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TIME-FRAMES, VOLUNTARY ACTS, AND STRICT LIABILITY

I. LEGAL RATIONALISM

Michael Bayles dedicated much of his professional life to a rational evaluation of the law. His first book in legal philosophy, *Principles of Legislation*, was written in response to what he perceived to be a lack of "public confidence in political authority".[1] Bayles sought to restore this confidence by identifying principles "which citizens have sound reason to accept".[2] He remained committed to this ambitious project in one of his last and most important books, *Principles of Law*. There Bayles argued that the task of providing a "systematic normative analysis of law"[3] consists in identifying principles "that rational persons would accept on their merits for courts to use to decide issues in an industrialized western society in which the persons are expected to live".[4]

Although Bayles sought to evaluate all areas of the law, both substantive and procedural, he was especially concerned to place the criminal law on a secure justificatory foundation. Since criminal punishment is the most powerful weapon by which political authority is exercised, a challenge to the rationality of the criminal law represents a challenge to political authority itself. Thus the criminal law received his special attention.

While most of the principles Bayles defended are familiar staples of Anglo-American law, he was no apologist for the status quo. He

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[1] Michael Bayles, *Principles of Legislation* (Detroit: Wayne State University Press, 1978), p. 11.

[2] Id., p. 12.

[3] Michael Bayles, *Principles of Law* (Dordrecht: D. Reidel Publishing Co., 1987), p. xviii.

[4] Id., p. 14.

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sometimes called for profound legal change. For example, he argued that "only purposeful, knowing, and reckless conduct should be criminal", so that punishment for negligence should be rejected.[5] Most Anglo-American jurisdictions include offenses of negligence, such as negligent homicide, which Bayles believed to be unjustified. Moreover, Bayles did not think that decisive reasons in favor of one principle over another could always be given. For example, he argued that "one cannot make a rational choice between" adversarial and inquisitorial legal systems.[6] But a fundamental presupposition of his project is that rational grounds for choosing among competing principles of law are typically available. We will call this fundamental presupposition the thesis of legal rationalism.

This thesis has been attacked recently by legal philosophers affiliated with the critical legal studies (CLS) movement. Theorists involved with this movement have been notoriously reluctant to define it, but Mark Kelman's recent characterization can be taken as fairly representative. According to Kelman, CLS theorists claim

> that the legal system is invariably simultaneously *philosophically committed* to mirror-image contradictory norms, each of which dictates the opposite result in any case (no matter how "easy" the case first appears). While settled *practice* is not unattainable, the CLS claim is that settled *justificatory schemes* are in fact unattainable. Efforts at norm legitimation are radically indeterminate.[7]

If CLS theorists are correct, then the thesis of legal rationalism is false.

Some theorists who explicitly disassociate themselves from CLS have been influenced by various aspects of this critique of the law. In a recent article, Larry Alexander acknowledges a "huge debt to Mark Kelman", although he disavows Kelman's "enthusiasm for either the 'insights' or the political agenda of the Critical Studies Movement".[8]

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[5] Id., p. 300.

[6] Id., p. 34.

[7] Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge: Harvard University Press, 1987), p. 13 (emphasis in original).

[8] Larry Alexander, 'Reconsidering the Relationship Among Voluntary Acts, Strict Liability, and Negligence in Criminal Law', in Ellen Frankel Paul, Red D.

Alexander is not persuaded that "either the law in general or the criminal law in particular is radically indeterminate [or] rife with internal contradictions".[9] Yet, as we will see, he follows Kelman in arguing that some fundamental principles of Anglo-American criminal law are "completely opposed to one another".[10]

Legal rationalists, like deconstructionists, are concerned to ferret out inconsistencies in the law. But their purposes are different. Deconstructionists point out inconsistencies in order to demonstrate the futility of trying to find justifiable principles of law. Legal rationalists point out inconsistencies in order to eliminate them and thereby improve the law.

While we endorse legal rationalism, a defense of this thesis is beyond the scope of this paper. Our aim here is modest. We will respond to an attempt by Alexander, inspired by Kelman, to "deconstruct" two principles of the criminal law he claims to be incompatible. We will argue that, when properly understood, these principles can be seen to be consistent.

II. ALEXANDER ON VOLUNTARY ACTS AND STRICT LIABILITY

Alexander presents the following two principles of Anglo-American criminal law:

(1) The "voluntary act principle": there can be no criminal liability in the absence of a voluntary act.
(2) The "strict liability principle": criminal liability can be predicated solely on a voluntary act and need not be predicated additionally on a showing of a culpable mental state or negligence (though whether it should be so predicated is controversial).[11]

Miller Jr., and Jeffrey Paul, eds.: *Crime, Culpability, and Remedy* (Cambridge: Basil Blackwell, 1990), p. 84.

[9] Id., p. 84.

[10] Id., p. 94.

[11] Id., p. 85.

He then follows Kelman in attempting to "deconstruct" these principles.[12] He begins by pointing out the following "tension" between them. The voluntary act principle must be satisfied in all cases of criminal liability. But, Alexander continues, any application of the voluntary act principle to a case of strict liability is "completely arbitrary"; it is impossible to determine nonarbitrarily whether any such case satisfies or violates the voluntary act principle. Nonarbitrary applications of this principle are possible only when an appeal can be made to culpability. If a voluntary act renders one culpable for criminal conduct, then the voluntary act principle is satisfied. But Alexander insists that culpability cannot "be required to satisfy the voluntary act principle without at the same time undermining the strict liability principle".[13] And there are no other further nonarbitrary grounds on which to decide whether that principle is satisfied.

