome cases. He need not have said, for example, that the human statue in (D) performs an action. Instead, he might have said that liability (if we had any reason to impose it) for the human statue could satisfy the act requirement even if he does not act, as long as it is based on conduct that includes a voluntary act or omission. Presumably, the human statue acted by placing his hat (in which he hoped to collect money) somewhere in sight of his audience. Liability would be compatible with the act requirement if it were based on this prior act. The fact that Fletcher does not mention this possibility raises my suspicion that he might accept the formulation of the act requirement I claimed to be obviously false: criminal liability is and ought to be imposed only *for* an act. Why else would he be so anxious to show that each of the persons in these troublesome cases perform acts? If the act requirement is formulated more plausibly, the issue of whether these persons act is not crucial in deciding whether liability would satisfy the act requirement.

Second, what role does the act requirement really play in our analysis of these troublesome cases? Suppose that we wanted to impose liability in some of these situations. Imagine, for example, that we had good reason to proscribe solicitation in public places, and thus to punish persons who seek money by dressing up like statues in parks. Assume, however, that our best philosophical analysis of the concept of action persuaded us that such persons do not act. What would (and should) our reaction be? Should we abandon the act requirement, or insist that no offense may be enacted? Nearly all commentators, I believe, would opt for the former alternative. Our level of confidence that a statute is a legitimate exercise of the penal sanction seems far greater than our degree of certainty about whether the human statue performs an act, or whether or not the criminal law contains an act requirement. If I am correct, I suspect that determinations of whether given impositions of liability satisfy the act requirement are likely to be infected by judgments that particular statutes are legitimate. The act requirement itself does little descriptive or normative work identifying unjustifiable impositions of the penal sanction. In this light, recall Fletcher's conclusion that "it is hard to see what could be gained by denying these

motionless actions are anything but actions.”<sup>33</sup> From my perspective, it is equally hard to see what could be *gained* by affirming that the persons described in the troublesome cases perform actions—except, of course, to preserve the act requirement (or a particular interpretation of that requirement) in the event that criminal liability is imposed.

Third, how should one decide whether the communicative theory of action is true? The basic idea, I have said, is that we come to understand whether persons are performing actions in much the same way that we understand whether persons are communicating. This hypothesis, as I construe it, is empirical. To assess it, we would have to investigate the causal processes by which we come to recognize that persons are communicating. How do we manage to do what we typically take for granted? A natural way to investigate these processes is by gathering data about persons whose capacities for understanding language have been impaired. Through brain damage or birth defect, some individuals are unable to comprehend language and/or whether others are communicating. Some make fundamental and elementary mistakes in comprehension. Are these individuals also unable to determine whether persons are acting? Can individuals lose one capacity but not the other? These questions help to show that the communicative theory of action is an empirical hypothesis for which scientific evidence must be obtained. Legal philosophers are welcome to entertain empirical hypotheses, but it is not too much to ask them to investigate whether their conjectures are confirmed by actual studies.

Fourth, what kinds of events is the communicative theory meant to *exclude* as actions? Thoughts? Doings that are not actions? Consider the following two examples. Suppose Bill is asked to calculate the product of nineteen and sixteen in his head. We can understand exactly what is going on in his mind while he is deep in thought. Do we thereby interpret Bill’s mental processes to be an act? It seems plausible to say that we can disagree about whether he is acting while agreeing about what is taking place in his head while he performs his calculations. Notice that if we decide that Bill is acting, the act requirement does not preclude punishment for thoughts—a very surprising implication of the communicative theory. As I have indicated, surely the most commonly accepted function of the act requirement is to disallow punishment for thoughts. Fletcher’s theory of action, however, seemingly lacks this implication.

Consider a second example. When I was in college, many students grew beards to express their countercultural predilections. Other students grew beards because they were too lazy to shave. Both classes of students express their character traits through their appearance. What

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<sup>33</sup> *Id.*

does the communicative theory say about these cases? It seems strained and peculiar to hold that either or both of these classes of students performed the *action* of growing a beard while at college. Yet it would be sensible to say that growing a beard was something they *did* as students. Not everything we *do* is an action; we sometimes *do* things without acting at all. Some of these doings are communicative; we can understand what these students were expressing. As these examples show, it is difficult to know exactly what kinds of events Fletcher's communicate theory disqualifies as acts. His theory seems to categorize all doings (for example, thoughts, or growing a beard) as acts as long as they are communicative.

