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## Taking Voluntariness Seriously

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# TAKING VOLUNTARINESS SERIOUSLY

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**Abstract:** Courts and commentators commonly claim that criminal law contains a voluntary act requirement. Despite the ubiquity of this assertion, there is remarkably little agreement on what the voluntary act requirement entails. This lack of uniformity is particularly problematic because, for some crimes, whether a defendant is guilty or innocent will turn on which conception of voluntariness is applied. In this Article, we critique the various conceptions of the voluntary act requirement, and propose an alternative set of principles for applying the notion that person is only criminally culpable for crimes committed voluntarily. First, culpability requires that the actus reus as a whole (rather than merely one element of the actus reus) be voluntary. Second, the voluntariness requirement is an affirmative element of every offense, with the prosecution bearing the burden of proving voluntariness. Third, the Constitution requires that voluntariness is a necessary condition of criminal liability. These principles resolve the inconsistent understandings of the voluntariness requirement and ensure that criminal liability is limited to those defendants who are responsible for prohibited activity.

## INTRODUCTION

As any first-year law student can explain, the “voluntary act requirement” is a foundational component of criminal law.<sup>1</sup> Courts,

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<sup>1</sup> See *Seymore v. State*, 152 P.3d 401, 403, 405 (Wyo. 2007), *abrogated by* *Granzer v. State* 193 P.3d 266 (Wyo. 2008); JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 127 (5th ed. 2009) [hereinafter DRESSLER 2009] (highlighting the importance of the voluntary act requirement); SANFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES* 182–83 (8th ed. 2007) (demonstrating that leading casebooks highlight that this “voluntary act requirement” or actus reus, is a foundational component). This fundamental requirement is variously referred to as the “actus reus requirement,” the “act requirement,” the “voluntary act requirement,” and the “voluntariness requirement.” See, e.g., JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 85 & n.6 (6th ed. 2012) [hereinafter DRESSLER 2012] (referring to both “the voluntary act rule” and “the actus reus requirement” to describe the same requirement); MARCUS D. DUBBER & MARK G. KELMAN, *AMERICAN CRIMINAL LAW: CASES, STATUTES, AND COMMENTS* 212 (2d ed. 2009) (using the term “act requirement”); CYNTHIA LEE & ANGELA P. HARRIS, *CRIMINAL LAW: CASES AND MATERIALS* 140 (2d ed. 2009) (using both the terms “voluntary act” and “the actus reus require-

commentators, and theorists overwhelmingly assert that criminal law contains an act requirement.<sup>2</sup> This surface consensus, however, belies the underlying reality of deep disagreement about the meaning, scope, and application of the act requirement in criminal law.<sup>3</sup> Given the purportedly fundamental nature of the requirement, it is remarkable how little agreement there is about the terminology employed, what the requirement (however described) means, why it is required, and how it relates to other elements of criminal law, including the mens rea requirement.<sup>4</sup>

This Article explores some of these longstanding and vexing theoretical questions, identifies practical problems that result from these uncertainties, and suggests a novel framework for substantially resolving them. Specifically, we directly address three critical, unresolved questions of criminal liability relating to the issue of voluntariness and actus reus.<sup>5</sup>

First, the Article considers whether the “voluntary act requirement” commands that voluntariness is an essential element of any criminal offense (which the prosecution must prove beyond a reasonable doubt), or whether the requirement is satisfied by allowing an af-

ment”); PAUL ROBINSON, CRIMINAL LAW 141 (1997) (explaining that the actus reus applies to the offense as well as the circumstances surrounding the event and that “[t]he conduct must include a voluntary act”); Douglas Husak, *Rethinking the Act Requirement*, 28 CARDOZO L. REV. 2437, 2437 (2007) (using the term “act requirement”); A.P. Simester, *On the So-Called Requirement for Voluntary Action*, 1 BUFF. CRIM. L. REV. 403, 404–05 (1998) (using the term “voluntary act requirement”).

<sup>2</sup> See *Seymore*, 152 P.3d at 403, 405; KADISH ET AL., *supra* note 1, at 182–83. Leading casebooks are almost all in accord in stating that criminal law has two foundational components: the actus reus and the mens rea. See DRESSLER 2009, *supra* note 1, at 127; KADISH ET AL., *supra* note 1, at 182–83; see also WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW § 3.2(c) (2d ed. 1986) (referring to the voluntary act requirement as a fundamental requirement of criminal liability); Husak, *supra* note 1, at 2437 (“The single matter on which [penal theorists] are virtually unanimous is that there is an act requirement in the criminal law.”); Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857, 862 (1994) (referring to the voluntary act as being a minimum condition for condemning the actor). But see WILLIAM J. STUNTZ & JOSEPH L. HOFFMANN, *DEFINING CRIMES* 50 (2011) (arguing that the voluntary act requirement means little and pointing to the Supreme Court case *Robinson v. California*, 370 U.S. 660 (1962)).

<sup>3</sup> See DRESSLER 2012, *supra* note 1, at 85 & n.6.

<sup>4</sup> See, e.g., DUBBER & KELMAN, *supra* note 1, at 212 (considering the actus reus requirement to be synonymous with the act requirement); LEE & HARRIS, *supra* note 1, at 140 (illustrating the different approaches to actus reus by using actus reus as an “umbrella term that ties together at least five loosely related doctrines or concepts”); Michael S. Moore, *Causation and the Excuses*, 73 CALIF. L. REV. 1091, 1097 (1985) (considering the act requirement to be a unitary principle).

<sup>5</sup> See *infra* notes 135–330 and accompanying text (proposing a solution to these three questions).

firmative defense of involuntariness (which must be demonstrated by the defendant). By examining the doctrinal underpinnings of the act requirement, we conclude that it is an implied element, not a defense, in every crime.

The second question we address is whether the “Voluntariness Requirement” (as we will refer to it) requires that every element of the actus reus be voluntary, or whether the requirement is satisfied when there is a single voluntary act—even when there are other elements of the actus reus that are *involuntary*. We argue that where an element of the actus reus is satisfied only due to involuntary conduct, a defendant generally should not be held criminally liable even if the defendant’s conduct included a voluntary act; that is, every element of the actus reus must be voluntary.

Third, we address the longstanding question of whether the requirement of an actus reus enjoys constitutional status. Based on existing Eighth Amendment law and the underlying purpose served by the requirement, we conclude that the voluntary actus reus concept, as defined in this Article, is constitutionally required.

In short, this Article fills a void in the case law and existing literature by addressing three questions of first-order importance as to the meaning of criminal law’s voluntary act requirement.<sup>6</sup> The resolution of these questions is no mere academic exercise. The difference between the various interpretations of the voluntary actus reus requirement, particularly in strict liability prosecutions, could be the difference between guilt and innocence.

The Article proceeds in three parts. Part I lays out both the common law development of the voluntary act requirement, and the theoretical bases for requiring a voluntary act as a condition of criminal liability.<sup>7</sup> Part II describes the current disagreements—among courts, commentators, and theorists alike—about the voluntary act requirement.<sup>8</sup> Finally, Part III sets out our three proposals, namely:

- (1) The Voluntariness Requirement is only satisfied if the actus reus as a whole, subject to a limited exception, is voluntary;
- (2) The Voluntariness Requirement is an element of each criminal offense, to be proved by the prosecution; and

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<sup>6</sup> See Husak, *supra* note 1, at 2438. Douglas Husak has called upon scholars to devise a theory of actus reus and explained that any such theory should account for the “descriptive and normative” components of the doctrine. *Id.*

<sup>7</sup> See *infra* notes 10–49 and accompanying text.

<sup>8</sup> See *infra* notes 50–134 and accompanying text.

(3) The Voluntariness Requirement is a constitutionally mandated condition of criminal liability.<sup>9</sup>

### I. THE BASIS OF THE ACTUS REUS REQUIREMENT

The doctrine of actus reus is at once a universally-regarded foundational requirement for criminal liability and a source of considerable confusion and disagreement.<sup>10</sup> Few legal doctrines marshal such support or create so much controversy, much less both. The purpose of this Part is to set out the history and basis of the requirement (or requirements) relating to the actus reus. That is to say, this Part provides an overview of the essential historical and doctrinal features of the voluntary act requirement. This effort at clarifying current doctrine is done, however, with one major caveat: The history of the doctrine is complicated by a complete lack of uniformity in terminology. As a result, our description of this history employs the same erratic terminology used by the courts and commentators responsible for the doctrine's development and influence.<sup>11</sup> In a subsequent part, we undertake the onerous task of generating a clear and consistent terminology from these longstanding concepts that, until now, have lacked a consistent vocabulary.

#### A. *The Common Law Development of the Actus Reus Doctrine*

Criminal liability requires both a guilty mind (*mens rea*) and a voluntary act (*actus reus*).<sup>12</sup> American academia and jurisprudence

<sup>9</sup> See *infra* notes 135–330 and accompanying text.

<sup>10</sup> See *supra* notes 2–4 and accompanying text (demonstrating the importance of the actus reus requirement and explaining the sources of confusion and disagreement in academia).

<sup>11</sup> See *supra* notes 1–3 and accompanying text (explaining that terminology is often used inconsistently). We are not oblivious to the irony of using older inconsistent terminology in this Part for the purpose of being consistent; however, our explication in this Part of the multiple rationales for the doctrine shows that “act” and “actus reus” are not synonymous, and that the requirement of an act (or actus reus) has a different justification than the voluntariness requirement. See *infra* notes 33–49 and accompanying text. In the past, terms have been used inconsistently, and their usage has conflated independent concepts with different rationales; nevertheless, we do not endeavor to correct this problem in this Part. See *supra* notes 1–3 and accompanying text.

<sup>12</sup> See, e.g., ROBINSON, *supra* note 1, at 141. Paul Robinson, for example, states that “[c]urrent doctrine conceptualizes offense requirements as part of either the *actus reus* (“bad act”) or *mens rea* (“guilty mind”) of an offense.” *Id.*; see DRESSLER 2012, *supra* note 1, at 85; ROBINSON, *supra* note 1, at 140 n.2 (quoting A.C.E. Lynch, *The Mental Element in the Actus Reus*, 98 LAW Q. REV. 109, 111 (1982)) (“The concepts of *actus reus* and *mens rea* are said to be ‘the corner-stone of discussion on the nature of criminal liability.’”).

reflect the fundamental importance of these two requirements.<sup>13</sup> For example, reflecting on the foundations of criminal law almost a century ago, Walter Wheeler Cook observed that “[i]t is a common saying that every crime may be looked at as composed of two elements: (1) an *act* and (2) the *intention*, or *state of mind* with which the act is done.”<sup>14</sup> Over sixty years ago, in *Morissette v. United States*, the Supreme Court expressed a similar view of the conceptual underpinnings of criminal liability: “Crime, [is] a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand.”<sup>15</sup> The leading treatises and textbooks of today still hew to this formulation.<sup>16</sup>

When characterizing crimes as consisting of an *actus reus* and *mens rea*, commentators customarily treat the *actus reus* requirement as synonymous with an “act.”<sup>17</sup> Consequently, commentators often appear to treat the requirement that a crime include an *actus reus* as interchangeable with the a requirement that the crime include an *act*—hence the (often parenthetical) references to a “guilty act” or a “bad act.”<sup>18</sup> The *actus reus* requirement is therefore commonly described as the “act requirement” or the “voluntary act requirement.”<sup>19</sup> Yet these same commentators also recognize that, in contemporary criminal law, the *actus reus* of a crime is not limited to positive acts.<sup>20</sup> Understood as the physical dimension of the crime, *actus reus* encompasses more than

<sup>13</sup> DUBBER & KELMAN, *supra* note 1, at 183 (explaining that “a crime in the common law sense consists of two ‘offense’ elements . . . [,] *actus reus* (the guilty act) and *mens rea* (the guilty mind)”); *see also id.* at 199 (“A *mens rea* without an *actus reus* was no crime, only an evil thought. An *actus reus* without a *mens rea* likewise did not a crime make . . .”).

<sup>14</sup> Walter Wheeler Cook, *Act, Intention, and Motive in the Criminal Law*, 26 YALE L.J. 645, 646 (1917).

<sup>15</sup> 342 U.S. 246, 251–52 (1952).

<sup>16</sup> *See, e.g.*, RICHARD J. BONNIE ET AL., CRIMINAL LAW 65 (3d ed. 2010) (“Traditionally, crimes are said to consist of a guilty act plus a guilty mind—in the language of the law, an *actus reus* and a *mens rea*.”); DUBBER & KELMAN, *supra* note 1, at 183 (explaining that criminal liability requires both *actus reus* and *mens rea*); ROBINSON, *supra* note 1, at 141 (same).

<sup>17</sup> *See* DUBBER & KELMAN, *supra* note 1, at 212 (discussing the importance of the “act requirement” in criminal law).

<sup>18</sup> *See id.* at 199, 212 (explaining that the two elements of an offense are *mens rea* and *actus reus*, and later describing the requirement that a crime include an act).

<sup>19</sup> *See infra* notes 33–49 and accompanying text. Nevertheless, the *actus reus* requirement, act requirement, and voluntary act requirement are not always used to refer to the same rule.

<sup>20</sup> DRESSLER 2009, *supra* note 1, at 85, 127. Although there is not universal consensus, the dominant view treats *actus reus* as “the physical or external portion of the crime,” as contrasted with *mens rea*, which is “the mental or internal ingredient” of the offense. *Id.*

positive acts.<sup>21</sup> Instead, it is commonplace to describe the actus reus as some combination of conduct, circumstances, and results, as is done by the Model Penal Code.<sup>22</sup>

Although there is a longstanding recognition that actus reus and mens rea play an equally fundamental role in limiting the reach of criminal law, the conceptual symmetry between these doctrines is belied by disparate doctrinal development, as well as a growing body of case law that regards mens rea as the primary and most important check on the imposition of criminal sanctions.<sup>23</sup> This divergence is due in part to the 1950s reforms of the Model Penal Code, which provided definitions and more rigorous methods for assessing the applicable mens rea to each element of a crime.<sup>24</sup> As a result, mens rea analysis is increasingly standardized in its meaning and robust in its application.<sup>25</sup>

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<sup>21</sup> See BONNIE ET AL., *supra* note 16, at 186 (“The act elements of the offense are characterized as ‘conduct,’ ‘circumstances,’ and ‘results.’”); DUBBER & KELMAN, *supra* note 1, at 200 (“Beginning with the Model Penal Code, it has become common to differentiate between three types of objective offense elements: *conduct*, *attendant circumstance*, and *result*.”); ROBINSON, *supra* note 1, at 141 (“The actus reus of an offense typically is described as including the conduct constituting the offense as well as any required circumstances or results of the conduct.”); *infra* notes 114–134 and accompanying text (explaining how the imprecise use of actus reus has contributed to misunderstanding the role of voluntariness in crimes with more than one actus reus element).

<sup>22</sup> DUBBER & KELMAN, *supra* note 1, at 200; see MODEL PENAL CODE § 2.01 explanatory note (1985).