Neither Kelman nor Alexander explains precisely what he means by calling a choice "completely arbitrary". However, they do not mean that a choice is unpredictable or random. Kelman contends that he "would have predicted the outcomes [of decision making processes] correctly for reasons I can share with others".[14] Unfortunately, he does not say what these reasons are, or why they are so pervasive. Apparently he is cognizant of the sorts of considerations used in making decisions, and thus is able to predict what the outcomes will be. His point must be that the considerations themselves are arbitrary, and lacking in rational justification. Recall Kelman's striking claim that: "While settled *practice* is not unattainable . . . settled *justificatory schemes* are in fact unattainable".[15]

Cases such as *State v. Baker*[16] are instrumental to Alexander's defense of his central claim that applications of the voluntary act principle to

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[12] Alexander also attempts to "deconstruct the distinction between negligence and strict liability" (Id., pp. 96–103), although we will not address his arguments about negligence here.

[13] Id., p. 92.

[14] Kelman, op. cit. note 7, p. 93.

[15] Id., p. 13.

[16] 571 P. 2d 65 (1977).

instances of strict liability are "completely arbitrary". Baker was convicted and fined $10 for driving 75 miles per hour in a 55 miles per hour zone, an offense of strict (or what the court called "absolute"[17]) liability. Baker admitted that his car was exceeding the speed limit, but denied that his driving at 75 m.p.h. was a voluntary act. He alleged that his cruise control stuck in the "on" position, causing his car to accelerate beyond the speed limit, and that he was unable to deactivate the cruise control by hitting the "off" button. He denied liability on the ground that his speeding was involuntary.

The Kansas Court of Appeals affirmed Baker's conviction without purporting to reject the voluntary act principle. The court argued:

> We have no doubt that if defendant were able to establish that his act of speeding was the result of an unforseen occurrence or circumstance, which was not caused by him and which he could not prevent, that such would constitute a valid defense to the charge. But, the evidence proffered suggests a malfunction of a device attached to the motor vehicle operated by the defendant over which he had or should have had absolute control. Defendant does not suggest that the operation of the motor vehicle on the day of his arrest was anything but a voluntary act on his part, nor that anyone other than himself activated the cruise control, which may have caused his excessive speed.[18]

The court attempted to distinguish this case from two precedents. In *State v. Kremer*,[19] the defendant was acquitted for going through a "red flashing" semaphore signal at an intersection after his brakes failed without warning. In *State v. Weller*,[20] the defendant was acquitted for driving 80 m.p.h. in a 45 m.p.h. zone after his accelerator unexpectedly broke. The *Baker* court argued:

> Unexpected brake failure and unexpected malfunction of the throttle on an automobile, both being essential components to the operation of the vehicle, differ significantly from the malfunction of a cruise control device to which the driver has voluntarily delegated partial control of the automobile. We believe it must be said that defendant assumed the full operation of his motor vehicle and

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[17] Id., p. 67.
[18] Id., pp. 67–68.
[19] 114 N.W.2d 88 (1962).
[20] 230 A.2d 242 (1967).

when he did so and activated the cruise control attached to that automobile, he clearly was the agent in causing the act of speeding.[21]

The court concluded that Baker's voluntary activation of his cruise control satisfied the voluntary act principle. The court denied, however, that either Kremer or Weller performed a voluntary act that would suffice to satisfy the voluntary act principle.

Alexander remarks that:

> If you are not particularly satisfied by the Kansas court's explanation of why Mr. Baker's punishment does not violate the voluntary act principle, or the court's grounds for distinguishing other similar cases, there is a good reason: the voluntary act principle and the strict liability principle are in conflict with one another, and the resolution of the conflict depends on a quite arbitrary decision with respect to determining the relevant voluntary act.[22]

The court's decision to count *Baker* as satisfying the voluntary act principle, but not to count *Kremer* and *Weller* as satisfying it, was wholly arbitrary. Such wholly arbitrary decisions, claims Alexander, are unavoidable in cases of strict liability; in such cases, the court cannot appeal to culpability, and nothing short of culpability will establish nonarbitrarily that the voluntary act principle is satisfied.

Following Kelman, Alexander diagnoses the difficulty in deciding such cases as follows. He alleges that applications of the voluntary act principle in cases of strict liability involve "completely arbitrary" solutions to "the time-framing problem". Unlike Kelman, Alexander discusses time-framing problems only as they pertain to conduct. He states that "time-framing refers to the temporal boundaries of the criminal conduct: when that conduct can be said to begin and end".[23]

Alexander contends that the court chose to adopt a narrow time-frame for the criminal conduct in *Kremer*, the failed brake case, and in

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[21] Op. cit., note 15, p. 69.

[22] Alexander, op. cit., note 8, p. 91.

[23] Id., p. 91. However, he confines his attention to when conduct begins, since, he claims, the question of when conduct ends is "of no concern" for his purposes (p. 91).

Weller, the broken accelerator case, while the court chose to adopt a broad time-frame in *Baker*. Although neither Kelman nor Alexander say explicitly what he means by "narrow" or "broad" time-frames of conduct, they seem to mean the following: to time-frame broadly is to hold that the criminal act begins with a voluntary act; to time-frame narrowly is to hold that the criminal act does not begin with a voluntary act. Of course, Alexander does not dispute that Baker activated his cruise control prior to the time that his car exceeded the speed limit. To time-frame Baker's criminal act broadly is to suppose that it began with his activation of the cruise control and continued through his act of speeding. If this account is correct, Baker's criminal act is identical to neither his voluntary activation of the cruise control nor his non-voluntary act of speeding. Instead, his criminal act is a complex entity that contains these two acts as temporal stages.