Finally and most importantly, exactly what is the communicative theory *about*—that is, what it is a theory *of*? At least two possibilities must be distinguished. On its face, it is a theory about how third parties are able to decide whether persons are acting. Sometimes Linda acts; at other times she does not, and Sue is able to draw this distinction in much the same way that she is able to decide whether Linda is communicating. But a second interpretation of the communicative theory is available. It might be a theory of what action *is*.<sup>34</sup> This possibility, however, is less plausible than the first. Fletcher may be on the right track in describing how a third party (Sue) goes about understanding events involving a first party (Linda). Sue uses social context to interpret what Linda is doing or saying, or whether she is doing or saying anything at all. But surely this is not the means by which Linda attributes meaning to her *own* behavior. Communication is a two-party process; if successful, it necessarily involves two persons. We communicate *to* someone. It is hard to see why the same is true of action; a shipwrecked Linda can successfully act on a desert island, without ever having met a single person since her infancy. We do not act *to* anyone. Linda need not depend on the context used by observers like Sue to attach significance to her own deeds or words. Fletcher implicitly admits that his communicative theory omits the first-party perspective when he concedes that Sue might be mistaken in her interpretations of Linda's behavior. He writes: "Of course, we might be wrong about what we think we see. . . . Our judgment of what we see must be revisable in light of new information. This is also true of hearing spoken language."<sup>35</sup> If mistakes by third parties are possible, there must be some mechanism by which words and deeds are given meaning above and beyond the interpretations of third-party observers. Presumably, this process involves the first-person, and does not depend

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<sup>34</sup> Even if I am correct to describe this alternative as less plausible, it seems to conform to Fletcher's own understanding of his project. He indicates that the "observer-based account here addresses the question of whether someone is acting." *Id.* at 411-12.

<sup>35</sup> *Id.* at 411.



on whether an observer happens to be present to engage in interpretation.

As far as I can see, the communicative theory does not begin to address this latter issue: the issue of what actions *are*.<sup>36</sup> Fletcher is critical of those legal philosophers, like Michael Moore, who posit wills or volitions to explain human action.<sup>37</sup> But Fletcher is able to avoid reference to such entities mostly because he does not investigate human action from the first-person perspective: from the vantage point of the actor herself. It is easy to see why a criminal theorist (or a legal philosopher generally) would neglect the first-person perspective. The third-person perspective is what interests the law; the act requirement is used to decide whether others are or are not liable and subject to penal sanctions. Arguably, criminal theorists have little reason to care about what action *is*. If so, however, they should be candid in admitting that the criminal law does not really care about action as that concept is understood both by philosophers and by speakers of English. What the law cares about, by contrast, is how we come to recognize whether other persons are acting.<sup>38</sup>

If we want to know what actions *are* and adopt (*inter alia*) the first-person perspective by reflecting on how *we* would know whether we are acting in any of the troublesome cases, it becomes far more plausible to suppose that our answer refers to something inside of us that is active when we act but not otherwise—the phenomenological feel I have when I raise my arm. This elusive “something” is what many have called a will or volition. Fletcher seems dismissive of the idea that actions are caused by volitions, reciting some objections that have persuaded many philosophers. “We never choose to have a ‘volition’ as such—and even if we did, we would not know how to recognize one when it occurred in isolation from our actions.”<sup>39</sup> To my mind, however, these objections are not decisive. The question whether something called a volition plays an important role in explaining human action is better addressed empirically than from our philosophical armchairs—through discoveries in neuroscience. Consider, for

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<sup>36</sup> That is, I do not believe that Fletcher intends to be providing what might be called a “response-dependent” analysis of action. Response-dependent analyses of some properties are plausible. Perhaps an object has the property of “being disgusting,” for example, when reasonable persons under ideal circumstances would react to that object with disgust. Perhaps a joke has the property of “being funny” when reasonable persons under ideal circumstances would react to that joke with laughter. Arguably, some or all moral properties are response-dependent. But no comparable response-dependent analysis of human action is plausible.

<sup>37</sup> MOORE, *supra* note 1.

<sup>38</sup> An analogy may be helpful. We may come to recognize whether a liquid is an acid or a base by dipping red or blue litmus paper in it. But even if this test is perfectly reliable, no one would suggest that it offers much insight into what an acid or a base *is*.