<sup>23</sup> Melissa Hamilton, *Reinvigorating Actus Reus: The Case for Involuntary Actions by Veterans with Post-Traumatic Stress Disorder*, 16 BERKELEY J. CRIM. L. 340, 340–41, 343 (2011) (citing EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAW OF ENGLAND 107 (1644)). On the other hand, given the rise in strict liability offenses, actus reus can be viewed as more fundamental than mens rea. See ROBINSON, *supra* note 1, at 228 (explaining strict liability in criminal law). Although there are numerous offenses which require no mens rea, there are no crimes that do not require *some* actus reus element. That is, even though legislatures have been willing to impose criminal punishment without a guilty mind, no legislature has been willing to punish for *only* a guilty mind. See BONNIE ET AL., *supra* note 16, at 65 (explaining that a fundamental principal of criminal law is that criminal liability only attaches to behavior).

<sup>24</sup> See, e.g., KADISH ET AL., *supra* note 1, at 222–23 (explaining that the Code “has proved extremely influential,” and that its “mens rea framework has been adopted explicitly in more than half of the American Jurisdictions, and it often influences judicial interpretations in the remaining jurisdictions as well.”); Michael L. Seigel, *Bringing Coherence to Mens Rea Analysis for Securities-Related Offenses*, 2006 WIS. L. REV. 1563, 1564–65 (“In what can only be described as a rare moment of collective genius, the [Model Penal Code] drafters cut through this legacy of incoherence.”).

<sup>25</sup> See Seigel, *supra* note 24, at 1565. To be sure, the term mens rea still enjoys different meanings in different jurisdictions, but vague terms, like malice and general or specific intent, are much less common now that the elemental approach to criminal law has emerged as dominant. *Id.* at 1564 (explaining the use of these terms prior to the drafting of the Model Penal Code). Accordingly, Oliver Wendell Holmes’s statement in 1916, that the problem with mens rea was the absence of any “understanding of what *mens rea* is[,]” is

The same cannot be said for the actus reus requirement.<sup>26</sup> Although the voluntary act requirement is routinely referred to as an equally “fundamental principle” of criminal law, there is remarkably little consensus about what it means, why it is required, and how it relates to other elements of criminal liability, including mens rea.<sup>27</sup>

To be fair, a certain amount of confusion has to be expected when dealing with a doctrine whose very origins are the subject of confusion.<sup>28</sup> Jerome Hall’s groundbreaking treatise notes that the term actus reus “seems” to have been introduced early in the twentieth century, but acknowledges that this is just a “guess.”<sup>29</sup> Moreover, it appears that the first usage of actus reus had conceived of the concept narrowly, as nothing more than an overt “observable act.”<sup>30</sup>

By contrast, it is commonplace today to define actus reus by reference to both an overt act and voluntariness.<sup>31</sup> Even setting aside the terminological confusion, and assuming for the moment that actus reus is synonymous with a voluntary act, it is necessary to define with some precision the component parts of the actus reus requirement: (1) the act; and (2) its voluntariness.<sup>32</sup>

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much less problematic today than in the past. See 1 HOLMES-LASKI LETTERS 5 (M. Wolfe ed., 1953). Federal criminal law, however, is still largely devoid of meaningful standardization in the application of mens rea. See Seigel, *supra* note 24, at 1564–65.

<sup>26</sup> State v. Deer, 287 P.3d 539, 542 (Wash. 2012) (explaining “that little attention has been paid to the notion of actus reus”).

<sup>27</sup> See, e.g., KADISH ET AL., *supra* note 1, at 183 (referring to the voluntary act requirement as a fundamental requirement of criminal liability); ROBINSON, *supra* note 1, at 141 (highlighting that actus reus is a fundamental requirement in criminal law). Leading casebooks tout the actus reus requirement as a foundational requirement for criminal culpability. See, e.g., KADISH ET AL., *supra* note 1, at 206; see also LAFAVE & SCOTT, *supra* note 2, § 3.2(c) (referring to the voluntary act requirement as a fundamental requirement of criminal liability).

<sup>28</sup> See JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 222 (2d ed. 1960) (discussing the origins of the term actus reus).

<sup>29</sup> *Id.* (relying on a letter from Professor J.W.C. Turner to support this speculation).

<sup>30</sup> *Id.* at 223 (quoting Letter from J.W.C. Turner, editor of Kenny’s Outlines of Criminal Law (Apr. 16, 1958)).

<sup>31</sup> KADISH ET AL., *supra* note 1, at 183. The 2007 version of a prominent casebook, for example, explains that it is a “fundamental principle that criminal liability always requires an ‘actus reus,’ that is, the commission of some voluntary act that is prohibited by law.” *Id.*

<sup>32</sup> See DRESSLER 2009, *supra* note 1, at 129 (discussing the requirements of voluntary acts). This bifurcation is consistent with the approach of the Model Penal Code; the Code defines “act” in Section 1.14 and then defines “voluntary act” in Section 2.01. MODEL PENAL CODE §§ 1.14, 2.01.

### B. *Distinguishing the Act from the Voluntary Act*

One of the most widely shared views about the *actus reus* requirement is that the doctrine is predicated on a desire to bar criminal liability for thoughts alone.<sup>33</sup> There is overwhelming consensus that the existence of a police state that punishes thought crimes is inconsistent with the goals of our justice system.<sup>34</sup> Such concerns are not merely the stuff of movies and academia. For example, at common law, the crime of treason could have been punished so long as the defendant was “compassing or imagining” the demise of the Crown.<sup>35</sup> As a result, there is a longstanding sense that the criminal law ought to distinguish “law from morals” by ensuring that “men [are] not to be tried for their thoughts.”<sup>36</sup>

In essence, arguments against punishing mere thought reflect concerns about: (1) the difficulty of distinguishing between mere desire and actual intention to commit a crime; and (2) a feeling that it is undesirable to have criminal law interfere where it is unclear that the offender has resolved to undertake the action. As Professor Abraham Goldstein explained:

Never, the maxim has it, do we punish an evil intent alone . . . . [T]he traditional conception of “act” continues its hold upon the imagination of men and upon legal doctrine. It expresses today, as it did three centuries ago, the feeling that the individual thinking evil thoughts must be protected from a state which may class him as a threat to its security. Rooted in skepticism about the ability either to know what passes through the minds of men or to predict whether antisocial behavior will follow from antisocial thoughts, the act requirement serves a number of closely-related objectives: it seeks to assure that the evil intent of the man branded a criminal has been expressed in a manner signifying harm to society; that there is no longer any substantial likelihood that he will be deterred by the threat of sanction; and that there has been an

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<sup>33</sup> See BONNIE ET AL., *supra* note 16, at 65; DUBBER & KELMAN, *supra* note 3, at 214.

<sup>34</sup> See BONNIE ET AL., *supra* note 16, at 65; DUBBER & KELMAN, *supra* note 3, at 214.

<sup>35</sup> See, e.g., HALL, *supra* note 28, at 176 (citing *Hales v. Petit*, (1562) 75 Eng. Rep. 387 (C.B.) 397; 1 pl. 253, 259–60).

<sup>36</sup> *Id.*; see, e.g., DRESSLER 2012, *supra* note 1, at 86.

identifiable occurrence so that multiple prosecution and punishment may be minimized.<sup>37</sup>

There is much to be said for arguments like these, which provide a conceptual justification for limiting criminal liability to acts. We don't want to punish mere dreams or fantasies that have not manifested into action of any sort.<sup>38</sup> These explanations for the purpose of the actus reus requirement, however, do not justify a voluntariness requirement.<sup>39</sup>

Stated differently, an aversion to thought policing may explain the requirement of an act, but it does not adequately justify the concomitant requirement of voluntariness.<sup>40</sup> There is no risk of punishing mere thoughts once the defendant has taken affirmative acts.<sup>41</sup> In essence, then, the aversion to punishing thoughts triggers an act requirement, but not a voluntary requirement.<sup>42</sup> Accordingly, the natural question for criminal law scholars is: "Why do we require that an act be both voluntary and overt? Do we seek to avoid different harmful consequences by these different requirements, or do they constitute a double defense against the same harmful consequences?"<sup>43</sup>

<sup>37</sup> Abraham S. Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 405–06 (1959); see also GLANVILLE LLEWELYN WILLIAMS, CRIMINAL LAW: THE GENERAL PART I (1961) (quoting Shakespeare for the proposition that thoughts alone are not punishable).

<sup>38</sup> See WILLIAMS, *supra* note 37, at 1. The line between mere fantasy and action can be a fine one, especially with respect to inchoate crimes, such as attempt and conspiracy. But even with attempt and conspiracy, criminal liability is contingent upon some actual steps being taken, beyond mere thoughts, towards committing the offense. See KADISH ET AL., *supra* note 1, at 693. That conspiracy, in particular, can blur the line between thoughts and actions, is precisely the reason that conspiracy can be controversial. See Benjamin Weiser, 'Ugly Thoughts' Defense Fails; Officer Guilty in Cannibal Plot, N.Y. TIMES, Mar. 13, 2013, at A1. (providing a recent example of this controversy).

<sup>39</sup> See *infra* notes 50–134 and accompanying text. In Part II, we push this argument one step further. We point out that the aversion to thought crimes does not justify requiring an act, in the sense of a bodily movement, or even conduct more broadly defined to include omissions. Rather, thought crimes are avoided by requiring an actus reus. That is, thought crimes are precluded by insisting on *some* physical component of crimes, whether conduct, circumstance, or result.

<sup>40</sup> See HERBERT MORRIS, FREEDOM AND RESPONSIBILITY 106 (1961) (questioning whether the act requirement and voluntary requirement serve different purposes).

<sup>41</sup> See *id.*

<sup>42</sup> See *id.* This view is in tension with John Austin's definition of an act. For Austin, an act only exists when there is bodily movement resulting from volition—that is to say, speaking of a "voluntary act" is redundant according to Austin. JOHN AUSTIN, LECTURES ON JURISPRUDENCE 415, 419 (1885). By contrast, other theorists, including Oliver Wendell Holmes, have defined an act as nothing more than a bodily movement. O.W. HOLMES, JR., THE COMMON LAW 91 (The Lawbook Exch., Ltd. 2005) (1881).

<sup>43</sup> See MORRIS, *supra* note 40, at 106.

A desire to avoid thought policing is not a sufficient justification for the requirement of voluntariness. Commentators seem to largely ignore this distinction between the rationale for requiring an act, on the one hand, and requiring that the act be voluntary, on the other.<sup>44</sup> The official comments to the Model Penal Code provide a salient explanation for the independent requirement of voluntariness.<sup>45</sup> The drafters of the Code explain that the “law cannot hope to deter involuntary movement or to stimulate action that cannot physically be performed.”<sup>46</sup> Involuntary movements, so the reasoning goes, may justify state-imposed therapy or civil confinement to keep the public safe, but they do not represent actions deserving criminal sanction.<sup>47</sup> Stated another way, the requirement of voluntariness, much like the mens rea limitation, is designed to limit criminal punishment only to those offenders who are truly responsible. Because only voluntary actions are truly deserving of “praise [or] blame,” the doctrine of actus reus limits criminal liability to those persons who are truly responsible for their actions.<sup>48</sup>

By grounding the requirement of voluntariness in responsibility, a more complete picture of the role that the act requirement plays in criminal law comes into focus.<sup>49</sup> The actus reus requirement seeks to avoid both punishing mental events alone and punishing acts for which the defendant lacks responsibility. This crucial insight, often over-

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<sup>44</sup> See *id.* (questioning if it is right to ignore this distinction).

<sup>45</sup> MODEL PENAL CODE § 2.01 cmt. 1.

<sup>46</sup> *Id.* (“[T]he sense of personal security would be undermined in a society where such movement or inactivity could lead to formal social condemnation of the sort that a conviction necessarily entails.”).

<sup>47</sup> See *id.*

<sup>48</sup> Sanford H. Kadish, *Excusing Crime*, 75 CALIF. L. REV. 257, 259 (1987) (discussing the effects of involuntary physical movements on criminal liability). Persons can be morally responsible for their thoughts, as well as *not* morally responsible for involuntary physical movements. The prohibition on thought crimes therefore does not differentiate between those actors who are responsible and those who are not. The requirement that there be some basis other than mere thoughts for criminal liability does not do the work of applying liability to those, and only those, who are responsible for their predicament; that work is done by an independent voluntariness requirement.

<sup>49</sup> See *id.* (explaining that the voluntary requirement serves the function of punishing only those who are morally deserving of punishment). Every harm inflicted through an involuntary act, however, is not necessarily immune from criminal punishment; it is possible to deter persons from putting themselves in situations in which the risk of a harmful involuntary act is high. See, e.g., *People v. Decina*, 138 N.E.2d 799, 803–04 (N.Y. App. Div. 1956) (affirming the indictment of a defendant who injured a pedestrian after having an epileptic seizure while driving).

looked, plays a central role in our conclusions about the proper scope and function of the actus reus doctrine in modern criminal law.

## II. THE VOLUNTARY ACT REQUIREMENT: DEEP DISAGREEMENT

Building on this history of the requirement of a voluntary actus reus, this Part describes, in detail, some of the on-the-ground conflicts that arise regarding the meaning and application of the actus reus requirement. In other words, this Part considers the practical manifestations of the definitional and theoretical concerns we have identified.<sup>50</sup> There are deep and important disagreements about the basic function of the actus reus doctrine in modern criminal law.<sup>51</sup> The surface level consensus that criminal liability cannot exist in the absence of an actus reus is often belied by the practical application of the doctrine.<sup>52</sup> The disconnect between the theory and the reality is due, in large part, to the fact that mens rea and actus reus are common law concepts, whereas modern criminal law is statutorily based.<sup>53</sup> Law students study the common law elements of crime, but legislatures are the ones with the power to define what conduct is criminal.<sup>54</sup> Thus, although legislators might be generally familiar with the principles of mens rea and actus reus, all too often the concepts are either missing from the statutes or impossible to decipher and define.<sup>55</sup>

It is therefore not surprising that courts in different jurisdictions have adopted divergent views of the act requirement in criminal law. Below, we address two of the most pressing questions concerning the

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<sup>50</sup> See *infra* notes 57–110 and accompanying text (addressing whether actus reus is an element of every crime or merely an affirmative defense); *infra* notes 111–134 and accompanying text (examining whether the voluntary requirement applies to all elements of a crime).

<sup>51</sup> See *supra* notes 1–3 and accompanying text (illustrating the inconsistency of the terms used).

<sup>52</sup> Husak, *supra* note 1, at 2438 (noting that almost no American scholars challenge the act requirement).

<sup>53</sup> See DRESSLER 2009, *supra* note 1, at 4 (“Today, in every state and in the federal system, legislators, rather than judges, exercise primary responsibility for defining criminal conduct and for devising the rules of criminal responsibility.”); see also *id.* at 149–50 (tracing the development of mens rea in English common law); Rachel Lyons, Note, *Florida’s Disregard of Due Process Rights for Nearly a Decade: Treating Drug Possession as a Strict Liability Crime*, 24 ST. THOMAS L. REV. 350, 357–58 (2012).