According to Alexander, if the court had decided that Baker's criminal conduct began at the moment his car exceeded the speed limit, it would have had to accept his claim that he did not act voluntarily. On the other hand, if the court had decided that Baker's criminal conduct began with his activation of the defective cruise control, it would have had to reject his claim that he did not act voluntarily. Alexander asks:

> How then do we choose the proper time-frame for strict liability crimes, given that too narrow a time-frame will threaten strict liability and too broad a time-frame will empty the voluntary act principle of its content?
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> The answer is that any choice is going to be completely arbitrary. Remember that we are dealing with strict liability crimes, which by definition do not require any culpability. Therefore, we cannot use a culpable choice as the touchstone of the commencement of the story. If Mr. Baker's choice to switch on the cruise control had been a culpable choice, no one would believe that the voluntary act principle was in issue in his case. . . . But culpability cannot be required to satisfy the voluntary act principle without at the same time undermining the strict liability principle.[24]

Thus, any decision the court could have rendered concerning whether the voluntary act principle is satisfied in a case of strict liability will be

[24] Id., p. 92.

completely arbitrary. The decision will invariably involve a wholly arbitrary choice of time-frame for the criminal conduct.[25]

Alexander says that we can "square strict liability crimes like Baker's with the voluntary act principle by broadening the time-frame, but in doing so we strip the voluntary act principle of its power to limit punishment".[26] The voluntary act principle will be stripped of this power in any case of strict liability, since "all conduct engaged in by adults will be traceable to some voluntary act in their pasts (unless they have been incapable of acting since infancy)".[27] Without culpability, any criminal conduct can be time-framed so that it commences with a voluntary act. Thus, without culpability, the voluntary act principle is rendered "vacuous".

In what follows, we will critically examine Alexander's would-be "deconstruction" of the voluntary act and strict liability principles. In section III, we will show that the decisions in *Baker, Kremer*, and *Weller* did not depend on solutions to time-framing problems. In IV, we will argue that solutions to time-framing problems are not "completely arbitrary", since there is a fact of the matter when conduct begins and ends. In V, we will argue that Alexander can maintain that it is completely arbitrary what we count as the commencement of criminal conduct only if he rejects the principle of legality as it is usually understood. In VI, we will propose three sufficient conditions for satisfaction of the voluntary act principle. In VII, we will argue that, even in a case of strict liability, it is not illegitimate to appeal to culpability to show that the voluntary act principle is satisfied. In VIII, we will argue that even if a legal system requires culpability for criminal liability, it could nonetheless enact strict liability offenses. Finally, in section IX, we will assess some objections by Bayles to strict liability, which he raises from the perspective of legal rationalism.

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[25] As we will see in section IV, however, Alexander acknowledges two exceptions to this generalization.

[26] Id., p. 94.

[27] Id., p. 91.

III. *BAKER, WELLER*, AND *KREMER* RECONSIDERED

In this section we propose to show that the decisions in the cases cited by Kelman and Alexander do not rest on arbitrary solutions to time-framing problems, since they do not rest on solutions to time-framing problems at all. Time-framing is simply not at issue.

According to Alexander, the court distinguished *Baker* from *Kremer*, the failed brake case, and *Weller*, the broken accelerator case, by assuming wholly arbitrary time-frames. The court denied that Kremer or Weller had performed a voluntary act during their offenses, but did not reach this conclusion about Baker. The reason, claims Alexander, is that the court adopted a narrow time-frame in *Kremer* and *Weller*, while the court adopted a broad time-frame in *Baker*.

This interpretation distorts the reasoning in *Baker*. The court claimed that "the evidence proffered suggests a malfunction of a device attached to the motor vehicle operated by the defendant over which he had or should have had absolute control".[28] Of course, Baker protested that he had no control over his cruise control at the time he was speeding. Similarly, Kremer lacked control over his brakes, and Weller lacked control over his accelerator when each committed his respective offenses. Why, then, did the court not conclude that Kremer and Weller "should have had absolute control" over the devices in question? The court answers:

> Unexpected brake failure and unexpected malfunction of the throttle on an automobile, both being essential components to the operation of the vehicle, differ significantly from the malfunction of a cruise control device to which the driver has voluntarily delegated partial control of that automobile. We believe it must be said that defendant assumed the full operation of his motor vehicle and when he did so and activated the cruise control attached to that automobile, he clearly was the agent in causing the act of speeding. . . . Obligations may not be avoided by delegating a task which he normally would perform to a mechanical device such as a cruise control.[29]

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[28] Op. cit., note 15, pp. 67–68.

[29] Id., p. 69.

Two claims seem central to the court's decision. First, the use of a cruise control, unlike a brake or accelerator, is not "essential" to the operation of the vehicle. Second, the cruise control, unlike a brake or accelerator, is a device to which the driver "delegates" the operation of his vehicle. The decision in *Baker* does not depend on the choice of a broad time-frame. The court does not suppose that Baker's criminal act began with his activation of the defective cruise control; it does not identify a single complex criminal act that includes both Baker's activation of the cruise control and his act of speeding as temporal stages. Instead, the court contends that Baker's use of his cruise control, an inessential device analogous to an agent, does not relieve him of responsibility for the excessive speed of his car.

We agree with Alexander's judgment that this decision is dissatisfying. Both of the considerations the court offers to distinguish cruise controls from brakes and accelerators seem irrelevant to the issue of liability. Even if a cruise control mechanism is in some sense an "inessential" device to which the defendant "delegates" the operation of his car, there is no apparent reason why he should be liable for its unanticipated failure. What is missing is an argument as to why an offense caused by the unforeseeable failure of an inessential device to which the defendant has delegated control of his car gives rise to liability, while the failure of an essential device to which he has not delegated control of his car does not. Why should the court hold that drivers activate inessential devices at their own peril? Or that drivers who delegate the operation of their cars to inessential devices are liable, whereas drivers who delegate such operation only to essential devices (e.g., brakes) are not?