<sup>39</sup> GRAMMAR MANUSCRIPT, *supra* note 2, at 392.

example, a series of experiments performed by Benjamin Libet.<sup>40</sup> He installed wires to detect electrical activity in the brains of people who were told to perform a simple voluntary act—like raising their arms. He monitored what took place before, during, and after the act was performed. He found that the decision to perform the act preceded the ensuing act by roughly 200 milliseconds. Moreover, he detected electrical activity in the brain even before the decision to act was made—activity, that is, that preceded conscious awareness of the decision. I do not pretend that such experiments prove anything. Certainly, multiple interpretations of Libet’s research can be (and have been) provided. I simply mention that such data are essential if we hope to determine whether anything we might call volitions play an important role in explaining human actions.

### III. AN ALTERNATIVE THEORY: CONTROL

Thus far, I have been mostly critical of the positions Fletcher has adopted about the nature of human action and the supposed act requirement in criminal law. Of course, it is far easier to criticize than to defend a theory. Can a better account of some of these controversies be offered? To address this question, I turn to the final controversy I mentioned at the outset. How is the act requirement defended normatively? This issue may seem almost impossible to tackle, since we lack an adequate account of both the act requirement and the nature of action itself. Despite these obstacles, I will sketch my own train of thought. A promising start begins with Fletcher’s suggestion that the act requirement serves “as a buffer against overweening state power.”<sup>41</sup> The act requirement serves this function because it purports to confine the punitive sanction to those matters over which it is fair to hold persons responsible.<sup>42</sup> If I have correctly identified the function of the

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<sup>40</sup> Benjamin Libet, *Do We Have Free Will?*, in *THE VOLITIONAL BRAIN* 47 (Benjamin Libet et al., eds., 1999). For further discussion of the significance of these experiments, see Stephen J. Morse, *Criminal Responsibility and the Disappearing Person*, 28 *CARDOZO L. REV.* 2545 (2007).

<sup>41</sup> GRAMMAR MANUSCRIPT, *supra* note 2, at 430.

<sup>42</sup> The act requirement would not serve this function unless it is fair to hold persons responsible for their actions. Perhaps it is fair to hold persons responsible for their actions only when they are free. But are our actions really free? Most theorists wisely sidestep this unbelievably complex issue, typically (although sometimes reluctantly) presupposing some version of compatibilism according to which our actions may be free despite being caused. Fletcher bravely enters this fray, apparently coming down on the side of incompatibilism: human actions are free and uncaused. Inspiration for Fletcher’s incompatibilism is derived from Noam Chomsky’s celebrated theory of language. Chomsky pointed out that speakers are capable of producing an infinite set of sentences in natural language; we routinely are able to utter sentences that no one has ever expressed in the whole course of human history. Somehow, Fletcher construes this amazing ability as evidence of causal indeterminism. He writes: “Determinist theories presuppose that a finite number of causal factors can generate predictions of all of our

act requirement, the challenge for commentators is to specify the connection between action and criminal responsibility. If persons are responsible for some things that are not acts, and/or are not responsible for some things that are acts, the act requirement may not be especially well-suited to perform its normative function. Some alternative principle may do a better job of limiting state power by ensuring that persons are held liable only when they are responsible.

Recall that the initial problem in formulating the act requirement is that liability need not be *for* an act. Thus we were led to attempts to construe the act requirement that employ the mysterious “includes” and “based on” relations. To my mind, however, we might better cope with this initial problem by developing the idea that the act requirement is designed to ensure that persons are liable only when they are responsible. What is important to our theory of criminal responsibility, I submit, is not action itself, but rather the control that actions typically presuppose.<sup>43</sup> In other words, our reason for wanting to include an act requirement in criminal law is because we care about control. It is easy to see why this concern would lead (or mislead) us into believing that an act should be needed for liability. Paradigmatically, our acts are under our control, while our non-acts are not under our control. The question whether our theory of criminal responsibility should lead us to adopt or to abandon the act requirement is best decided by attending to two types of possible cases:

TYPE A: Liability is imposed for something over which the agent has control, even though it is not an act;

TYPE B: Liability is imposed for an act, even though the agent lacks control over it.