<sup>54</sup> See, e.g., BONNIE ET AL., *supra* note 16, at 78 (describing the “principle of legality” as “the insistence on advance legislative crime definition”); see also *id.* at 80 (“Judges no longer feel free to respond to new situations as the occasion demands. They increasingly regard themselves as bound to enforce only those offenses previously declared to exist.”).

<sup>55</sup> See STUNTZ & HOFFMAN, *supra* note 2, at 50 (explaining that legislatures are often politically motivated when they draft statutes).

proper meaning and application of the actus reus requirement: (1) whether the voluntary act is an implied element in every crime; and (2) if so, whether it applies to every element of the crime.<sup>56</sup>

A. *Actus Reus as an Element of Every Crime, or Merely a Defense?*

A court could take either of two diametrically opposed approaches to the actus reus requirement.<sup>57</sup> First, a court could require the prosecution to prove the existence of an actus reus beyond a reasonable doubt. Alternatively, a court could hold that the burden is on the defendant to prove the absence of an actus reus.

Courts across different jurisdictions, and sometimes within the same jurisdiction, have embraced both of these formulations.<sup>58</sup> Actus reus, then, exists in American criminal law as an absolute requirement, or alternatively as a mere affirmative defense—and potentially a gratuitous defense.<sup>59</sup>

A vocal minority of lower courts have approached the actus reus question with unique and refreshing candor by acknowledging that they do not know what role the actus reus rule plays in the actual adjudication of crimes.<sup>60</sup> For example, in 1993, in *Alford v. State*, the Texas Court of Criminal Appeals—sitting en banc—remarked that at least three cases held actus reus to be an implied element in all crimes.<sup>61</sup> The court then identified three cases from the same jurisdiction that took the opposite position, concluding that the voluntary act requirement was an affirmative defense that must be raised by the defendant.<sup>62</sup>

<sup>56</sup> See *infra* notes 57–110 and accompanying text (addressing whether actus reus is an element of every crime or merely an affirmative defense); *infra* notes 111–134 and accompanying text (examining whether the voluntary requirement applies to all elements of a crime).

<sup>57</sup> See *infra* note 62 and accompanying text (demonstrating the approaches that different courts have taken).

<sup>58</sup> See *Alford v. State*, 866 S.W.2d 619, 624 (Tex. Crim. App. 1993) (en banc) (expressing frustration with the inconsistency of approaches taken by courts); see *infra* note 62 and accompanying text (demonstrating the approaches that different courts have taken).

<sup>59</sup> See *Alford*, 866 S.W.2d at 624.

<sup>60</sup> See *id.*

<sup>61</sup> *Id.* at 624 n.8 (“We recognize the existence of authority which appears to be conflicting on the issue of whether voluntariness is an element or fact that must be proven by the State.”).

<sup>62</sup> *Id.* Compare *Alvarado v. State*, 704 S.W.2d 36, 38 (Tex. Crim. App. 1985) (holding that a Texas statute imposes an “engage in conduct” requirement onto every offense), and *Williams v. State*, 630 S.W.2d 640, 644 (Tex. Crim. App. 1982) (en banc) (holding that the defendant should be acquitted if there is a reasonable doubt as to whether he voluntarily engaged in the conduct), and *Dockery v. State*, 542 S.W.2d 644, 649–50 (Tex. Crim. App. 1975) (holding that the State must prove both voluntary conduct under 6.01(a) and culpable mental state), *with*

Candor as to the confusion surrounding the voluntary act requirement has been rare.<sup>63</sup> Instead, courts and scholars typically adopt one of two diametrically opposed views of the actus reus requirement as it applies to a given case.<sup>64</sup>

### 1. The Essential Element View

One view of actus reus with both historical and current prominence is the absolutist approach, which considers the actus reus doctrine to be a fundamental requirement in all criminal cases.<sup>65</sup> According to this line of thinking, a voluntary act is no less essential to culpability than a guilty mind.<sup>66</sup> Consistent with this view, commentators have remarked that as a matter of practice, the actus reus is “almost universally treated as a required element of every offense.”<sup>67</sup> Thus, although it is perfectly appropriate to speak about an involuntary act defense, this view regards it as a serious mistake to equate an involuntary act with an affirmative defense like duress or self-defense.<sup>68</sup> Instead, the key is to recognize that a voluntary act is “an element of every criminal offense,” which means that as a matter of constitutional law, the burden is on the prosecution to prove voluntariness beyond a reasonable doubt.<sup>69</sup> One scholar has even posited that the actus reus is a more fundamental element in establishing criminal liability than mens rea.<sup>70</sup> For example, in a statutory rape case, a defendant would not be guilty if the defendant was unconscious or asleep while the alleged victim engaged in intercourse.<sup>71</sup>

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Crank v. State, 761 S.W.2d 328, 352 (Tex. Crim. App. 1988) (holding that voluntariness of the defendant’s actions is a defense which must be raised by the accused), and *Bermudez v. State*, 533 S.W.2d 806, 807 (Tex. Crim. App. 1976) (“[V]oluntariness’ of the conduct is in the nature of a defense and need not be pled in the indictment . . .”), and *Davis v. McCotter*, 766 F.2d 203, 204 (5th Cir. 1985) (relying on *Bermudez* to hold that because voluntariness is not an element of aggravated robbery, it need not be proven by the State; therefore, it is not a violation of due process to require the defendant to prove an affirmative defense of duress).

<sup>63</sup> See *supra* notes 58–62 and accompanying text.

<sup>64</sup> See *supra* notes 61–62 and accompanying text (demonstrating the approach of Texas lower courts).

<sup>65</sup> ARNOLD H. LOEWY, CRIMINAL LAW: CASES AND MATERIALS 427 (3d ed. 2009) (arguing that “actus reus is even more fundamental or basic to criminal liability than mens rea”).

<sup>66</sup> See *id.*

<sup>67</sup> PAUL H. ROBINSON, CRIMINAL LAW DEFENSES 263 (1984).

<sup>68</sup> See LOEWY, *supra* note 65, at 427.

<sup>69</sup> DRESSLER 2012, *supra* note 1, at 93; ROBINSON, *supra* note 67, at 263.

<sup>70</sup> See LOEWY, *supra* note 65, at 427.

<sup>71</sup> See *id.*

Many scholars and courts have agreed with the view that a voluntary act is an essential implied element of every crime, regardless of statutory text.<sup>72</sup> For example, in the 2002 case *U.S. v. Tinoco*, the United States Court of Appeals for the Eleventh Circuit explained that actus reus is traditionally thought of as a required element in every crime.<sup>73</sup> Other cases have attributed a similarly reified status to the actus reus.<sup>74</sup> The quintessential case evincing this view of the actus reus doctrine is probably the 1879 decision of the Kentucky Supreme Court, *Fain v. Commonwealth*.<sup>75</sup> In *Fain*, the defendant fell asleep with a gun in a crowded hotel lobby, and when he was “awakened suddenly and still in a somnambulistic state, he killed a person in the lobby.”<sup>76</sup> The court reversed Fain’s conviction, despite the presence of an act, because the prosecution had not produced evidence of voluntariness.<sup>77</sup> This outcome is supported by the idea that the “law only punishes for overt acts done by responsible moral agents;” thus, Fain did not deserve criminal sanctions because he was not morally culpable.<sup>78</sup>

The 2007 Wyoming Supreme Court case *Seymore v. State*—a less famous, but more recent decision—similarly illustrates this view.<sup>79</sup> In *Seymore*, the defendant was convicted of an escape offense for failing to return to a detention facility after checking out five hours earlier.<sup>80</sup> On appeal, the defendant argued that the jury instruction was defective for

<sup>72</sup> See, e.g., *United States v. Tinoco*, 304 F.3d 1088, 1106 (11th Cir. 2002); *Fain v. Commonwealth*, 78 Ky. 183, 192–93 (1879); *Seymore v. State*, 152 P.3d 401, 406 (Wyo. 2007); LOEWY, *supra* note 65, at 427; ROBINSON, *supra* note 67, at 263–67.

<sup>73</sup> *Tinoco*, 304 F.3d at 1106 (holding that “facts not formally identified as elements of the offense charged” should be treated as elements when they relate to “traditional elements,” such as actus reus, causation, and mens rea).

<sup>74</sup> WAYNE R. LAFAVE, 2 SUBSTANTIVE CRIMINAL LAW § 4.1 (2d ed. 2012) (citing *United States v. Vilches-Navarrete*, 523 F.3d 1, 13 (1st Cir. 2008)); *United States v. Rendon*, 354 F.3d 1320, 1328 (11th Cir. 2003)).

<sup>75</sup> 78 Ky. at 192–93; see LESLIE W. ABRAMSON, KENTUCKY PRACTICE SERIES, SUBSTANTIVE CRIMINAL LAW § 2:4 (2012–2013 ed.) (describing *Fain* as one of the “classic American cases”). *Fain* was included in the famous 1940 criminal law textbook authored by Herbert Wechsler and Jerome Michael as support for the essentialness of a voluntary act for criminal liability. JEROME MICHAEL & HERBERT WECHSLER, CRIMINAL LAW AND ITS ADMINISTRATION 35 (1940).

<sup>76</sup> 78 Ky. at 184.

<sup>77</sup> *Id.* at 192–93 (acknowledging, nonetheless, that if Fain had been aware of his propensity for sleepwalking, then he might have been guilty of homicide for falling asleep in public with a loaded gun).

<sup>78</sup> ROBINSON, *supra* note 67, at 161 (discussing excuses for criminal liability); see *Fain*, 78 Ky. at 192–93.

<sup>79</sup> See 152 P.3d at 403, 405.

<sup>80</sup> *Id.* at 403.

failing to require specific intent to escape.<sup>81</sup> The Wyoming Supreme Court explained that even though the crime was merely a crime of “general intent”—requiring only an intent to do the prohibited act—the prosecution still had to prove beyond a reasonable doubt that the act was voluntary.<sup>82</sup> The court reasoned that it was reversible error for the case to have been submitted to the jury without an instruction requiring a finding beyond a reasonable doubt of voluntariness.<sup>83</sup> More specifically, the defendant was not guilty of the escape offense because the State did not prove that the defendant’s failure to return was voluntary.<sup>84</sup> Without an instruction requiring a finding of voluntariness, the conviction could not stand because the requirement of a voluntary act, no less than the requirement of a guilty mind, was deemed necessary to the imposition of a criminal conviction.<sup>85</sup>

## 2. The Affirmative Defense

A second group of scholars and courts agree that the absence of *actus reus* must preclude a conviction, but they argue that the burden of proving involuntariness should rest with the defendant because involuntariness is best thought of as a defense.<sup>86</sup> Similarly, a related argument is that the law ought to recognize an overriding “presumption of voluntariness” in criminal prosecutions.<sup>87</sup> The theoretical justification for this approach, however, is incomplete. For example, one commentator urged a presumption of voluntariness by noting that the “law assumes that every person intends the natural consequences of his vol-

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<sup>81</sup> *Id.* at 405.

<sup>82</sup> *Id.* at 406 (“[E]ven a general intent crime requires a showing that the prohibited conduct was undertaken voluntarily.”).

<sup>83</sup> *Id.* at 405 (explaining that “[a]ll first-year law students are taught that, as a general rule, every crime must contain two elements: an *actus reus* and a *mens rea*”). For a more complete summary and criticism of the decision, see Birthe S. Christensen, Case Note, *Criminal Law—the Wyoming Supreme Court’s Confusion on Voluntary Act: Automatic Jury Instruction on the Voluntary Act Requirement?*; *Seymore v. State*, 152 P.3d 401 (Wyo. 2007), 9 WYO. L. REV. 625, 626–27 (2009). In the view of this commentator, it is an error to treat voluntariness as a true element of every crime. *Id.*

<sup>84</sup> *Seymore*, 152 P.3d at 406.

<sup>85</sup> *Id.* (“No crime has been committed, for instance, if an adult community corrections resident fails to return to the facility because of disabling injuries suffered in an automobile accident or a natural calamity.”).

<sup>86</sup> See, e.g., *United States v. Webb*, 747 F.2d 278, 283–84 (5th Cir. 1984) (explaining that, under Texas law, voluntariness is a defense and is not addressed unless the defense raises the issue); *Brown v. State*, 955 S.W.2d 276, 280 (Tex. Crim. App. 1997) (considering involuntariness to be a defense); Christensen, *supra* note 83, at 626 (same).

<sup>87</sup> See Christensen, *supra* note 83, at 627, 631.

untary acts.”<sup>88</sup> The problem with this presumption is that it rests on the finding of a voluntary act, and is thus circular. On the one hand, when a criminal injury occurs—e.g., a robbery, rape, or murder—it makes sense to infer that the actions of the perpetrator were voluntary. In the normal course of things, one does not injure or rob another without acting voluntarily. On the other hand, as the *Fain* case famously illustrates, even shooting someone in a public hotel lobby may not be a voluntary act.<sup>89</sup>

Moreover, the difference between allowing a permissive presumption of voluntariness and treating involuntariness as an affirmative defense is of significant practical import. Even if a presumption is permitted, if the voluntary act is an element of the offense, the jury is still instructed that the prosecution must prove beyond a reasonable doubt that the defendant’s actions were voluntary.<sup>90</sup> By contrast, if involuntariness is merely an affirmative defense, then the defendant may bear the burden of disproving voluntariness.<sup>91</sup> Stated differently, it is one thing to say that the defendant should, in the ordinary course of a criminal case, contest voluntariness if he thinks it is an issue (and thus rebut the presumption), but it is quite another to say that the *actus reus* is merely an affirmative or even gratuitous defense.<sup>92</sup>

In short, there are two ways in which involuntariness could be thought of as a defense. First, one could accept the idea that the defendant, as a purely procedural matter, may raise the issue of involuntariness to refute an essential element of the crime.<sup>93</sup> Under this view, involuntariness is a defense in the sense that it permits one to escape liability and in the sense that the defendant typically has a duty to raise it—but it still functions like an absolute requirement (an element) when raised.

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<sup>88</sup> *Id.* at 631.

<sup>89</sup> 78 Ky. at 192–93.

<sup>90</sup> *See, e.g., Sandstrom v. Montana*, 442 U.S. 510, 512, 524 (1979) (holding that a conclusive or mandatory presumption violates due process, but creating constitutional space for an instruction that allows, but does not require, the jury to make an inference).

<sup>91</sup> *See KADISH ET AL., supra* note 1, at 38–39 (discussing the presumption of innocence).

<sup>92</sup> *See, e.g., 14 PENNSYLVANIA PRACTICE SERIES* § 1:1 (“Hence, the voluntariness of a defendant’s act is an element of the offense in Pennsylvania (as in every other state) that must—when the issue is raised—be established by the Commonwealth beyond a reasonable doubt.”).