For these reasons, we are not persuaded by the court that the failure of a cruise control should be treated any differently from the failure of a brake or accelerator. We anticipate that others will share these reasons for finding the court's arguments in *Baker* to be dissatisfying. *Baker*, we suspect, was decided wrongly. Unfortunately, Alexander does not even entertain the possibility that Baker should have been acquitted. His commitment to the view that *Baker* was decided arbitrarily prevents him from assessing whether it was decided correctly or incorrectly. However, our main point is not to argue that *Baker* was

decided incorrectly, but to show that the court's decision did not depend on broad time-framing.

IV. TIME-FRAMING AND ARBITRARINESS

Time-framing problems can be difficult, even when conduct is voluntary. Suppose that Smith kills Jones by shooting him. When does the killing occur? Does it occur when Smith attempts to squeeze the trigger? Or when she succeeds in squeezing the trigger? When the gun fired? When the bullet enters Jones's body? When Jones dies? Does the time of the killing span from the time Smith attempts to squeeze the trigger until the moment of Jones's death? Or is it a momentary achievement that begins and ends with Jones's death? Such questions about the time of a killing have long troubled action theorists.[30] Here we will not endeavor to answer such questions, but to argue that Kelman and Alexander are simply mistaken in contending that when conduct begins and ends is wholly arbitrary. While it may be controversial exactly when a given instance of conduct begins or ends, some claims about when it begins or ends are obviously false.

When did Smith kill Jones? Some answers are clearly wrong. For example, the killing does not end after Jones dies, or begin before Smith acquired her gun. Even within these parameters, some answers are incorrect. The killing does not begin or end when the bullet has travelled one-half of the distance between the gun barrel and Jones. Nor does the killing begin or end when the bullet has travelled three-quarters of the distance between the gun barrel and Jones. Thus, some claims about when this action begins or ends are plainly mistaken.

Judgments about when an act begins or ends would be completely arbitrary only if there were no fact of the matter about when an action occurs. But it is absurd to hold that there are no such facts of the matter. Thus, judgments about when an action begins or ends cannot be completely arbitrary. To be sure, some such judgments will

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[30] See Alvin Goldman, 'The Individuation of Action', LXVIII *Journal of Philosophy* (1971): 761; and Judith Jarvis Thomson, 'Individuating Actions', LXVIII *Journal of Philosophy* (1971): 774.

be indeterminate, since actions lack precise temporal boundaries. But the absence of precise temporal boundaries does not support Alexander's sweeping generalization.

While Alexander explicitly says on several occasions that "*any* choice [of a time-frame for a strict liability offense] is going to be completely arbitrary",[31] he qualifies this generalization in two places. Recall Alexander's remark that "all conduct engaged in by adults will be traceable to some voluntary act in their pasts (unless they have been incapable of acting since infancy)".[32] Notice that this parenthetical qualification suggests at least one time constraint, namely that an act cannot begin before the agent exists. However, only given this first constraint, it is indeterminate whether Baker began speeding with his first act as an infant. Indeed, it would not be incorrect to hold that an agent begins her every action, voluntary or involuntary, with her very first action.

Alexander acknowledges a second constraint on time-framing. He admits that "sometimes time-framing will be limited by the semantics of the statute".[33] His example of this limitation is "stretch[ing] a statute [such as that involved in *Baker*] to reach those who are merely passengers".[34] Unfortunately, Alexander does not say exactly what it is about the semantics of this statute that precludes such an injustice. Perhaps he reasons as follows. If a person is a passenger at a given time, he cannot be driving at that time, and so he cannot be violating a statute that prohibits dangerous driving. Someone might suggest that the passenger can be convicted if the conduct is time-framed broadly, to include a time when he was driving. By this rationale, a person could be convicted of dangerous driving while she sits at her word processor, if she ever drove in the past. Alexander responds that the "semantics of the statute" precludes this obviously unjust result. But if a passenger at a given time cannot be a driver at that time, and if there is no fact of the matter about when an agent is driving during

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[31] Alexander, op cit., note 8, p. 92 (emphasis ours).
[32] Id., p. 91.
[33] Id., p. 92.
[34] Id., pp. 92–93.

the agent's lifetime, then there can be no fact of the matter about whether an agent is a passenger at any given time. This result demonstrates once again the absurdity of holding that there is no fact of the matter about when an act begins.

Alexander appears to acknowledge that there is a fact of the matter about when an action begins in cases other than strict liability. Consider his observations about Dr. Jekyll and Mr. Hyde. He writes:

> Consider the Jekyll-and-Hyde choice to render oneself an involuntary actor as part of a criminal scheme, for example, taking a potion that one knows will later induce homicidal automatism: there is no question but that the culpable choice [of taking a potion that one knows will later induce homicidal automatism] satisfies the voluntary act requirement despite involuntariness at the time of the homicidal conduct.[35]

This remark implies that there is a fact of the matter about when the homicidal conduct occurred; it implies that Dr. Jekyll's culpable voluntary act of drinking the potion occurred prior to Mr. Hyde's homicidal conduct. So, Alexander himself thinks there is a fact of the matter about when an action begins in cases other than strict liability. Moreover, even in cases of strict liability, Alexander often speaks of the arbitrariness of finding an "earlier" voluntary act. Thus, he recognizes that even in cases of strict liability, there is a fact of the matter about when a particular act begins.

V. CRIMINAL CONDUCT AND LEGALITY

What, then, could Alexander mean by saying that it is "wholly arbitrary" when criminal conduct begins? Let us return to *Baker*. Alexander concedes that Baker's activation of the cruise control occurred prior to his exceeding the 55 m.p.h. speed limit, and so prior to his speeding. In claiming that it is wholly arbitrary when Baker's criminal conduct began, Alexander does not mean that it is wholly arbitrary when Baker began to speed. What he means, we think, is that it is wholly arbitrary whether we say that Baker's criminal conduct began with his activation of the cruise control, or whether we say that his

[35] Id., p. 92.

criminal conduct did not begin until he actually began to speed. If so, then Alexander believes it to be arbitrary whether Baker's criminal conduct is taken to *be* speeding, or only to include speeding. Alexander's talk of arbitrary time-framing is thus misleading. What he really thinks is wholly arbitrary in the absence of culpability is not when an act begins, but rather which acts commence criminal conduct. That is, he thinks that in the absence of culpability, we can take any course of conduct initiating with a voluntary act and terminating in a criminal offense to be criminal conduct.