If criminal responsibility is intuitively acceptable in (A) but not in (B), we are entitled to conclude that a control requirement does a better job promoting the normative function of the act requirement than the act

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actions. It would follow that our speech acts, our uses of language, would also have to be finite and calculable.” *Id.* at 404. Since the variety of our speech acts is infinite, Fletcher concludes that determinism must be false, and actions can be uncaused. If I have understood his argument correctly, I regard it as baffling. An ability to perform an infinite variety of distinct actions, linguistic or otherwise, shows absolutely nothing about whether these actions are uncaused. Computers can form infinite strings of numbers, and produce particular sequences that have never been formulated previously. Conventional wisdom holds the same is true of the mechanisms that produce snowflakes. But no one would think that the ability to produce novel and unique structures shows that computers do not cause the strings of numbers they generate. Similarly, no one believes the shapes of snowflakes are uncaused. In short, neither infinite variety nor novelty provides a shred of evidence for incompatibilism. Fletcher is probably correct to suggest that actions must (in some sense) be free if they are to play an important role in a theory of responsibility. But I think he is better advised to avoid the landmine of problems that await commentators who attempt to understand the complex nature of human freedom.

<sup>43</sup> See Douglas Husak, *Does Criminal Liability Require an Act?*, in *PHILOSOPHY AND THE CRIMINAL LAW: PRINCIPLE AND CRITIQUE* 60 (R.A. Duff ed., 1998).

requirement itself. Unfortunately, my suggestion will prove hard to confirm. Since both the concepts of action and that of control are vague and imprecise, it will not be easy to describe cases that clearly qualify as examples of type (A) or (B). We should not expect a knock-down demonstration of the superiority (or inferiority) of the control requirement to the act requirement. Nonetheless, I hope the following considerations are suggestive.

Let us begin with type (B). Examples are (real or imaginary) cases in which liability is imposed for a nonvoluntary act. Actions are nonvoluntary, it seems plausible to believe, when agents lack control over them. If nonvoluntary acts exist, the voluntariness and act requirements must be distinct.<sup>44</sup> As we will see, Fletcher believes the act and voluntariness requirements are separate. This view *appears* to conform to that adopted in the Model Penal Code. The Code seemingly requires an action, and then, as a distinct condition, requires that such action be voluntary. An “act” is defined as a “bodily movement whether voluntary or involuntary,”<sup>45</sup> and a separate provision describes when actions are voluntary.<sup>46</sup> Thus the Code appears to contemplate the existence of nonvoluntary actions; voluntariness is an independent condition added to the act requirement. But this view of the relation between the act and voluntariness requirements is problematic, even as an interpretation of the Code. Suppose that James pushes Steve’s body into contact with Carl, causing Carl to be injured. Of course, the imposition of liability on Steve would violate the voluntariness requirement. But would the imposition of liability violate the act requirement as well, as something independent of the voluntariness requirement? At first blush, the answer would seem to be no. According to the Code’s definition of action, it would appear that Steve has acted. After all, there has been a bodily movement, and the body that has moved is that of Steve. Yet it seems wrong to say that Steve has acted (albeit nonvoluntarily). Steve’s body has moved, but Steve has not moved his body. If Steve’s “acts” are those events not only in which Steve’s body moves, but also in which Steve moves his body, then Steve has not acted at all. The difference between the event in which Steve’s body moves, and the event in which Steve moves his body, which I take to be the difference between nonvoluntariness and voluntariness, just *is* the difference between non-action and action. Thus, even the Code might be interpreted so that the voluntariness requirement is redundant with the act requirement. Although the locution “nonvoluntary action” is not transparently incoherent, I am inclined to believe that so-called nonvoluntary actions are not actions at

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<sup>44</sup> GRAMMAR MANUSCRIPT, *supra* note 2, at 416.

<sup>45</sup> MODEL PENAL CODE § 1.13(2) (1962).

<sup>46</sup> *Id.* § 2.01(2).

all.<sup>47</sup> If I am correct, cases in which liability is imposed for a nonvoluntary action cannot be examples of type (B)—because no such actions exist.