<sup>93</sup> *See Brown v. State*, 955 S.W.2d 276, 280 (Tex. Crim. App. 1997) (holding that the jury shall be charged on the issue of voluntariness only when admitted evidence raises the issue of voluntariness and the defendant requests the charge).

Some courts have embraced this approach and held that, because “voluntarily” means the “absence of an accidental act, omission or possession,” the State needs to prove voluntariness if the evidence raises the issue of accident.<sup>94</sup> For example, in 1992, in *Baird v. State*, the Indiana Supreme Court explained that although the Indiana Code requires a voluntary act for criminal liability, “the [S]tate must prove the defendant acted voluntarily beyond a reasonable doubt” only if the evidence raises an issue of voluntariness.<sup>95</sup>

Alternatively, one could conceive of involuntariness as a true affirmative defense, such that the burden is on the defendant to prove it, and the failure of the prosecution to make any showing as to voluntariness would not preclude a conviction.<sup>96</sup> Some courts have adopted this latter view, treating involuntariness as a mere defense, rather than an element.<sup>97</sup> This represents a material departure from the traditional notion that actus reus is an implied element of every offense.

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<sup>94</sup> *Id.*; *Alford*, 866 S.W.2d at 624.

<sup>95</sup> 604 N.E.2d 1170, 1176 (Ind. 1992); see IND. CODE § 35-41-2-1 (2010); see also *Davidson v. State*, 849 N.E.2d 591, 593 (Ind. 2006) (treating voluntariness as a non-element). Although the defendant in *Davidson* wanted an instruction that his killing had to be both intentional and voluntary, the trial court had refused such an instruction and was affirmed on appeal. 849 N.E.2d at 593.

<sup>96</sup> See *Webb*, 747 F.2d at 283–84. Some commentators treat the actus reus as an affirmative defense. For example, Birthe S. Christensen has argued that making voluntariness an affirmative defense is constitutionally permissible. Christensen, *supra* note 83, at 626. Notably, Christensen’s support for this claim is rather tenuous; the corresponding footnote cites only to *Patterson v. New York*, 432 U.S. 197, 205–06 (1977), which simply holds that if something is an affirmative defense, as opposed to an element, the burden may be shifted to the defendant without offending due process. *Id.* For a more detailed discussion and critique of the *Patterson* reasoning, see Donald A. Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 CAL. L. REV. 1665, 1675–77, 1679–80 (1987).

<sup>97</sup> See, e.g., *State v. Jones*, 527 S.E.2d 700, 706 (N.C. Ct. App. 2000) (explaining that unconsciousness is an affirmative defense that the defendant must prove to the jury). Deborah Denno has summarized the divergent treatment of the voluntary act requirement across jurisdictions:

Most states have an explicit requirement or a provision that approximates such a requirement. One state, however, has since repealed its voluntary act requirement and six out of seven states never codified the explicit requirement they had initially proposed. Some state codes and the federal criminal code have no code-explicit voluntary act requirement, although a defendant’s volitional impairments can mitigate the sentence under the Federal Sentencing Guidelines. In turn, some states have a defense of involuntary conduct or a comparable intermediate voluntary act provision that falls between an explicit requirement and no requirement whatsoever.

Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 277–81 (2002).

### 3. The Implications of Involuntariness as a Defense

There is some scholarly support for the view that an actus reus requirement, if it exists at all, is merely a defense. Furthermore, some judges and scholars entirely reject the actus reus requirement as an outdated, academic relic of the common law.<sup>98</sup> For example, a leading criminal law casebook from 2011, by scholars William Stuntz and Joseph Hoffman, does not include an actus reus set of materials.<sup>99</sup> Instead, they explain that there is no freestanding actus reus requirement independent of the statutory elements of the crime.<sup>100</sup> Under this view, the rules of actus reus apply only if legislatures choose to embrace the principles of actus reus.<sup>101</sup> Accordingly, although there may be reasons that legislators want to include an actus reus requirement, there is no overarching principle requiring that such an element be implied.<sup>102</sup>

If a court were to embrace this view, then absence of voluntary actus reus is, at most, an affirmative defense.<sup>103</sup> Furthermore, as a defense—like the heat of passion defense—it could be entirely eliminated from the realm of criminal litigation.<sup>104</sup>

When the absence of voluntary is only an affirmative defense, rather than an element, the implications for criminal defendants are striking. For example, in 2012, in *State v. Deer*, the Washington Supreme Court considered whether a woman's claim that she was asleep was a defense to an allegation of sex with a minor.<sup>105</sup> As previously noted, everything from the Model Penal Code to the common law case of *Fain* considers conduct (or omissions) while one is asleep to be a prototypical example of an involuntary action, undeserving of criminal sanc-

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<sup>98</sup> ROBINSON, *supra* note 67, at 266; STUNTZ & HOFFMAN, *supra* note 2, at 50.

<sup>99</sup> STUNTZ & HOFFMAN, *supra* note 2, at 50.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* (“Legislators are not required to explain or justify the choices they make when drafting statutes. Often those choices have more to do with political advantage than with legal principle.”).

<sup>102</sup> ROBINSON, *supra* note 67, at 266. Involuntary conduct is a statistical and subjective abnormality; the relevant facts are peculiarly within the knowledge of the accused; and where a harm has been caused by a defendant's act, it seems fair to require him to adduce evidence that the act was involuntary. This analysis suggests that for constitutional purposes involuntariness should be viewed as a general excuse rather than as a universal offense element. *Id.*

<sup>103</sup> See KADISH ET AL., *supra* note 1, at 39. Scholars have discussed the fact that so long as the defense is gratuitous—that is, can be eliminated entirely—the burden can be shifted to the defendant. *Id.*

<sup>104</sup> *Patterson*, 432 U.S. at 201 (heat of passion defense).

<sup>105</sup> 287 P.3d 539, 542–43 (Wash. 2012).

tion.<sup>106</sup> The Washington Supreme Court, however, held that the State was not required to prove as an element of the crime that the defendant was awake.<sup>107</sup> The alleged involuntariness of the actions was irrelevant to the question of criminal culpability. In justifying this holding the court explained:

It is generally recognized that the defendant bears the burden of proving an affirmative defense by a preponderance of the evidence. The sole exception is when a defense “negates” an element of the charged offense, in which case due process requires the State to bear the burden of disproving the defense. Deer’s “sleep sex” defense does not fall within the category of negating defenses. Third degree rape of a child is a strict liability offense, the elements of which are sexual intercourse, between the defendant and a child who is at least 14 but under 16 years of age and at least 48 months younger than the defendant, occurring in the state of Washington. A claim of having been asleep during sexual intercourse with a child does not negate the fact that sexual intercourse occurred. This is not the same as creating a “reasonable doubt” as to an element of the State’s case, which is apparently what Deer’s proposed instruction would have required.<sup>108</sup>

In other words, the Washington Supreme Court took the quintessential example of involuntary *actus reus*—being asleep or unconscious—and held that this did not undermine the essential elements of a criminal conviction. Far from the generally accepted notion of a guilty mind and a physical act as the foundational requirements of criminal culpability, the court held that the prosecution had no duty to show any voluntary *actus reus* on the part of the defendant.<sup>109</sup> The court went on to explain: “[T]he defense must be allowed in order to avoid an unjust conviction, but the defendant bears the burden of proving it.”<sup>110</sup>

The preceding discussion demonstrates deep disagreement among both courts and commentators as to whether voluntariness is an essen-

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<sup>106</sup> MODEL PENAL CODE § 2.01 cmts. 1 & 2 (Official Draft and Revised Comments 1985) (listing reflexes, convulsions, unconsciousness, hypnosis, and somnambulism as involuntary acts).

<sup>107</sup> *Deer*, 287 P.3d at 542–43.

<sup>108</sup> *Id.*

<sup>109</sup> *See id.*

<sup>110</sup> *Id.*

tial element of every criminal offense, or whether voluntariness is merely an affirmative defense, and perhaps subject to elimination by legislatures. This question is of pressing practical, as well as theoretical, importance, and we propose a resolution of the issue in Part III. We argue that voluntariness should be considered a necessary element of every criminal offense.

### B. *How Many Voluntary Actus Reus Elements?*

Assuming that voluntariness is required, confusion arises as to how it is defined. In theory, it is essential to define the range of conduct that might constitute a voluntary act; in practice, it is nearly impossible. Even if a legislature sets out to define the requirements of a voluntary act with precision, these efforts have minimal value because of the absence of a “universally accepted definition.”<sup>111</sup> Even those following the lead of the Model Penal Code on this issue do not provide any meaningful guidance. For example, it is commonplace for a state to dictate by statute or case law that the “minimum requirement for criminal liability is the performance by a person of conduct which includes a voluntary act.”<sup>112</sup>

Time and again, the definition of voluntary act fails to elaborate on the relationship between mens rea and actus reus.<sup>113</sup> In fact, these terms have been historically conflated. For example, a 1989 model jury instruction in Arizona reads: “The State must prove that the defendant did a voluntary act forbidden by law. You may determine that the defendant intended to do the act if the act was done voluntarily.”<sup>114</sup>

This confusion surrounding actus reus also means that it is unclear whether the voluntariness requirement applies to every material element of the crime. In Colorado, for example, a voluntary act is simply defined as “an act performed consciously as a result of effort or deter-

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<sup>111</sup> DRESSLER 2009, *supra* note 1, at 127.

<sup>112</sup> COLO. REV. STAT. § 18-1-502 (2012); OHIO REV. CODE ANN. § 2901.21 (West 2012) (explaining that a “person’s liability is based on conduct that includes either a voluntary act, or an omission to perform an act or duty that the person is capable of performing”).

<sup>113</sup> *State v. Lara*, 902 P.2d 1337, 1339 (Ariz. 1995) (adopting a conflated view of the actus reus and mens rea requirements).

<sup>114</sup> *Id.* (discussing the recommended 1989 Arizona jury instructions). This example has value in illustrating the historical confusion surrounding actus reus and mens rea as discrete concepts. Nevertheless, it should be noted that the recommended Arizona jury instructions have since been updated and no longer appear to conflate these terms. *See* ST. B. ARIZ., STANDARD CRIM. INSTRUCTIONS 24 (2012), [http://www.azbar.org/media/58832/2-standard\\_criminal\\_revised\\_2012.pdf](http://www.azbar.org/media/58832/2-standard_criminal_revised_2012.pdf).

mination.”<sup>115</sup> By contrast, states—including Colorado—follow the Model Penal Code’s example and routinely define the mens rea requirement with a high degree of precision, specifying, for example, the proper analysis for assessing the applicable mens rea for each material element.<sup>116</sup> Accordingly, assuming voluntariness is required, confusion arises as to whether it is required as to every material element, or whether a single voluntary act suffices, even if other elements of the actus reus are not voluntary.

### 1. The Single Voluntary Act View

The Model Penal Code formulation, which has been adopted in many jurisdictions, strongly suggests that only *one* voluntary act is required: It refers to conduct that includes a singular voluntary act.<sup>117</sup> Specifically, Section 2.02(1) of the Code states, “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>118</sup> The natural reading of this requirement is that if the actus reus for an offense consists of more than one act, or conduct made up of multiple, simpler acts, or an act together with attendant circumstances, then the Code’s “Voluntary Act Requirement” is satisfied—even if some of the acts, or the circumstances, are involuntary.<sup>119</sup>

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<sup>115</sup> COLO. REV. STAT. § 18-1-501(9) (2012).

<sup>116</sup> *Id.* § 18-3-104 (2012); *see id.* § 18-4-302 (2012).

<sup>117</sup> *See* MODEL PENAL CODE § 2.01 (explaining that “*a* voluntary act or the omission to perform *an* act” is required for criminal liability to attach (emphasis added)). *But see* Husak, *supra* note 1, at 2441 (demonstrating that this question is still unsettled). Nevertheless, the meaning of the Code’s requirement that liability be based on conduct that includes a voluntary act is far from clear. As one commentator notes:

[E]xactly 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.

Husak, *supra* note 1, at 2441. Whatever the meaning of these relationships, however, it is apparent that the Code does not require every actus reus element to be voluntary. *See* MODEL PENAL CODE § 2.01.

<sup>118</sup> MODEL PENAL CODE § 2.01 (emphasis added).

<sup>119</sup> In fact, the voluntary act that satisfies the Code’s Voluntary Act Requirement need not even be an act proscribed by the offense in question. The proscribed conduct must merely be “based on” conduct that “includes” a voluntary act. *See* Husak, *supra* note 1, at 2441 (“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 ‘in-

Consider, for example, the offense of public intoxication. This offense has two actus reus elements: being intoxicated, and being in public.<sup>120</sup> If both these elements are voluntary—that is, the actor was voluntarily intoxicated and appeared in public voluntarily—then the actor is guilty of public intoxication. But suppose one element of the offense is voluntary, and the other is not. For example, an alcoholic could argue that he became intoxicated involuntarily, but voluntarily chose to be in a public place when he became intoxicated.<sup>121</sup> Or a person could have voluntarily chosen to become intoxicated in private, and then have been taken against his will to a public place.<sup>122</sup> In either case, the Model Penal Code would allow the defendant to be convicted of public intoxication.<sup>123</sup> The Code's Voluntary Act Requirement insists only upon conduct that involves a voluntary act, and both situations described above involved a voluntary act.<sup>124</sup> In the first example, the voluntary act was appearing in public; in the second example, the voluntary act was becoming intoxicated.<sup>125</sup> Because the defendant's conduct in each case involved a voluntary act, the fact that the other actus reus element was not voluntary (or, in the case of intoxication by an alcoholic, arguably involuntary) is irrelevant to the Code's Voluntary Act Requirement.<sup>126</sup>

## 2. The Multiple Voluntary Acts View

The role of voluntariness under the Code is at odds with the approach taken in the influential 1944 Alabama Court of Appeals decision *Martin v. State*.<sup>127</sup> In *Martin*, the defendant was arrested at his home and taken onto a public highway, after which he was charged with the crime of being drunk on a public highway.<sup>128</sup> The court held

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cludes' a voluntary act. I must confess that I am baffled about how to understand this 'includes' relation.')

<sup>120</sup> See *Powell v. Texas*, 392 U.S. 514, 541 (1968) (plurality opinion) (explaining these two elements).

<sup>121</sup> See *id.*

<sup>122</sup> See *Martin v. State*, 17 So. 2d 427, 427 (Ala. Ct. App. 1944).

<sup>123</sup> See MODEL PENAL CODE § 2.01 (requiring only one voluntary element).

<sup>124</sup> *Id.*

<sup>125</sup> See *Powell*, 392 U.S. at 541 (plurality opinion); *Martin*, 17 So. 2d at 427.

<sup>126</sup> See MODEL PENAL CODE § 2.01.

<sup>127</sup> See 17 So. 2d at 427.