If this is indeed Alexander's view, then he is mistaken. Recall Alexander's remark that "sometimes time-framing will be limited by the semantics of the statute". We think that this remark is a gross understatement. Judgments about when criminal conduct begins are always constrained by the semantics of the statute. As typically understood, the principle of legality requires that persons can be held criminally liable only if their acts are proscribed by a statute. Given this requirement, a voluntary act can count as the commencement of a criminal act only if it can count as the commencement of an act cited in a criminal statute. Consider a statute that prohibits speeding. If a person is not speeding, he cannot be committing this offense, and if a person has not begun to speed, he cannot have begun to commit this offense. In other words, a driver cannot have begun to speed unless he *is* speeding. Recall that to time-frame broadly is to hold that the criminal act begins with a voluntary act, while to time-frame narrowly is to hold that the criminal act does not begin with a voluntary act. Since the statute specifies speeding as the criminal act, any claim that the criminal act began with a voluntary act that occurred prior to the time the defendant was actually speeding is patently false.

Unless the activation of a defective cruise control can count as the commencement of speeding, it is simply false that Baker began to speed when he activated his cruise control. Alexander can maintain that Baker's act of speeding began in this way only if he holds that Baker's criminal conduct is speeding. However, Alexander admits that Baker did not begin to speed until some time after he activated the cruise control. So, Alexander must hold that Baker's criminal act is not speeding after all, but some act that began with the activation of a defective cruise control. A name could be given to this act, but that

name would not be "speeding". What, then, is this act? Alexander might reply that Baker's criminal act is of a kind not mentioned in the statute he was accused of violating. However, this response is incompatible with the principle of legality, which is typically understood to imply that an act is criminal only if it is prohibited by a statute.

Alexander provides no indication that his views on time-framing have repercussions for the principle of legality. But his views seem to imply that criminal conduct need not be cited in any criminal statute. However, he might respond that the principle of legality is respected if an agent performs an act that includes an act proscribed by a criminal statute. We think that if the principle of legality is interpreted in this way, so that criminal conduct need not itself be cited in any statute, then the voluntary act principle should be understood differently from the way Alexander understands it. Instead of the principle requiring that the agent perform some voluntary act that is relevant to the agent's criminal conduct, it should be understood to require that the agent perform some voluntary act that is relevant to her performing the conduct specified in the appropriate criminal statute. However, if the voluntary act principle is understood in this way, then Alexander has provided no reason to think that, in the absence of culpability, any earlier voluntary act can be deemed relevant to the conduct specified in a criminal statute.

VI. THE VOLUNTARY ACT PRINCIPLE

Alexander says surprisingly little about how, exactly, the voluntary act principle should be understood. As he formulates this principle, it says only that "there can be no criminal liability in the absence of a voluntary act". Of course, criminal conduct need not itself be voluntary in order to satisfy the voluntary act principle. But there must be some relation between a voluntary act and criminal conduct that makes it the case that the voluntary act principle is satisfied. What is this relation? We will call this relation 'the relevance relation'.[36] A full explication of the relevance relation would be needed to provide a

[36] The *Model Penal Code* unhelpfully, and we believe somewhat misleadingly, uses "includes" to express this relation. See *Model Penal Code* Section 2.01(1).

complete account of the voluntary act principle. While we will not attempt a full explication here, we will now suggest three relations between voluntary acts and criminal conduct that arguably suffice to satisfy the voluntary act principle.

Suppose that O is a criminal offense. Then, we think an agent D's O-ing (e.g., Baker's speeding) satisfies the voluntary act principle if

[1] D's O-ing is a voluntary act.

Surely, a voluntary act is relevant to criminal conduct if it *is* criminal conduct. Moreover, the voluntary act principle is satisfied if

[2] D performed a voluntary act in order to O.

Condition [2] is satisfied, for instance, in the Jekyll-and-Hyde case described by Alexander.

In addition, we think it plausible that the voluntary act principle is satisfied if

[3] D O-ed by performing a voluntary act.

Condition [3] would be satisfied, for example, if one embezzled money by illegally transferring it into one's account, or if one killed someone by shooting him.[37] Whether [3] suffices to satisfy the voluntary act principle depends on the rationale for the principle. That rationale is subject to dispute. Alexander suggests that the rationale is to preclude impositions of liability for conduct that is beyond the agent's control.[38] Paradigm cases of acts beyond the agent's control include reflex actions, convulsions, and movements of the body in sound sleep or during unconsciousness.[39] If the voluntary act principle is intended

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[37] The literature on the by-relation is vast. See especially, Donald Davidson's 'Agency', reprinted in ed. Donald Davidson, *Actions and Events* (Oxford, 1980); Alvin I. Goldman, *A Theory of Human Action* (Princeton, Princeton University Press: 1970); and Jonathan Bennett's *Events and Their Names* (Cambridge: Hacking, 1988).

[38] Alexander, op. cit., note 8, p. 86. See also Douglas Husak, *Philosophy of Criminal Law* (Totowa: Rowman & Littlefield, 1987), chapter four.