Fletcher supports his position about the difference between the act and voluntariness requirements by contending that “there are enormous differences between the criteria of action and of voluntariness.”<sup>48</sup> In particular, “the notion of action is categorical: Either you do it or you do not. Voluntariness is a matter of degree. Some actions are more voluntary . . . than others.”<sup>49</sup> To be sure, Fletcher allows for situations in which we might be “unsure whether an apparent action is indeed an action.”<sup>50</sup> In cases of hypnosis or sleepwalking, for example, appearances might be deceptive. But Fletcher assures us that “an apparent action is an action unless there are good grounds for denying the force of appearances.”<sup>51</sup> He does not tell us much about what would persuade him that an apparent action is not an action. Perhaps he cannot improve on the Model Penal Code, which simply lists several examples of nonvoluntary actions, lumping all remaining cases together as those that are “not a product of the effort or determination of the actor.”<sup>52</sup> When all is said and done, however, Fletcher concludes that given events either are actions, or they are not.

I doubt that the notion of action is categorical, and the basis of my skepticism is important for clarifying what actions *are*. Many alleged cases of action are borderline, neither clearly action nor inaction. If Fletcher’s troublesome cases are not illustrative of this phenomenon, we might think of coughs, sneezes, burps, yawns, habitual gestures, and a host of equally familiar behaviors. Why should we insist that each of these events ultimately must be classified as an action or a non-action? What further evidence do we need in order to place these events on one side of the line or the other? The concept of action, like virtually all concepts in ordinary language, is vague, and admits of borderline cases. Although philosophers differ about how to construe vague predicates, I assume a predicate is vague when there simply is no right answer about whether or not that predicate applies. Of course, one always can resort to stipulation. But the most informative description of the behaviors I have listed is that they resemble clear cases of action in some ways, but differ from them in others. An action has been performed more or less,

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<sup>47</sup> Some courts have held that an involuntary act “is in reality no act at all. It is merely a physical event.” *State v. Utter*, 479 P.2d 946, 950 (Wash. 1971). For scholarly support, see JEFFRIE G. MURPHY, *Involuntary Acts and Criminal Liability*, in *RETRIBUTION, JUSTICE, AND THERAPY* 116 (Wilfred Sellars ed., 1979).

<sup>48</sup> GRAMMAR MANUSCRIPT, *supra* note 2, at 416.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 398.

<sup>51</sup> *Id.* at 399.

<sup>52</sup> MODEL PENAL CODE § 2.01(2)(d) (1962).

to some degree or another. Of course, exactly the same is true of voluntariness. If neither concept is categorical, Fletcher's basis for distinguishing the act and voluntariness requirements fails.

Suppose I am mistaken, however, and nonvoluntary actions exist. As I have said, it seems plausible to suppose that agents lack control over such actions. The reason to deny that defendants should be liable for their nonvoluntary actions is the absence of control. If control somehow were present despite the absence of voluntariness, however, our intuitive resistance to liability would evaporate. This explains our intuitions in the "culpability in causing" cases to which I referred: those situations in which a nonvoluntary act is preceded by a culpable voluntary act that causes it. When an agent performs a voluntary act, intending, knowing, or consciously disregarding the risk that it will cause him to perform a subsequent nonvoluntary criminal act, we are far more likely to allow liability because the criminal act was under the control of the agent. It is reasonable to expect him to refrain from performing the prior voluntary act that caused him to perform the subsequent nonvoluntary criminal act—and to punish him if he fails to refrain.

Type (B) cases are hard to find. What about type (A)? Perhaps some criminal *omissions* are examples of type (A): liability is imposed for something over which the agent has control, but is not an act. Consider Fletcher's treatment of the bystander who passively lets a child drown, knowing he is capable of rescue. Does he act? Does he act if he is not a stranger but the parent of the victim? Must he recognize the victim as his child before his conduct is an act? I am unsure about how to answer these questions. Perhaps these examples should be treated as borderline cases—cases in which reasonable minds may disagree about whether an action has been performed.<sup>53</sup> My point, however, is that the presence or absence of action is irrelevant to the fairness of imposing liability for the subsequent death. Trying to resolve these cases by deciding whether the defendant has "acted" is misguided. The presence or absence of control, however, seems crucial.<sup>54</sup> If the bystander has little or no control over whether the child

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<sup>53</sup> Fletcher is correct that the absence of bodily movement is not decisive in categorizing conduct as an act or omission. But here our agreement ends. What is significant in categorizing the conduct as an act or omission, according to Fletcher, is "whether [the bystander] was conscious and engaged in the process of letting the child drown." *GRAMMAR MANUSCRIPT*, *supra* note 2, at 396. This proposal to decide whether the agent is acting or omitting is cryptic. At the very least, Fletcher must describe how being "engaged in [a] process" differs from action. He subsequently indicates that the locution "in the process of letting the child drown" should not be confused with what I have called "control" over the fate of the child—roughly, the ability to save or to allow the child to drown. Fletcher writes "the bystander might be acting in deciding to let the child drown, but might have minimal control over whether the child drowns." *Id.* at 396 n.21.