<sup>128</sup> *Id.* The relevant statute provided that: "Any person who, while intoxicated or drunk, appears in any public place where one or more persons are present, . . . and manifests a drunken condition by boisterous or indecent conduct, shall, on conviction, be fined." *Id.*

that the voluntariness requirement was not satisfied because the defendant's appearance in public was involuntary.<sup>129</sup>

Martin's public drunkenness was based on conduct that included a voluntary act—namely, his voluntary private intoxication.<sup>130</sup> This voluntary act is sufficient to satisfy the Model Penal Code's voluntary act requirement.<sup>131</sup> But the *Martin* court, in a decision routinely cited with approval by other courts, nonetheless held that the voluntariness principle precluded conviction of the defendant.<sup>132</sup> According to the *Martin* view, the *involuntariness* of the defendant's appearance in public precluded his conviction, despite the fact that the defendant also committed a voluntary act.<sup>133</sup> The *Martin* view suggests that when the actus reus contains multiple elements, such as an act and attendant circumstances, a single voluntary act is not sufficient for liability.

Scholars and courts are therefore deeply divided about whether voluntariness applies only to a single act, or to the actus reus elements as a whole—just as they are deeply divided on whether voluntariness is an offense element, or an affirmative defense.<sup>134</sup>

### III. THE SOLUTION

#### A. Clarifying the Concepts and Terminology

We propose that the better approach is to require voluntariness for the actus reus as a whole, rather than in relation to a single act.<sup>135</sup> For

<sup>129</sup> *Id.* The court in *Martin* explained that:

Under the plain terms of this statute, a voluntary appearance is presupposed. The rule has been declared, and we think it sound, that an accusation of drunkenness in a designated public place cannot be established by proof that the accused, while in an intoxicated condition, was involuntarily and forcibly carried to that place by the arresting officer.

*Id.*

<sup>130</sup> *Id.* For an insightful discussion of *Martin*, see Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 603–04 (1981) (acknowledging that the defendant in *Martin* may have done something voluntary—other than privately drinking—that posed a risk of arrest and public intoxication, such as beating his wife).

<sup>131</sup> See MODEL PENAL CODE § 2.01 (requiring only one voluntary act).

<sup>132</sup> 17 So. 2d at 427; see, e.g., *Powell*, 392 U.S. at 540 n.1 (plurality opinion) (citing *Martin* for the proposition that “[i]f an intoxicated person is actually carried into the street by someone else, ‘he’ does not do the act at all, and of course he is entitled to acquittal”); *Gorham v. United States*, 339 A.2d 401, 431 n.9 (D.C. 1975) (citing *Martin* for the proposition that “duress” has been accepted by courts as an excuse).

<sup>133</sup> 17 So. 2d at 427.

<sup>134</sup> Compare *Lara*, 902 P.2d at 1339 (embracing the single voluntary act view), with *Martin*, 17 So. 2d at 427 (embracing the multiple voluntary acts view).

<sup>135</sup> See *infra* notes 233–234 and accompanying text.

reasons that we discuss in detail below, we prefer the *Martin* approach over the Model Penal Code approach. Requiring that the actus reus as a whole be voluntarily “completed” before punishment is imposed accords with the minimum requirement of moral (and hence criminal) responsibility. In this Part, we put forward our proposals for resolving the deep divides on the issues of actus reus, namely the constitutional status of voluntariness; whether voluntariness is an offense element or an affirmative defense; and whether voluntariness is satisfied by a single voluntary act when a crime definition includes multiple actus reus elements. But before we can posit a solution to these puzzles, we need to refine and clarify the concepts and terminology employed in relation to voluntariness and actus reus.<sup>136</sup> The confusion in this area of the law is compounded and perpetuated by a lack of uniform vocabulary. We shall therefore precisely define the following: (1) actus reus; (2) the Actus Reus Requirement; (3) the Voluntariness Requirement; and (4) the concept of voluntariness.

## 1. Defining Actus Reus

The rationale for the actus reus requirement has a long history of conceptual confusion and obfuscation.<sup>137</sup> No less significant is the confusion regarding the terminology applied in the context of describing the act requirement. Courts and commentators agree that “[i]n general, a crime contains two components: an ‘*actus reus*’ and the ‘*mens rea*.’”<sup>138</sup> But this agreement does not reach far. There is no universal consensus as to the meaning of actus reus.<sup>139</sup>

Nonetheless, there is a common central idea behind the distinction between actus reus and mens rea, namely that “[t]he *actus reus* is the physical part of the crime; the mens rea is the mental or internal ingredient.”<sup>140</sup> The ascendant view, and the view that seems sensible to us, is that the physical parts of a crime—the actus reus—can consist of actions or omissions, attendant circumstances, and results caused by actions or omissions. This is the formulation adopted in the Model Penal Code, but it also describes almost all common law crimes.<sup>141</sup> On this

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<sup>136</sup> See *infra* notes 137–192 and accompanying text (clarifying these concepts).

<sup>137</sup> See *supra* notes 50–134 and accompanying text (explaining the confusion associated with actus reus).

<sup>138</sup> DRESSLER 2009, *supra* note 1, at 127.

<sup>139</sup> *Id.* (highlighting that “[c]ourts and criminal lawyers use the term in various ways”).

<sup>140</sup> *Id.*

<sup>141</sup> MODEL PENAL CODE § 1.13(9); see also BONNIE ET AL., *supra* note 16, at 187 n.b (“Often translating a common law rule into the Model Code vocabulary—and analyzing it

analysis, “[t]he act elements of the offense are characterized as ‘conduct,’ ‘circumstances,’ and ‘results.’”<sup>142</sup> The criminal offense’s “conduct” elements “describe the acts or omissions required to commit an offense.”<sup>143</sup> The “circumstance” elements “consist of external facts that must exist in order for the crime to be committed.”<sup>144</sup> And “result” elements are “any consequences of the defendant’s conduct that are incorporated in the definition of the offense.”<sup>145</sup>

The *actus reus* of a crime, as we will use the term, therefore consists of some combination of elements of act or omission, attendant circumstances, and result (although a crime need not have elements from *each* of these categories).<sup>146</sup>

## 2. The Actus Reus Requirement

Defining the term *actus reus* eliminates only a fraction of the terminological confusion because there is no uniform employment of terms to describe the requirements associated with the concepts of voluntariness, acts, and *actus reus*. Wayne LaFave, for instance, appears to use “the act requirement” to designate that a crime must consist of a voluntary act (as opposed to either an involuntary act or, in general, an omission).<sup>147</sup> Abraham Goldstein, by contrast, uses the act requirement to designate only the prohibition on thought crimes, and not a requirement for a voluntary act.<sup>148</sup>

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under the Model Code methodology—can lead to a clearer understanding of the common law rule.”); Albin Eiser, *The Principle of “Harm” in the Concept Crime: A Comparative Analysis of the Criminally Protected Legal Interests*, 4 DUQ. U. L. REV. 345, 386 (1965) (“[A]ctus reus is to be interpreted as the comprehensive notion of act, harm, and its connecting link, causation, with *actus* expressing the voluntary physical movement in the sense of conduct and *reus* expressing the fact that this conduct results in a certain proscribed harm.”).

<sup>142</sup> BONNIE ET AL., *supra* note 16, at 186.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> See, e.g., DRESSLER 2009, *supra* note 1, at 127 (“Some offenses, however, are defined in terms of conduct, such as the crime of driving an automobile while intoxicated. No ultimate result—no death or injury to person or property—is required to be guilty of this offense.”).

<sup>147</sup> WAYNE LAFAVE, MODERN CRIMINAL LAW 210–53 (5th ed. 2001). LaFave has a chapter titled “The Act Requirement,” which consists of three sections: “Voluntary Act,” “The ‘Act’ of Possession,” and “Omissions.” *Id.* The text does not use the phrase “actus reus requirement.” See *id.*

<sup>148</sup> Goldstein, *supra* note 37, at 405–06 (noting how the act requirement assures that “the evil intent of the man branded a criminal has been expressed in a manner signifying harm to society; that there is no longer any substantial likelihood that he will be deterred . . . and that

The same distinction between the act requirement (which precludes thought crimes) and the voluntary act requirement was accepted, in a sense, by the drafters of the Model Penal Code.<sup>149</sup> The term “Voluntary Act Requirement” was motivated by two concerns: namely, excluding punishment for mere thoughts, and excluding punishment for involuntary conduct.<sup>150</sup> Accordingly, the impermissibility of punishing for thoughts alone is not only conceptually distinct from the inappropriateness of punishing mere involuntary movements, but the justifications for each principle are different as well.<sup>151</sup> Society does not punish for mere thoughts because such thoughts have not yet manifested in social harm, and there is always the possibility that people will choose not to follow through with their evil thoughts.<sup>152</sup> In contrast, involuntary movement may indeed have manifested in social harm.<sup>153</sup> Commentators nonetheless argue that involuntary movement is not an appropriate basis for punishment because punishing involuntary movement does not satisfy either the deterrence or retribution goals of punishment.<sup>154</sup> Involuntary movements cannot be deterred, and they do not deserve condemnation.<sup>155</sup> More fundamentally, actors are only responsible for what they voluntarily do.<sup>156</sup>

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there has been an identifiable occurrence so that multiple prosecution and punishment may be minimized”).

<sup>149</sup> See *id.*; Husak, *supra* note 1, at 2454.

<sup>150</sup> AM. L. INST., MODEL PENAL CODE COMMENTARIES, Comment on § 2.01, at 214–13 (1985). The comments to the Model Penal Code, for example, explain that:

It is fundamental that a civilized society does not punish for thoughts alone. Beyond this, the law cannot hope to deter involuntary movement . . . ; the sense of personal security would be undermined in a society where such movement . . . could lead to formal condemnation of the sort that a conviction necessarily entails.

*Id.*

<sup>151</sup> See *id.*

<sup>152</sup> Goldstein, *supra* note 37, at 405–06.

<sup>153</sup> See *Fain v. Commonwealth*, 78 Ky. 183, 184 (1879).

<sup>154</sup> See Goldstein, *supra* note 37, at 405–06; Husak, *supra* note 1, at 2454.

<sup>155</sup> See Goldstein, *supra* note 37, at 405–06. On the other hand, H.L.A. Hart indicates that allowing the defense of insanity has a cost. H.L.A. Hart, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS ON THE PHILOSOPHY OF LAW 1, 19–20 (2d ed. 2008). According to Hart, it may lessen the deterrent effect by providing sane would-be criminals with the option of committing an offense and then pretending to be insane. *Id.*

<sup>156</sup> See Husak, *supra* note 1, at 2454. The connection between responsibility and voluntariness further demonstrates that the concern about liability for involuntary acts or decisions is distinct from the concern about thought crimes. Our concern with criminalizing mere thoughts is not motivated by a belief that we are not responsible for our thoughts. Rather, we deem it fundamentally wrong to criminalize thoughts even when we are respon-

Nevertheless, the Model Penal Code employs a single “Requirement of Voluntary Act” to achieve these separate goals. Section 2.01(1) requires that: “A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable.”<sup>157</sup> We argue that the drafters of the Code erred by conflating these two principles—one relating to thought crimes, the other relating to involuntary conduct—into a single voluntary act requirement. The conflation of these two principles not only leads to confusion about whether, and why, bodily movement is a prerequisite for criminal liability. It has also led courts and commentators to the erroneous conclusion that criminal liability may be imposed in situations where, for example, the defendant found himself or herself involuntarily in the relevant attendant circumstances, provided there was *some* voluntary action.<sup>158</sup> It must have, in other words, *some actus reus*.

The term “actus reus requirement” is sometimes used as an alternative to, or in addition to, the “act requirement” and the “voluntary act requirement.” Although the Model Penal Code does not contain the phrase “actus reus requirement,” many courts, commentators and theorists do use this term, and they use it to describe different fundamental requirements of criminal law.<sup>159</sup> Some use “the actus reus requirement” interchangeably with “the act requirement” or “the voluntary act requirement.”<sup>160</sup> Others use the term to encompass several conceptually distinct requirements.<sup>161</sup> For example, actus reus can be viewed as an “umbrella term,” which covers inter alia the prohibition on thought crimes, the requirement that the defendant’s act be voluntary, and the general rule that one is not liable for omissions absent a legal duty to act.<sup>162</sup>

In contrast, theorist Michael Moore uses the “actus reus requirement” not as an overarching term that includes the act requirement, but rather as a distinct and separate requirement.<sup>163</sup> Accordingly,

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sible for them. *Id.* (arguing that criminal liability should only attach when people are responsible for their actions).

<sup>157</sup> MODEL PENAL CODE § 2.01.

<sup>158</sup> See e.g., *State v. Lara*, 902 P.2d 1337, 1339 (Ariz. 1995) (requiring only one voluntary movement).

<sup>159</sup> See *supra* notes 1–3 and accompanying text (demonstrating the variety of vocabulary used by commentators).

<sup>160</sup> See Husak, *supra* note 1, at 2437 (using the term “act requirement”).

<sup>161</sup> LEE & HARRIS, *supra* note 1, at 140 (describing actus reus as an “umbrella term”).

<sup>162</sup> *Id.*

<sup>163</sup> MICHAEL S. MOORE, *ACT AND CRIME* 170 (2010).

Moore defines “actus reus requirement” as “the act for which an accused is punished must be an act (bodily-movement-caused-by-a-volition) that has the properties required by some complex act description contained in some valid source of criminal law.”<sup>164</sup> So defined, the “actus reus requirement” is closely connected to “the principle of legality in Anglo-American law [which] restricts the sources of that law to statutes of proscriptive application.”<sup>165</sup> L.A. Zaibert accepts Moore’s terminology and argues that:

[T]he act requirement cannot be coherently said to be the *same* as, or a *part* of, the actus reus requirement. These are two independent requirements, and each of them serves a different purpose and has a different justification. Requiring that liability be predicated only upon actions is a basic moral intuition. Requiring that liability only be imposed for those actions which have already been legally described is a political requirement.<sup>166</sup>

So, depending on which source you read, the “act requirement,” “the voluntary act requirement,” and the “actus reus requirement” are either synonymous, overlapping, or conceptually distinct. Before we can say anything useful on the subject, then, we must specify precisely what *we* mean by the terms we will employ when giving our proposals.

We shall use the term “Actus Reus Requirement” to manifest the prohibition on thought crimes—and *only* the prohibition on thought crimes. The Actus Reus Requirement, on our account, requires simply that a crime must have some actus reus. To not be an offense of mere thought, a crime must have some non-mental component. That is, a crime must have a physical component.<sup>167</sup>

Given this definition, the Actus Reus Requirement becomes a relatively modest requirement. It does not require that the elements of a crime require an act, as opposed to an omission. Nor does it require that the definition of a crime include a voluntary act—for in and of itself, the Actus Reus Requirement does not require an act (in the Model

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<sup>164</sup> *Id.* at 169.

<sup>165</sup> *Id.* at 169–70.

<sup>166</sup> L.A. Zaibert, *Philosophical Analysis and the Criminal Law*, 4 *BUFF. CRIM. L. REV.* 101, 119–20 (2000).