[39] The term "act" in the law is used in a very broad sense, to include such movements of the body. See *Model Penal Code*, Section 2.01(2).

only to rule out such acts, then [3] should be sufficient to satisfy the voluntary act principle. For if D O-ed by performing a voluntary act, then D's O-ing cannot be a reflex, or convulsion, or the like. One can, of course, make oneself have a convulsion by, for example, performing a voluntary act such as taking a pill that will induce a convulsion. But one cannot have a convulsion by taking such a pill, or by doing anything else voluntarily. For if D Os by V-ing, the V-ing is the way D O-ed. For example, if D killed someone by shooting him, then the latter is the way D did the former; shooting can be a way of killing someone. No voluntary act, however, can be the way one convulsed, since no type of voluntary act can be a way of convulsing. Thus, when condition [3] is satisfied, O is not a reflex, or convulsion, or the like.

We are not claiming that [1]–[3] exhaust the sufficient conditions for satisfaction of the voluntary act principle. We doubt that they do.[40] But each of [1], [2], and perhaps [3] is sufficient to satisfy the voluntary act principle.

VII. THE VOLUNTARY ACT PRINCIPLE AND CULPABILITY

Consider again Alexander's assumption that, in the absence of culpability, criminal liability cannot be imposed unless criminal conduct begins with a voluntary act. If condition [1] is satisfied, then of course the criminal conduct O begins with a voluntary act, since it *is* a voluntary act. Moreover, if [3] is satisfied, then the criminal conduct begins with a voluntary act. For on any plausible explication of the by-relation, if D O-ed by performing a voluntary act V, then D's V-ing either commenced or occurred at the same time as D's O-ing.[41] However, if [2] is satisfied, O itself need not begin with a voluntary act, since the voluntary act D performs in order to do O need not commence D's O-ing. For example, Jekyll's taking the potion in order to

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[40] We suspect that there are knowledge, recklessness, and negligence conditions that suffice to satisfy the voluntary act principle. However, no such further condition will matter for present purposes.

[41] See the references in op. cit., note 41.

kill did not commence his killing.[42] However, it seems that when [2] is satisfied, the agent is culpable for O, since he engaged in the criminal conduct purposely. So, neither [1], [2], nor [3] conflict with Alexander's assumption that, in the absence of culpability, criminal conduct must commence with a voluntary act. However, there may well be other conditions which conflict with this assumption.

What about Alexander's contention that, in the absence of culpability, there is no nonarbitrary sufficient condition for satisfaction of the voluntary act principle? As we noted, condition [2] suffices for culpability. What, then, about [1] and [3]? It is uncertain whether [1] suffices for culpability. This issue cannot be resolved without considering what makes an act voluntary in the relevant sense. While Alexander discusses the voluntary act principle, he says almost nothing about voluntariness itself. As he acknowledges, the notion of voluntariness is typically explicated in terms of the will: A voluntary act is a willed act. If to will an act is to attempt it, then a voluntary act just is a successful attempt. On this understanding, [1] may well imply culpability.

However, condition [3] does not imply culpability. The fact that an agent did O by performing some voluntary act does not imply that the agent is culpable for O. Agent D may do O by performing a voluntary act, when D is completely unaware that, and has no reason to be aware that, she is doing O. Indeed, it is not even required that D have the concept of O-ing. For example, an agent might speed by exceeding 55 m.p.h., without even having the concept of speeding. But it is uncertain whether [3] is a sufficient condition for satisfaction of the voluntary act principle. Condition [3] would suffice to satisfy the voluntary act principle if that principle is intended only to rule out cases of reflex actions, convulsions, movements in sound sleep, and the like. However, if the principle is intended to do further work, it is uncertain whether [3] is sufficient to satisfy it.

Thus, on the one hand, it is uncertain whether [1] implies culpability; on the other hand, it is uncertain whether [3] is sufficient to satisfy the voluntary act principle. Therefore, it is uncertain whether

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[42] Of course, if Jekyll and Hyde are different agents, no act performed by one could commence an act performed by the other.

Alexander is correct that, in the absence of culpability, there is no nonarbitrary sufficient condition for satisfaction of the voluntary act principle. To determine whether either [1] or [3] conflicts with Alexander's contention, more work must be done on the notion of a voluntary act, and on the rationale for the voluntary act principle. These matters, however, are beyond the scope of this paper.

Nonetheless, it is important to emphasize that from the fact that a sufficient condition to satisfy the voluntary act principle implies culpability, it does not follow that it is illegitimate to appeal to that principle in a case of strict liability. Recall Alexander's remark that "we are dealing with strict liability crimes, which by definition do not require any culpability. Therefore, we cannot use a culpable choice as the touchstone of the commencement of the story".[43] Suppose, however, that condition [1] proves to imply culpability. Surely, one could appeal to [1] in a case of strict liability to show that the voluntary act principle is satisfied. Even in a case of strict liability, the voluntary act principle would be satisfied if the criminal conduct itself were voluntary. Suppose that Baker's speeding had been deliberate. His act would satisfy the voluntary act principle, even if speeding were a strict liability offense. It is one thing to say that strict liability does not require culpability; it is quite another to say that culpability cannot be appealed to in a case of strict liability to show that the voluntary act principle is satisfied. Not requiring culpability is, of course, different from excluding culpability. Alexander appears to be fixated on cases of strict liability in which the criminal act itself is not voluntary. This fixation leads him to neglect the fact that condition [1] is typically satisfied in strict liability offenses such as speeding.