<sup>54</sup> In a class of cases popularly known as Frankfurt-style counterexamples, Harry Frankfurt

drowns, why would anyone think it fair to convict him for the death? A consequence one cannot control is an inappropriate basis of liability.<sup>55</sup> Control without action, however, is a fair basis for punishment. If we do not want to hold bystanders criminally responsible when they have control over the deaths of drowning children, we will need to appeal to a different principle from that which underlies the act requirement.

Perhaps omissions are not the best examples of type (A); R.A. Duff presents a better candidate. He asks us to imagine a case in which "I am standing, innocently, by your valuable vase. A child playfully grabs my arm, and moves it towards the vase in such a way that it will clearly knock the vase over. I could easily resist the child, and withdraw my arm, but do not; the vase is broken."<sup>56</sup> Would liability for the offense of criminal damage be compatible with the act requirement? Here again we have a borderline case of action; there may be no right answer to whether the breaking of the vase is accomplished by my act. The important point, however, is that the determination of whether I act in this scenario seems irrelevant to the justifiability of convicting me of the offense. The crucial question is not whether I did or did not "act," but whether I had or lacked the degree of control over the breaking of the vase that would make it fair to be held responsible for it. If resisting the child is easy, as Duff stipulates, responsibility for breaking the vase should be imposed. I see no reason to believe that liability in this case is problematic because of something called the act requirement. Instead, liability is unproblematic because the values that underlie the (so-called) act requirement are served. Liability is consistent with ensuring that people are convicted only for events (in this case, the breaking of the vase) over which they are responsible, and they are responsible for these events because they have a sufficient degree of control over their occurrence.

But several central questions remain, and I do not pretend to have precise answers to them. First, what exactly *is* control? Second, what degree of control over a state of affairs is sufficient to satisfy the requirement I am tempted to substitute for the act requirement? Third, how does the control requirement relate to other fundamental principles

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famously argues that a person may do x freely (and thus be responsible for x-ing) even though he lacked the ability to do otherwise. Suppose, for example, that Smith unknowingly is locked in a room, hears screams outside, believes he can intervene, but decides not to do so. Many respondents say that the fact that the room was locked so that Smith could not have helped if he had tried does not preclude his responsibility for failing to prevent x. Many other respondents have different intuitions about these cases. I take no position on whether Frankfurt-style counterexamples show that moral responsibility for x does not imply the ability to do otherwise.

<sup>55</sup> Some theorists believe that consequences are *never* under the control of agents, and thus hold that the occurrence or nonoccurrence of harm should be irrelevant to criminal responsibility. I believe agents generally *do* have control over the consequences of their actions, although I will not defend that claim here.

<sup>56</sup> DUFF, *supra* note 1, at 69.

in our theory of criminal liability? Finally, how exactly should the control requirement be formulated? In particular, can some version provide a plausible solution to the notorious culpability-in-causing cases—such as *Decina*?<sup>57</sup> Is it sensible simply to ask whether there ever was a time in which the defendant had sufficient control over the occurrence of the harm (e.g., the deaths of the pedestrians) that he should have prevented it, so it is fair to hold him liable in the event that he failed to do so? Notice that this question does not ask for a factual determination. Whatever may be true of the concept of action, the question of whether the agent had control over a state of affairs is not solely descriptive. Issues surrounding control are normative. It may have been misguided to think that a purely factual concept like action could play the role in a theory of criminal responsibility typically assigned to the act requirement. Beyond this simple observation, however, I will not hazard answers to these difficult questions. Admittedly, nothing is achieved merely by replacing one set of mysteries for another. Like many philosophers, I must be content with the modest progress that is made by asking the right questions. I conclude that we should not be confident about whether criminal law contains an act requirement unless and until we gain a better understanding of the basic issues I have discussed here. Once we gain this understanding, we may find that an alternative requirement—the requirement of control—does a better job serving the normative objectives of the act requirement than the act requirement itself.

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<sup>57</sup> *People v. Decina*, 138 N.E.2d 799 (N.Y. 1956). For a description of this unique case, see *supra* note 12.