<sup>167</sup> By using the shorthand “physical component,” we do not intend to conflate the actus reus elements with physical acts. Rather we use physical to denote a distinction between the purely mental elements of the crime. In this sense, actus reus elements could be thought of as external, or objective elements.

Penal Code sense of a “bodily movement”).<sup>168</sup> But, lean as it is, our Actus Reus Requirement nonetheless satisfies the concerns regarding thought crimes without being misleading, such as when commentators have described the requirement as the “act requirement.”<sup>169</sup> To characterize the requirement in this way is not entirely accurate because the goal served by the requirement—prohibiting thought crimes—does not necessarily require an *act*. For example, it may be satisfied by omission in certain cases, such as where a conscious decision not to give assistance results in physical harm. The evil intent in such a case has been “expressed in a manner signifying harm to society,” there is “no longer any substantial likelihood that he will be deterred by the threat of sanction” before the evil intent is manifest physically, and there has been “an identifiable occurrence so that multiple prosecution and punishment may be minimized.”<sup>170</sup> Additionally, the assertion that criminal law includes an “act requirement,” with an act understood as a physical movement, is simply not descriptive of criminal law. Such a requirement is difficult to square with not only criminal liability for omissions, but also for crimes such as possession, which need not involve bodily movements.

Our version of the Actus Reus Requirement has multiple benefits. It more accurately reflects the contours of criminal liability and separates out the principle that criminal liability should not be based on mere thoughts from other conceptually distinct principles, including those relating to voluntariness and the distinction between acts and omissions. We are not suggesting that these other concerns are unimportant. Quite the contrary. Rather, we argue that unnecessary confusion ensues from lumping these principles together under the same term. If a distinction between acts and omissions, for example, is justified, it must be justified on a ground other than the principle of not imposing criminal liability for mere evil thoughts.<sup>171</sup> The better way to describe the prohibition on thought crimes is to require not some *act*, but rather some actus reus. That is, some physical element of a crime—

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<sup>168</sup> MODEL PENAL CODE § 1.13(2).

<sup>169</sup> Goldstein, *supra* note 37, at 405–06.

<sup>170</sup> *Id.*

<sup>171</sup> We can easily imagine scenarios in which omissions are distinguishable from thought crimes and from the rationale for prohibiting thought crimes. Most obviously, if a person drowns due to the failure of another to render assistance, then something other than a mere thought has occurred. A physical harm has manifested, and to convict the person who failed to assist would amount to conviction for a thought crime. To the extent that criminal law hesitates to impose criminal liability on omissions, therefore, the hesitation must be justified on a basis other than the prohibition on thought crimes.

whether an act or omission, an attendant circumstance, a resulting harm, or some combination. Requiring an actus reus, rather than an act, allows us to incorporate liability for some omissions without having to argue either that some omissions count as acts (and therefore satisfy the requirement of an act) or whether criminal liability for omissions is an exception to the act requirement.

So, we use the term “Actus Reus Requirement” to mean that a crime must have some physical component, which satisfies the principle that mere thoughts ought not give rise to criminal liability.<sup>172</sup> Our formulation is also preferable to the term “voluntary act requirement” because it removes the suggestion, inherent in the phrase “the voluntary act requirement,” that the only thing required to be voluntary is the *act* component of a crime’s actus reus. As we argue below, the better view is that the requirement of voluntariness—or, more accurately, the prohibition on criminalizing involuntariness—should apply to each element of the actus reus, including multiple acts and attendant circumstances. Although it makes no sense to say that the circumstances are *voluntary* (e.g., the fact that a road is public), it does make sense to consider whether the fact that the circumstances are attendant is voluntary or involuntary (e.g., that the defendant is in a public road and therefore voluntarily in a public place).

### 3. The “Voluntariness Requirement”

We will use the “Voluntariness Requirement” to refer to the requirement that the actus reus be voluntary. This term has several advantages over the term “voluntary act requirement.” First, it is more precise, dealing only with issues relating to voluntariness versus involuntariness, without also trying to capture the prohibition on thought crimes. Second, removing any mention of “act” signals that voluntariness is relevant to elements of the actus reus other than acts. Third, the

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<sup>172</sup> Although we decline to employ Moore’s terminology, we do not mean to suggest that the principle embodied in Moore’s phrase, “the actus reus requirement,” is unimportant. We suggest that this principle is provided by the presumption of innocence. That is, the requirement that an individual may only be convicted of a crime when the prosecution has proven beyond a reasonable doubt that each of the constitutive elements of that crime—both actus reus and mens rea—have been satisfied. See *In Re Winship*, 397 U.S. 358, 364 (1970) (“Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

term Voluntariness Requirement does not suggest that every crime must include a bodily movement.<sup>173</sup>

As both a normative and descriptive matter, not all crimes require a voluntary act because not all crimes require acts, in the sense of bodily movements.<sup>174</sup> Nor should they. As a number of prominent scholars have pointed out, bodily movements are not morally unique.<sup>175</sup> The demarcation line between what the state is justified in punishing and what it is not thus does not map onto the presence or lack of bodily movements. It does, however, correlate to whether or not the relevant physical aspects of the offense (the *actus reus*) are voluntary. Douglas Husak, for example, argues that:

[T]he act requirement is designed to ensure that persons are liable only when responsible. What is important to our theory of criminal responsibility, I submit, is not action itself, but rather the control that actions typically presuppose. 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.<sup>176</sup>

Even though Husak refers to “control,” the same argument applies to voluntariness. Paradigmatically, our acts are voluntary and our non-acts are not voluntary.<sup>177</sup> But although this is true of the paradigm cases, the action/inaction dichotomy is nonetheless an inadequate proxy for the voluntariness/involuntariness distinction (or for control versus lack of control).<sup>178</sup> There are cases of bodily movements—or actions—that a person does not control and that are involuntary, such as somnambulism, or epilepsy, and for which assignment of moral and

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<sup>173</sup> MODEL PENAL CODE § 1.13. Our term is also unlike the term “voluntary act requirement” (which does suggest a bodily movement is required at least when, as in the Model Penal Code, an “act” is understood as a bodily movement). See *supra* notes 151–152 and accompanying text.

<sup>174</sup> See 21 U.S.C. § 841(a)(1) (2012) (making it a crime “to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance”).

<sup>175</sup> See, e.g., Husak, *supra* note 1, at 2454; Simester, *supra* note 1, at 406 (“[T]he foundation of moral responsibility is not action but voluntariness . . .”).

<sup>176</sup> Husak, *supra* note 1, at 2454.

<sup>177</sup> See *id.*

<sup>178</sup> See *id.* (discussing the importance of “control”).

criminal wrongdoing is inapposite. Likewise, there are some situations of inaction, such as omissions in the context of a duty of care, in which the person nevertheless retains control; i.e., the person could have done other than decline to act. We would refer to these as examples of voluntary inaction, or voluntary omission. In these situations, moral and criminal responsibility strikes us as appropriate, despite the absence of bodily movement.

Thus, criminal law should not include an “act requirement,” where the act in question is a bodily movement. Rather, criminal law should include a foundational voluntariness requirement. In making this claim, we not only take into account Husak’s critique of the act requirement, but also those of other commentators.<sup>179</sup> A.P. Simester, for example, has asserted that “the foundation of moral responsibility is not action but voluntariness; or strictly, the absence of involuntariness.”<sup>180</sup> We clarify and expand upon this assertion by proposing that moral (and hence criminal) liability requires voluntariness—that is, the absence of involuntariness—for every element of the *actus reus*.

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<sup>179</sup> *Id.* at 2459 (“I conclude that we should not be confident about whether criminal law contains an act requirement . . . [W]e may find that an alternative requirement—the requirement of control—does a better job serving the normative requirements of the act requirement than the act requirement itself.”); see George P. Fletcher, *On the Moral Irrelevance of Bodily Movements*, 142 U. PA. L. REV. 1443, 1444 (1994).

<sup>180</sup> Simester, *supra* note 1, at 406. For other similar critiques of the requirement of a voluntary act, see Fletcher, *supra* note 179, at 1444 (arguing that “[t]he act requirement speaks to the critical importance of human agency in our theory of moral and legal responsibility,” and that human agency does not turn on the existence of bodily movements); see also Michael Corrado, *Is There an Act Requirement in the Criminal Law?*, 142 U. PA. L. REV. 1529, 1533 (1994) (asserting that “[t]here is no movement requirement in the criminal law,” but there may be “a requirement of physical conduct which would include both movements and failures to move”). Michael Corrado’s requirement of physical conduct is similar to our *Actus Reus Requirement*, although we refer to the requirement of some physical component of the offense, which may include elements that can be described as neither movements nor failures to move. Take Corrado’s own example: “I am driving down a long, straight highway; the car is on cruise control, and I am not moving the wheel because my steering is accurate and the road is straight . . . I see an old enemy standing in my lane about two hundred yards ahead of me. Her back is turned; she does not see me approaching . . . Thereafter I do not move, and the car runs over my old enemy, killing her.” *Id.* at 1538. As Corrado points out, “[t]here is no doubt that killing the woman was something I did, and that it was voluntary and intentional.” *Id.* Moral and criminal condemnation is therefore warranted. But Corrado also points out that “no volitional movement” was part of the killing. *Id.* Nor should the killing be treated as an omission—unlike, say, “a mere bystander who might save the victim but does not.” *Id.* at 1540. Although the killing therefore involves neither a bodily movement nor a failure to move, imposing criminal liability on the driver would not violate either of our principles. See *id.* The *Actus Reus Requirement* is satisfied by the fact that there was a physical harm: the driver’s old enemy is dead. And the *Voluntariness Requirement* is satisfied because the *actus reus* involved no involuntariness.

#### 4. On the Meaning of “Voluntariness”

The astute reader will have noticed that, although we have explained our preference for the terms “Actus Reus Requirement” and “Voluntariness Requirement,” we have so far said little about the meaning of “voluntariness.” We remedy that deficiency in this Subsection, although what follows will fall short of a complete exposition and defense of a conception of voluntariness. That is a daunting project in its own right, and well beyond the scope of this Article. This Subsection will provide a sketch of our notion of voluntariness sufficient for the reader to make sense of and evaluate our proposals—namely that: (1) voluntariness is a fundamental requirement of criminal responsibility, and therefore an element of the offense to be proved by the prosecution; and (2) this fundamental requirement is not satisfied if *any* element of the actus reus is involuntary.<sup>181</sup>

This Subsection is not a complete definition of what constitutes a voluntary act.<sup>182</sup> It is also deficient, for our purposes, because it purports to explain the meaning of *voluntary acts*, not the meaning of *voluntary*. The same deficiency applies to many of the traditional formulations, which also define voluntary only in relation to acts.<sup>183</sup>

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<sup>181</sup> See *infra* notes 193–234 and accompanying text. As explained in Section B of this Part, we recognize a limited exception to this general principle. See *infra* notes 193–234 and accompanying text.

<sup>182</sup> See Zaibert, *supra* note 166, at 124–25 (“Clearly, mentioning a few actions that are not voluntary is not enough to specify the meaning of voluntary.”).

<sup>183</sup> Russell L. Christopher & Kathryn H. Christopher, *The Paradox of Statutory Rape*, 87 IND. L.J. 505, 519 (2012). For example, Russell and Katherine Christopher recently summarized the conventional definition of voluntary acts as follows: “A voluntary act is conventionally defined as a willed bodily movement, or a willed muscular contraction or conduct within the control of the actor. Involuntary acts involve a lack of control over one’s movements and are not a product of the effort or determination of the actor.” *Id.* (citations omitted) (internal quotation marks omitted) (citing Meir Dan Cohen, *Actus Reus*, in 1 ENCYCLOPEDIA OF CRIME AND JUSTICE 15, 18 (Sanford H. Kadish ed., 1983)) (noting that in committing an involuntary act, “the defendant completely lacks control over his bodily movements in a way that makes the legally mandated conduct impossible”); R. A. DUFF, INTENTION, AGENCY & CRIMINAL LIABILITY: PHILOSOPHY OF ACTION AND THE CRIMINAL LAW 118 (1990) (noting that “a voluntary act is, on one common account, a willed bodily movement—a movement caused by a mental act of volition”); HOLMES, *supra* note 42, at 54 (“The act is not enough by itself . . . It is a muscular contraction, and something more. A spasm is not an act. The contraction of the muscles must be willed.”); MOORE, *supra* note 163, at 28; Jeffrie G. Murphy, *Involuntary Acts and Criminal Liability*, 81 ETHICS 332, 333 n.3 (1971)); see also *Takacs v. Engle*, 768 F.2d 122, 126 (6th Cir. 1985) (“[T]he voluntary act requirement is a narrow one, removing only truly uncontrollable physical acts from criminal liability.”); ARNOLD H. LOEWY, CRIMINAL LAW IN A NUTSHELL 138 (1975) (“[T]he term voluntary simply means the muscular contraction is willed.”); CHARLES TORCIA, WHAR-

A logical place to look for a definition of “voluntariness” as it applies to criminal law is the Model Penal Code. The Model Penal Code “defines” voluntary acts in Section 2.02 by reference to a list of things that are not voluntary acts, including:

- (a) a reflex or convulsion;
- (b) a bodily movement during unconsciousness or sleep;
- (c) conduct during hypnosis or resulting from hypnotic suggestion;
- (d) a bodily movement that otherwise is not the product of the effort or determination of the actor, either conscious or habitual.<sup>184</sup>

But, as we have already explained, acts are not the only things that we can sensibly describe as voluntary or involuntary. Omissions can be thought of as either voluntary or involuntary, as the Model Penal Code hints when it refers to “a voluntary act or the omission to perform an act *of which he is physically capable.*”<sup>185</sup> An omission to perform an act of which the person is not physically capable, then, can be thought of as an involuntary omission.<sup>186</sup>

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TON’S CRIMINAL LAW § 25, at 117–18 (14th ed. 1978) (asserting that “an act is ‘voluntary’ when the bodily movement is the product of conscious effort or determination”).

<sup>184</sup> MODEL PENAL CODE § 2.01. The Code’s definitional section merely defines “voluntary” as having “the meaning specified in Section 2.01.” *Id.* § 1.13(3).

<sup>185</sup> *Id.* §2.01(1) (emphasis added).

<sup>186</sup> See Simester, *supra* note 1, at 417. Simester notes:

Obviously, the involuntariness of omissions cannot be explained in precisely the same way as for actions. It would be odd indeed to talk of a reflex or convulsive omission. Nonetheless, even for omissions the criminal law requires that D must be responsible for her behavior before she commits the *actus reus* of a crime. D’s omission is involuntary, and her responsibility for the *actus reus* is negated, when she fails to discharge a duty to intervene because it was impossible for her to do so. In such a situation, we must draw an analogy with the test [for involuntary acts]: D’s moral responsibility to avoid some outcome is denied where she was unable to prevent it from occurring.