Moreover, reconsider [2], the condition satisfied in the Jekyll-and-Hyde case. This condition, it seems, can be satisfied in a case of strict liability. Alexander thinks that the voluntary act principle can be nonarbitrarily applied in the Jekyll-and-Hyde case, even though he fails to specify the criminal charge brought against Dr. Jekyll. The fictional character Dr. Jekyll, made infamous by Robert Louis Stevenson, committed murder, an offense requiring a high degree of culpa-

[43] Alexander, op. cit., note 8, p. 92.

bility. However, suppose that Dr. Jekyll had been charged with the commission of a strict liability offense. Although no jurisdiction has enacted a strict liability offense of homicide, suppose that such an offense existed, and Dr. Jekyll had been accused of violating it. Surely, Dr. Jekyll would be liable for this offense. There is no reason for anyone who is persuaded that Dr. Jekyll is guilty of murder to doubt that he is guilty of strict liability homicide as well. Obtaining a conviction for an offense of strict liability should be easier, not harder, than obtaining a conviction for an offense requiring culpability. Crimes of strict liability are created largely to facilitate conviction, not to impede it. Like manslaughter or negligent homicide, an offense of strict liability homicide would be a lesser-included offense in the crime of murder. Any facts that would establish a conviction for murder would surely establish a conviction for the lesser-included offense of strict liability homicide. It is paradoxical to pause before convicting Dr. Jekyll of the strict liability crime, but to have no hesitation before convicting him of murder. Moreover, suppose that Baker had activated his cruise control in order to speed. Surely, one could appeal to this fact to show that the voluntary act principle is satisfied, even though speeding is a strict liability offense. Thus, even in a case of strict liability, culpability can be used to show that the voluntary act principle is satisfied.

VIII. CULPABILITY AND STRICT LIABILITY

Let us grant just for the sake of argument that Alexander is right that there is no nonarbitrary sufficient condition to satisfy the voluntary act principle that does not imply culpability. Then, it seems to us that the conclusion to draw would be that satisfaction of the voluntary act principle requires culpability. If so, there would indeed be a "tension" between the voluntary act and strict liability principles. This tension would have nothing to do with time-framing, however, and no solution to time-framing problems would dispel it.

Consider a legal system in which the following three claims hold:

[A] No strict liability offense requires culpability.

[B] Criminal liability requires satisfaction of the voluntary act principle.

[C] Satisfaction of the voluntary act principle requires culpability.

If [A]–[C] hold in the system, then strict criminal liability appears to be impossible. The system would impose an impossible condition on strict criminal liability offenses; it would follow that they do and do not require culpability. If a legal system is to include strict criminal liability offenses, it would appear that at least one of [A]–[C] must be rejected.

One might respond to the above by denying [C]. We have left open whether [C] is true, since we have left open whether every sufficient condition for satisfying the voluntary act principle implies culpability. We suspect that [C] is false. Perhaps [1] does not imply culpability, or [3] is sufficient to satisfy the voluntary act principle. Or perhaps, as seems likely, there is some further sufficient condition for satisfaction of the voluntary act principle that does not imply culpability. We will not, however, focus on whether [C] is false, for a tension can be generated by a weaker set of principles than [A]–[C].

Consider the following two claims:

[A] No strict liability offense requires culpability.

[D] Criminal liability requires culpability.

Claim [D] is implied by, but does not imply, [B] and [C]. But if a legal system holds [A] and [D], it is committed to the view that strict criminal liability does and does not require culpability.

If a legal system is to retain strict criminal liability offenses, which of [A] or [D] should it reject? Claim [A] appears secure, as it appears to be true by definition. So, it may well seem that a legal system can retain strict criminal liability offenses only by rejecting [D]. Indeed, the situation seems worse, since the following claim, which, like [A], is implied by Alexander's strict liability principle, seems true by definition:

[E] No strict liability offense requires either culpability or negligence.

And this principle appears incompatible with the following weaker claim than [D]:

[F] Criminal liability requires either culpability or negligence.

Conditions [E] and [F] imply that strict criminal liability offenses both require and do not require either culpability or negligence. If a legal system includes strict criminal liability offenses, it must, it seems, reject [F].

How should the legal system respond if Alexander is correct that the voluntary act and the strict liability principles are in conflict? Should the voluntary act principle be rejected or restricted? Or should strict criminal liability offenses be disallowed? Alexander writes:

> Ultimately, the conclusion I am led to is that the voluntary act principle, taken to the fullest extent that its rationale suggests, requires us to reject the other two principles: that is, principles that envision crimes predicated on strict liability and negligence. On the other hand, the considerations behind the strict liability and negligence principles are valid and probably should limit the application of the voluntary act principle.[44]

Why, one might well wonder, would it not be obvious that the legal system should disallow strict criminal liability instead? Alexander replies that strict criminal liability offenses should be retained because they

> serve the retributive value of seeing that the culpable do not go unpunished in that by omitting the necessity to prove culpability beyond a reasonable doubt, they make it easier to convict the culpable. In addition, strict liability crimes deter unwanted conduct (which produces undeserved suffering, arguably a desert-based value if not a retributive one) in two ways: first, they deter would-be culpable actors who might otherwise engage in harmful conduct believing, whether correctly or incorrectly, that the prosecution will be unable to prove their culpability; second, they deter the innocent by creating incentives to take extraordinary care to avoid harmful conduct. Finally, strict liability crimes cost less to investigate and prosecute.[45]

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[44] Id., p. 85.

[45] Id., p. 88.

Alexander's suggestion seems to be that we need not require satisfaction of the voluntary act principle in cases of strict criminal liability.

However, criminal liability in the absence of either culpability or negligence seems to us to be manifestly unjust. Although the reasons in favour of allowing strict criminal liability offenses are weighty, they do not outweigh the considerations in favor of requiring culpability or negligence for criminal liability. If strict criminal liability is incompatible with [F], then strict criminal liability offenses should be disallowed.

We will not argue this point, however, since requiring either culpability or negligence for criminal liability is *not* incompatible with strict criminal liability offenses. Claim [E] (and likewise claim [A]) is (are) ambiguous. The following two claims disambiguate [E]:

[E1] No strict liability offense *explicitly* requires culpability or negligence.

[E2] No strict liability offense *tacitly* requires culpability or negligence.