*Id.* Simester provides the following example of an involuntary omission:

For instance: after an earthquake, D observes that his daughter is suffocating under a pile of rubble. D fails to rescue her because he is pinned beneath some collapsed masonry from which he cannot escape. D is not responsible for failing to rescue his daughter, and cannot be attributed with the *actus reus* of a homicide. This is true even if, for some reason, D had wanted his daughter dead, and would not have rescued her had it been possible to do so.

*Id.* at 417–18.

In addition to acts and omissions, we can also think of situations or states of affairs as involuntary.<sup>187</sup> In each case, the common idea that we associate with voluntariness is that the defendant could have done otherwise.<sup>188</sup> It is this ability to do otherwise (or when linguistically appropriate, the ability to have things be otherwise), that we take as the *sine qua non* of voluntariness. This understanding of voluntariness accords with the conceptions of voluntariness expounded by scholars and with the claim that “control” is central to criminal responsibility.<sup>189</sup>

In short, we contend that an *actus reus* element is voluntary whenever the defendant could have done otherwise. We understand voluntariness as related to the ability to choose or do otherwise; to use the language of volition, voluntariness is associated with freedom of the will.<sup>190</sup> But we shall bracket the deliciously migraine-inducing question of whether voluntariness, or free will, is consistent with a deterministic universe insofar as that debate is peripheral to the questions we seek to

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 412. Simester is again useful in explaining the application of voluntariness to situations, focusing on voluntariness as requiring “that the defendant could have done something about it.” To wit:

The *actus reus*, although it specifies no act or omission, must still have been voluntary . . . . Unless there is a requirement of voluntariness, situational offenses are at odds with the deepest presuppositions of the criminal law. The very notion of a trial, of a plea, assumes putative answerability for something. One is not answerable for a state of affairs (e.g., having red hair), and it should not be the *actus reus* of an offense, unless one is able to avoid that state of affairs (e.g., by shaving one’s head or dyeing the hair another color).

*Id.*

<sup>189</sup> Corrado, *supra* note 180, at 1560 (arguing that “the ability to choose to do otherwise is an essential element of the ability to do otherwise, and that therefore punishment is only appropriate when the agent was able to choose otherwise”); Husak, *supra* note 1, at 2454 (“What is important to our theory of criminal responsibility, I submit, is not action itself, but rather the control that actions typically presuppose.”); Steven S. Nemerson, Note, *Criminal Liability Without Fault*, 75 COLUM. L. REV. 1517, 1518 (1975) (“When we hold someone morally blameworthy we imply that he has failed to do something which he morally ought to have done, or that he has done something which he morally ought to have refrained from doing: we imply that he ought to have done something other than what he in fact did. But to imply that a person *ought* to have done something other than he did is to imply that he *could* have done something other than he did or, in other words, that his act or omission was voluntary.”).

<sup>190</sup> In this way, our approach is consistent with the fundamental insight of Jerome Hall: “[O]ur criminal law rests precisely upon the same foundation as does our traditional ethics: human beings are ‘responsible’ for their volitional conduct.” Jerome Hall, *Interrelations of Criminal Law and Torts: I*, 43 COLUM. L. REV. 753, 776 (1943). H.L.A. Hart emphasized the same “fundamental principle of morality that a person is not to be blamed for what he has done if he could not help doing it.” H.L.A. HART, *Punishment and the Elimination of Responsibility*, in PUNISHMENT AND RESPONSIBILITY, *supra* note 155, at 158, 174.

resolve in this Article.<sup>191</sup> Accordingly, we will proceed on the basis that there are such things as voluntariness and involuntariness, and that moral responsibility tracks the distinction between them in the manner we describe below. Nevertheless, we will remain agnostic as to whether particularly controversial situations are examples of involuntariness.<sup>192</sup>

### B. *Voluntarily Completing the Actus Reus*

As we described in Part II, courts and commentators are deeply divided on whether the Voluntariness Requirement is satisfied by a single voluntary act, or whether voluntariness must attach to each actus reus element. This issue arises when the definition of an offense includes multiple actus reus elements—i.e., for crimes that consist of more than one act, or one that requires certain attendant circumstances, or perhaps a particular result.<sup>193</sup> One important voice in this debate is the Model Penal Code, which seems to require only a single voluntary act to trigger liability.<sup>194</sup> By contrast, cases such as the influential 1944 Alabama Court of Appeals decision in *Martin v. State* reject this

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<sup>191</sup> See Husak, *supra* note 1, at 2453 n.42 (“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.”). We acknowledge that in sidestepping this question, we take a significant shortcut. Were there a prize for Philosophy’s Most Intractable Problem, the relationship between free will and determinism would surely be among the finalists. As Richard Boldt has put it, “Efforts to understand the relationship between free will and determinism for purposes of figuring an actor’s moral responsibility have preoccupied a diverse group of thinkers from Plato and St. Augustine to Martin Luther and David Hume.” Richard C. Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. PA. L. REV. 2245, 2254 (1992). Despite the efforts of these historical giants, and of more modern luminaries such as Harry Frankfurt, Gary Watson, Peter Strawson, and Michael Moore, a convincing explanation of the relationship between freedom and determinism remains elusive. See generally Harry Frankfurt, *Freedom of the Will and the Concept of a Person*, in MORAL RESPONSIBILITY (1986) (exploring the relationship between freedom and determinism); P.F. STRAWSON, FREEDOM AND RESENTMENT (1974) (same); Gary Watson, *Free Agency*, in MORAL RESPONSIBILITY, *supra* (same); Michael S. Moore, *Causation and the Excuses*, 73 CALIF. L. REV. 1091 (1985) (same).

<sup>192</sup> For example, we do not take a position on whether drug addiction or alcoholism gives rise to an irresistible compulsion to obtain and use drugs or alcohol. For discussions of the competing views about whether drug addiction or alcoholism give rise to involuntariness, see generally Powell v. Texas, 392 U.S. 514 (1968) (demonstrating the disagreement among different judges); United States v. Moore, 486 F.2d 1139 (D.C. Cir.) (en banc) (same); Boldt, *supra* note 191, at 2295–2303 (demonstrating that this has been a historically contentious question).

<sup>193</sup> See *supra* notes 57–134 and accompanying text.

<sup>194</sup> See MODEL PENAL CODE § 2.01; *supra* note 115 and accompanying text (explaining that the Code’s definition is unclear).

approach and preclude liability when there is a mix of voluntary and involuntary actus reus elements.<sup>195</sup>

We conclude that the Model Penal Code's single-voluntary-act approach fails to meet the rationale for requiring voluntariness. The Code's lax voluntariness requirement allows criminal liability to be imposed on individuals who do not meet "the minimum requirement of moral responsibility" that undergirds the actus reus requirement.<sup>196</sup> Accordingly, we urge an application of the voluntariness rule that would require, with one important exception, voluntariness for every physical or external element. Below, we explicate what it means to apply voluntariness to each of the different types of elements—conduct, circumstances, and results.

### 1. Multiple Bodily Movements

In order to illustrate the importance of requiring voluntariness for multiple actions, it is useful to consider a relatively simple example. Consider an individual who voluntarily extends the upper arm, while a muscle spasm causes the lower arm to extend as well—making contact with another person.<sup>197</sup> It seems to us that this ought not to be treated as an instance of voluntarily hitting another person. The individual should therefore not be held criminally liable for, say, an assault offense—even a strict liability assault offense. The movement of the individual's arm, taken as a whole, was not voluntary and cannot be attributed as the individual's own act.<sup>198</sup>

This example, however, arguably satisfies the Model Penal Code's "Voluntary Act Requirement." The conduct that provides the basis for putative liability—the conduct of moving the arm—*includes* a voluntary act, namely voluntary upper arm movement. By requiring only that liable conduct "include" a voluntary act, and by defining "acts" as bodily movements, the Code allows criminal liability to be imposed for conduct that is best considered, as a whole, to be involuntary. Furthermore, as the above example demonstrates, this problem may arise even with respect to conduct that can naturally be thought of as a single act, such as (involuntarily) moving your arm. Moreover, it is important to realize

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<sup>195</sup> See 17 So. 2d 427, 427 (Ala. Ct. App. 1944).

<sup>196</sup> William Wilson, *Impaired Voluntariness: The Variable Standards*, 6 BUFF. CRIM. L. REV. 1011, 1036 (2003).

<sup>197</sup> This example is adapted from Simester, *supra* note 1, at 422 ("But if I extend my upper arm and a muscle spasm causes the lower arm to extend also, then my conduct in extending my whole arm is not thereby volitional.")

<sup>198</sup> See *id.*

that the question of whether one or multiple acts must be voluntary is a basis for refuting or accepting criminal liability that is entirely independent of whether the defendant has the requisite mens rea for the offense.

## 2. Conduct Elements

Given the above example, and the inherently physical nature of conduct elements, it is relatively easy for us to conclude that as a general matter, criminal liability requires that all conduct elements be undertaken in a voluntary manner. Isolating mens rea by, for example, considering strict liability crimes that require only a single voluntary act, produces results that are inconsistent with the notion that criminal liability should reflect culpability. In this Subsection, we provide a more comprehensive defense of this conclusion before moving on to consider other types of elements.

As a starting point, recall that the Model Penal Code's formulation of the "Voluntary Act Requirement" is satisfied if *an act* was voluntary, or merely includes a voluntary bodily movement, regardless of whether all of the acts specified by a statute were undertaken voluntarily.<sup>199</sup> This arguably puts the role of voluntariness under the Code at odds with the approach taken in *Martin*, where the court held that the voluntariness requirement precluded convicting a defendant who voluntarily became intoxicated in his own home, but was later carried against his will into a public place.<sup>200</sup>

We think *Martin* is correct, and that the Code's more anemic voluntariness principle is lacking. The defendant's satisfaction of the set of actus reus elements of public drunkenness was involuntary, even though his public drunkenness was based on conduct that included a voluntary act—namely, his voluntary private intoxication.<sup>201</sup> For a variety of reasons, private intoxication by adults is not treated as criminal conduct.<sup>202</sup> It is not behavior the law officially disapproves of, nor does the law attempt to deter such behavior.<sup>203</sup> But the person, like *Martin*, who voluntarily gets drunk in private and is then involuntarily carried to a public place, is in the same position vis-à-vis deterrence and desert as the person who voluntarily gets drunk in private, and is not moved

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<sup>199</sup> MODEL PENAL CODE § 2.01.

<sup>200</sup> See 17 So. 2d at 427.

<sup>201</sup> See Kelman, *supra* note 130, at 603–04.

<sup>202</sup> See *Martin*, 17 So. 2d at 427.

<sup>203</sup> See *id.*

against her will. The law cannot always effectively deter involuntary public intoxication in isolation: the only sure way to avoid the possibility of involuntary public intoxication is to not get drunk in private. Otherwise individuals could get drunk, and then get carried against their will into a public place. Or a person could get *very* drunk and involuntarily walk to a public place. And so on. Getting drunk in private is not illegal, and so we can infer that the government does not want to deter adults from engaging in this conduct. It is thus at least arguable that deterring public intoxication in isolation from deterring the act of becoming intoxicated will, at least on occasion, be something beyond the scope of criminal law.

More importantly, people who get drunk in private have not done anything that society officially disapproves of, and therefore do not deserve to have criminal culpability applied to them. The additional factor of involuntarily appearing in public does not add any immorality to voluntarily private intoxication and thus it should also not add any illegality to it. The voluntary private drinker who appears in public against his will is no more blameworthy—or deterrable—than the voluntary private drinker who does not appear in public against his will.

Accordingly, it seems that requiring only some part of the *actus reus* to be voluntary results in overbroad criminal sanction under either a consequentialist or retributive approach. Neither deterrence nor moral culpability are heightened by punishing one who voluntarily becomes intoxicated but involuntarily appears in public.<sup>204</sup>

On the other hand, reasonable people might believe that there are circumstances in which a person who involuntarily appears in public in an intoxicated state ought to be criminally liable. For example, there might individuals who know, prior to getting drunk, that there is a high likelihood that they will not be able to avoid ending up in public—either because they know that they will become aggressive and the police are likely to be called, or because they know it is likely that they will venture into public in a stupor.<sup>205</sup> In such cases, it may be appropriate for the state to deter even the initial *private* intoxication, due to the unacceptably high risk of resultant *public* intoxication, and the original voluntary private intoxication may be deemed blameworthy.<sup>206</sup> But the

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<sup>204</sup> See Kelman, *supra* note 130, at 598 (explaining that “[n]otions of blameworthiness and deterrence are both based on the assumption that authors make intentional choices”).

<sup>205</sup> See *id.* at 603 (“But the defendant in *Martin* . . . may have done *something* voluntarily (before the police came) that posed a risk that he would get arrested and carried into public in his drunken state.”).

<sup>206</sup> See *id.*

reason it is blameworthy is not because the person did, in fact, end up in public—but rather, because the person was aware of, but disregarded, a substantial risk that the proscribed conduct would ensue. So, if these are the situations that a legislature wishes to deter, and for which it believes blame is deserved, then the criminal offense should reflect this. That is, the criminal code should include an offense of reckless intoxication, or reckless voluntary intoxication resulting in public intoxication, or some similar offense.<sup>207</sup> By creating this crime, those whose conduct is deemed culpable are punishable, but the general rule that voluntariness should apply to all elements is preserved. Whereas the statute in *Martin* contained two distinct actus reus elements—appearing in public and being intoxicated—a reckless intoxication statute could be drafted such that the only actus reus element was the act of intoxication.<sup>208</sup>

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<sup>207</sup> See *id.* at 604. Kelman argues that *Martin* is difficult to reconcile with the New York Court of Appeals's 1956 decision in *State v. Decina*, 2 N.Y.2d 133 (1956), unless we acknowledge the "hidden interpretive time-framing construct" of criminal law. *Id.* In *Decina*, the court sustained a conviction for negligent homicide, where the defendant's car hit a group of school girls that were walking on a sidewalk, killing four of them. 2 N.Y.2d at 135–36. The court sustained the conviction, even though the defendant was suffering from an epileptic seizure at the time of the accident, reasoning that he acted voluntarily in deciding to drive knowing that he was at risk for an epileptic attack. *Id.* at 140. *Martin* and *Decina*, however, can be reconciled on the basis of the concurrence requirement: the defendant in *Decina* satisfied the actus reus of the offense (voluntarily operating a motor vehicle, when he first got into the car and drove, which operation caused the later death of the victims) at the same time that he satisfied the mens rea component (recklessness, because when he was first, voluntarily, operating the motor vehicle, he was conscious of the risk of a blackout). On the other hand, accepting *arguendo* Kelman's point that the odds of a belligerent drunk arguing with his wife being arrested are higher than the odds of an epileptic having a seizure while driving, we still do not have concurrence. More importantly, we do not—at any time—have any voluntary satisfaction of all the actus reus elements. Although we can argue that *Martin* got drunk with reckless disregard for the possibility that he would be taken into public, at no point was he voluntarily drunk in public. Whereas *Decina* was, at some point, voluntarily operating a motor vehicle, and it is at least arguable that this voluntary driving "caused" the death, it was a but-for cause, and probably a proximate cause. So contra Kelman, we can distinguish *Martin* and *Decina* on a principled basis, and in a manner that preserves—indeed, highlights—the appropriateness of applying the voluntariness requirement to all the components of the actus reus.