An offense explicitly requires whatever elements are mentioned in the statute. By definition, neither culpability nor negligence are elements explicitly mentioned in a strict liability offense. Thus [E1] is true by definition. Claim [E2], however, can be rejected without incoherence since it is not true by definition. Suppose that strict criminal liability offenses must satisfy the voluntary act principle, and that satisfaction of that principle requires culpability or negligence. Then, strict criminal liability statutes tacitly require culpability or negligence since all criminal statutes will at least tacitly require culpability or negligence. The point to note for present purposes is this: There is no conceptual mistake in claiming that a strict criminal liability statute tacitly requires either culpability or negligence. Moreover, considerations in favor of strict criminal liability offenses would be reasons to deny [E2]. If a legal system has strict criminal liability offenses, and requires culpability or negligence for criminal liability, then it rejects [E2]. But there is no contradiction in that.

Claims [E1] and [F] are consistent. Claim [E1] implies that strict criminal liability offenses do not explicitly require culpability or negligence while [F] implies that strict criminal liability offenses at

least tacitly require culpability or negligence. But these are not conflicting requirements. Thus, a legal system can have strict criminal liability offenses while retaining [F]. The failure to distinguish [E1] and [E2] is, we think, responsible for the appearance of conflict between strict liability offenses and [F]. To be sure, many legal philosophers have presupposed that strict criminal liability does not require culpability or negligence, either explicitly or tacitly. However, [E2], unlike [E1], is not true by definition. And if [E2] is incorrect, then strict criminal liability requires culpability or negligence after all, albeit only tacitly.[46]

XI. BAYLES ON STRICT LIABILITY

As we mentioned earlier, the project of legal rationalism is by no means apologetics for the status quo. Strict criminal liability offenses have frequently been attacked within the rationalist tradition. We think that distinguishing explicit from tacit requirements for strict liability is useful in responding to some of these attacks.

Bayles opposed strict criminal liability offenses within the rationalist tradition.[47] His reasons depend on his views about the justification of punishment and the "aims of the criminal law". He contends that "denunciation" – which "condemn[s] conduct contrary to social values" – is widely recognized as one of these "aims".[48] But

> denunciation is not so much an independent aim as one method by which prevention can be achieved. The point of denouncing wrongdoing, thereby attaching a stigma to the convicted person and bolstering social values (educative effect) is at least to confirm law abiding denizens in their conduct. If denunciation had no effect on the incidence of criminal acts, what would be its point?[49]

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[46] For an argument that conviction for a strict liability offense really requires evidence of culpability, see Douglas Husak, op. cit., note 38, pp. 136–41.

[47] See Bayles, op. cit., note 3, p. 298.

[48] Id., p. 281.

[49] Id., p. 290.

This "denunciatory aim of criminal law requires that the conduct be ethically culpable".[50] Bayles continues:

> Although it is often said that denunciation supports the social values underlying the law, it is likely to do so only when conduct contrary to those values is ethically culpable. . . . For a denunciatory effect, condemnation must appeal to people's strong sentiments of disapprobation, and these are largely restricted to ethically culpable conduct.[51]

Thus Bayles opposed liability without culpability (which he equated with strict liability)[52] because "it does not conform to the denunciatory aim of the criminal law".[53]

Bayles failed to heed the distinction between tacit and explicit requirements for strict liability offenses. Understanding strict criminal liability offenses to tacitly require culpability would, we think, "conform to the denunciatory aim of criminal law". This purpose can be served even though strict liability offenses do not explicitly require culpability. So, even if Bayles is correct about the denunciatory aim of criminal law and about what is required for a denunciatory effect, his argument does not show that strict criminal liability is objectionable.

It is, of course, not our concern to defend strict criminal liability. Indeed, while Bayles's denunciation argument does not warrant excluding strict criminal liability, a plausible reason for doing so emerges from his work. As Bayles insisted, the dangers of punishing the innocent are so grave that "criminal wrongdoing must be proved beyond a reasonable doubt".[54] By "criminal wrongdoing", he should be understood to mean not only the elements of criminal conduct mentioned in a statute, but also the more general requirements for criminal liability. Only elements explicitly included in a criminal statute are clearly required to be proved beyond a reasonable doubt.[55] Jurisdic-

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[50] Id., p. 296.
[51] Id., pp. 290–291.
[52] Id., p. 295.
[53] Id., p. 298.
[54] Id., p. 59.
[55] *Patterson v. New York*, 432 U.S. 197 (1977).

tions need not require that the prosecution prove that the defendant satisfied the voluntary act principle, for instance, since it is only a tacit requirement that criminal conduct involve some relevant voluntary act. Thus, if strict liability offenses only tacitly require culpability, conviction for an offense of strict liability will not require that the prosecution prove that the defendant acted culpably. Instead, the burden of proof would be on the defendant to show that she did not act culpably. Strict liability offenses relieve the prosecutor of the burden of proving the guilt of the defendant beyond a reasonable doubt. Such offenses thus seem to circumvent the principle that prosecutors assume this burden. We believe that this principle may be compromised by strict criminal liability offenses. If, as Bayles maintains, a just legal system would require that the prosecution prove culpability beyond a reasonable doubt, then it would understand culpability to be an explicit requirement of any criminal offense. Therefore, a just legal system would not contain strict criminal liability offenses.

From the perspective of legal rationalism, the central issue surrounding strict criminal liability is normative. The issue is whether a legal system should require that the prosecution prove culpability beyond a reasonable doubt. If so, then the system should not contain strict criminal liability offenses. Whether the prosecution should be required to prove culpability beyond a reasonable doubt is, however, beyond the scope of this paper.[56] But the considerations at stake in this issue should be assessed within the tradition of legal rationalism endorsed by Bayles.

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[56] For a useful discussion of this issue within the legal rationalist tradition, see Jeffrey Reiman and Ernest van den Haag, 'On The Common Saying That It Is Better That Ten Guilty Persons Escape Than That One Innocent Suffer: Pro And Con', in Paul, Miller, and Paul, op. cit., note 8, p. 226.