<sup>208</sup> See *Martin*, 17 So. 2d at 427. One might argue, then, that our voluntariness proposal is subject to legislative manipulation, but such is the case with all of criminal law. A legislature can raise or lower the culpable mental state, or convert what was formerly an element into a mere defense. Cf. *Patterson v. New York*, 432 U.S. 197, 210 (1977) (explaining that legislatures can "reallocate burdens of proof by relabeling [them] as affirmative defenses"). Our proposal accepts the primacy of the legislature in the sphere of designating crimes, but calls for a rigorous enforcement of the voluntariness requirement to those elements of a crime specified by a legislature.

We can remove the element of recklessness or negligence by considering a situation similar to *Martin*, but involving public indecency instead of public intoxication. Suppose D is taking a shower in his home, with no reason to believe he is likely to be arrested, when he is forcibly removed and taken naked into a public street. D's conduct includes *a* voluntary act—voluntarily getting naked—and thus one could argue that he is guilty under a public indecency statute that requires one to appear in public and expose oneself.<sup>209</sup> But surely D should not be held criminally liable. His voluntary conduct was neither unlawful nor reckless as to the potential resulting public injury, and his presence in a public place was involuntary. Stated differently, the public exposure is not something for which he is morally (or criminally) responsible.

*Martin* and the public indecency example above suggest that instead of requiring only *some* voluntary actus reus, a defendant should only be culpable when *every* element of the actus reus was voluntary. As a general matter, this is the appropriate rule; it is the approach that truly respects the underlying culpability concerns that justify the voluntariness requirement. This recognition will not change the outcome in all, or even a majority of criminal cases because most criminal conduct is fully volitional.<sup>210</sup> Nevertheless, there are cases in which this recognition will make the difference between guilt and innocence, and *Martin* is but one illustrative example.<sup>211</sup>

Rather than endorsing an absolutist requirement of voluntariness as to each element, which we acknowledge would have the benefit of simplicity as well as parity with the mens rea rules, we feel compelled to conclude that such an approach does not work either. Consider the example of D\*, who is taken by the police—while fully clothed—into a public place. D\* manages to remove his clothing before being placed in the officers's car. We would not hesitate to conclude that D\* is guilty of the offense of public indecency. But like both *Martin* and D, D\* did not voluntarily satisfy every element of the offense. In all three cases,

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<sup>209</sup> The question of actual criminal liability might be resolved by showing that the defendant lacked the requisite mens rea for the offense. For example, the Colorado offense of public indecency includes “[a] knowing exposure of the person’s genitals to the view of a person under circumstances in which such conduct is likely to cause affront or alarm to the other person.” COLO. REV. STAT. § 18-7-301 (2012). Significantly, however, under our view, even if public indecency was a strict liability offense, the defendant could not be guilty based on the facts described above because of the absence of complete voluntariness.

<sup>210</sup> See ROBINSON, *supra* note 1, at 266 (arguing that involuntary conduct is infrequently responsible for the crime that occurs).

<sup>211</sup> See *Martin*, 17 So. 2d at 427.

the defendant's presence in public was involuntary. Because we think it necessary to hold D\* liable, but not Martin and D, we need to modify our tentative voluntariness principle.

The obvious difference between D\*, on the one hand, and Martin and D, on the other, is the sequence of voluntary and involuntary actus reus.<sup>212</sup> Both Martin and D acted voluntarily before they were involuntarily placed in the attendant circumstances that transformed their criminally innocent behavior into a criminal offense.<sup>213</sup> The voluntary actus reus occurred before the involuntary actus reus. When Martin and D acted voluntarily, their conduct—and their choice to engage in behavior when they could have done otherwise—was legally innocent. In contrast, D\* acted voluntarily *after* he was involuntarily placed in the attendant circumstances of being in public.<sup>214</sup> At the time that D\* took off his clothing, he could have done otherwise—and had he done otherwise, he would not have been guilty of a crime. In acting as he did, D\* voluntarily completed the actus reus of public indecency. D\* voluntarily transformed a criminally innocent situation (being in public) to a situation involving criminal liability (public indecency). Martin and D, on the other hand, had their criminally innocent situation (being drunk and naked in private, respectively) involuntarily transformed into a criminally culpable situation. At the time the actus reus was completely satisfied, D\* had “control” over whether the actus reus was satisfied; D\* could have done otherwise than satisfy the actus reus elements of the crime.<sup>215</sup> It therefore makes sense to say that, in D\*'s case, the actus reus taken as a whole was voluntary, even though not every actus reus element was voluntary.

This leads to our formulation of the Voluntariness Principle: a person is only liable for a crime when the actus reus as a whole is voluntary. For “the actus reus as a whole” to be voluntary, every element of the actus reus does not need to be voluntary; one or more elements of the actus reus could be involuntary. Instead, the element of actus reus that

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<sup>212</sup> Kelman reconciles *Martin* and *Decina* by noting the different subconscious time slices employed in each case. See Kelman, *supra* note 130, at 603–04. In *Martin*, Kelman says, the court took a narrow slice of time and focused on the involuntary nature of Martin's appearance in public, while ignoring his earlier voluntary drinking. See *id.* In *Decina*, however, the court considers a wider time frame, including Decina's voluntary operation of a motor vehicle before his epileptic seizure. See *id.* We agree with Kelman—and with comedians throughout the ages—that timing is crucial. But on our account, it is the time sequence rather than the time slices that are vital to voluntariness.

<sup>213</sup> See *Martin*, 17 So. 2d at 427.

<sup>214</sup> See *id.*

<sup>215</sup> See Husak, *supra* note 1, at 2434 (arguing that “criminal liability requires control”).

transformed the behavior from innocent to an offense must be voluntary. In other words, at the time the actus reus was completed—at the time the behavior became criminal—the defendant could have done otherwise than to satisfy the physical elements of a crime. When the actus reus elements are satisfied in sequence, rather than all at the same time, this will typically require that the defendant could have done otherwise at the time the last element of the actus reus was satisfied.<sup>216</sup>

At this point, it is worth pausing to note more explicitly the similarities and differences between our approach to voluntariness and the Model Penal Code's approach to mens rea.<sup>217</sup> In large part, we borrow from the insight of the Code that culpability requirements must, as a general matter, apply uniformly to all material elements. Section 2.02 of the Code requires that a culpable mens rea be proved beyond a reasonable doubt "with respect to each material element of the offense."<sup>218</sup> We think the same principle substantially applies to the requirement of voluntariness—that is, we assess each material element for voluntariness in a manner functionally similar to the Code's approach to mens rea. We stop short, however, of a wholesale importation of the mens rea element approach into the voluntariness realm. As noted above, we recognize an exception to voluntariness when the involuntary elements occurred prior to a voluntary act that evinces sufficient culpability. In

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<sup>216</sup> This may not always be the case. Suppose using offensive language in public is an offense, and that the offense includes broadcasting offensive language. Suppose further that a person decides to make a public political protest, and that her message includes offensive language, but is worried that she will lose her nerve when the time comes. So she creates a device that will broadcast her recorded offensive message at a predetermined time, and that once set cannot be turned off. She sets the device, and handcuffs herself to a bench in a public park. At the pre-set time, the device broadcasts her recorded offensive message. Our intuition is that she is guilty of using offensive language in public and that the Voluntariness Principle has been satisfied. But the actus reus as a whole was only *satisfied* at the time that the recording was broadcast. And at that moment, she could not have done otherwise than broadcast an offensive message in public. This seems to violate our conception of the Voluntariness Principle. But this is why we formulate the Voluntariness Principle by reference to when the actus reus was "*completed*." We can conceive of the actus reus being completed at the point at which satisfaction of all the actus reus elements is inevitable. In this example, for the purposes of the Voluntariness Principle, the actus reus was complete at the moment the defendant handcuffed herself to a public bench, because from that moment, satisfaction of the actus reus was inevitable. At that moment, the defendant could have done otherwise, and therefore the Voluntariness Principle was satisfied.

<sup>217</sup> MODEL PENAL CODE § 2.02(1).

<sup>218</sup> *See id.*

short, we import the essence, but not the entirety, of the elemental approach into the voluntary act realm.

### 3. Circumstance Elements

Given the analysis and examples immediately above, we think most readers will agree that the culpability necessary for criminal liability requires that all of the statutorily specified conduct elements be voluntary. But the voluntariness issue becomes more complex when the actus reus of an offense consists of an act together with attendant circumstances. In other words, the question is whether the voluntariness requirement specified in this Article applies with equal force to circumstance elements. Intuitively, it is much less obvious that a circumstance element must, or even could, be voluntary. We conclude, however, that although a defendant could not “do otherwise” when it comes to a circumstance element, the voluntariness principle requires an assessment of whether the defendant “could have things be otherwise.” That is to say, in this Subsection, we defend the novel claim that circumstance elements must be voluntary.

Consider, first, a slight variation on the *Martin* case, involving a statute that criminalizes public intoxication during daylight hours.<sup>219</sup> If Martin is voluntarily intoxicated and voluntarily leaves his home, then both the public and intoxication elements are satisfied. But what if a police officer confronts and detains him early in the morning and detains him in public, against his will, until sunrise. Although the acts of intoxication and appearing in public were voluntary, the attendant circumstance required for criminal liability—the time of day—is involuntary because Martin could not have made the circumstance otherwise. In our view, this case requires acquittal on voluntariness grounds, just as surely as the actual *Martin* case, because the circumstance element relating to daylight hours was involuntary. Because the defendant in this scenario was detained against his will until daylight and could not have had the circumstance be otherwise, the defendant is not sufficiently culpable so as to warrant a conviction. The logic of this example has application in a variety of other contexts.

Recognizing that circumstances (and not just acts and omissions) may be voluntary also allows us to make sense of cases in which the offense’s actus reus specifies no act or omission. Two cases that deal with persons present in a country illegally illustrate this point: the English

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<sup>219</sup> See 17 So. 2d at 427.

case of *Larsonneur*, and the New Zealand case of *Finau v. Department of Labour*.<sup>220</sup> In *Larsonneur*, the defendant was forcibly brought back to the United Kingdom by police and then convicted of being in the U.K. illegally.<sup>221</sup> In *Finau*, the defendant was convicted of remaining in New Zealand after the expiration of her visitor's permit, but her conviction was overturned on appeal "on the basis that it had been impossible for her to leave the country, owing to her pregnancy and the consequent refusal of any airline to carry her."<sup>222</sup> A.P. Simester argues persuasively that *Finau* is preferable to *Larsonneur* because "*Finau* makes clear a further proviso: that the defendant could have done something about it. The *actus reus*, though it contains no act or omission, must still have been voluntary."<sup>223</sup>

Our intuitions about *Larsonneur* and *Finau*, which we suggest most folks would share, support both our Actus Reus Requirement and our Voluntariness Requirement. In both *Larsonneur* and *Finau*, the actus reus contained no specific act or omission.<sup>224</sup> Nonetheless, they were not thought crimes, as there was *some* actus reus element, namely, being in the relevant country at the relevant time.<sup>225</sup> But even in the absence of an act or omission, it makes sense to ask whether the actus reus was voluntary—and to only impose criminal liability when this question is answered in the affirmative.<sup>226</sup> Both the Actus Reus Requirement and the Voluntariness Requirement, as we have defined them, make sense as minimum elements of criminal liability and are preferable to the traditional formulations of the "act requirement" and the "voluntary act requirement."<sup>227</sup>

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<sup>220</sup> See Simester, *supra* note 1, at 410–11 (citing *Finau v. Depart. of Labour* [1984] 2 NZLR 396 (CA) and *Larsonneur*, [1933] 24 A.C. 74 (Eng.)).

<sup>221</sup> *Id.* at 411.

<sup>222</sup> *Id.* at 411–12.

<sup>223</sup> *Id.*

<sup>224</sup> See *id.* at 410–11 (citing *Finau*, 2 NZLR 396 and *Larsonneur*, 24 A.C. 74). Alternatively, one could conceive of these cases, or at least the *Finau* case, as imposing liability based on an omission. *But see id.* at 412–13 (arguing that in *Finau*, liability is not based on an omission, such as it would be where a defendant overstays his visa because he is unable to pay for a plane ticket to leave the country).

<sup>225</sup> See Simester, *supra* note 1, at 410–11 (citing *Finau*, 2 NZLR 396 and *Larsonneur*, 24 A.C. 74).

<sup>226</sup> Simester, *supra* note 1, at 410–11 ("*Finau* makes clear a further proviso: that the defendant could have done something about it. The *actus reus*, though it contains no act or omission, must still have been voluntary.>").

<sup>227</sup> Some people's intuitions may suggest that *Finau* was wrongly decided because *Finau* could have left the country at an earlier stage of her pregnancy. Notably, however, this fact does not undermine the importance of voluntariness as we understand it; rather, it confirms the importance of whether the defendant could have done otherwise. If *Finau*

In sum, an important feature of our formulation of the Voluntariness Requirement is that it does not limit the concept of voluntariness only to bodily movements, nor is it limited to the broad conception of affirmative acts. Instead, we recognize that even if the actus reus included voluntary conduct, the actus reus as a whole may be involuntary if other elements of the actus reus were involuntary. Stated differently, the concept of involuntariness applies to circumstances as well as actions. If an individual could not choose to be otherwise than in the circumstances, then the circumstances apply involuntarily. Thus, even when the defendant took one or more voluntary and culpable acts, the involuntariness of attendant circumstance may render the defendant insufficiently culpable for criminal punishment.

#### 4. Voluntariness and Results

Our discussion of voluntariness and multiple actus reus elements must also address how voluntariness applies to result elements. We have demonstrated that if conduct consists of multiple bodily movements, then the fact that one of the constitutive movements was voluntary is insufficient to establish that the conduct as a whole was voluntary. We have also argued that circumstance elements are similarly subject to the Voluntariness Requirement. Finally, we must now address whether our conception of voluntariness applies to pure result elements. That is, does it make sense to say that a result—an objectively observable circumstance that is caused by the defendant's actions—is involuntary? The answer, it seems to us, is: perhaps. It depends on whether the conduct that caused the result was voluntary.

Consider first the case in which the underlying conduct is involuntary. If the act or omission was involuntary—if the defendant could not have done otherwise—then it makes sense to describe the concomitant result as involuntary. Suppose, for example, a mountain climber knocks his companion off a cliff due to an unexpected epileptic seizure. In cases of this type, because the underlying conduct is *arguendo* involuntary, we have little hesitation in declaring that the companion was killed involuntarily.<sup>228</sup> In other words, we have no trouble designating the ac-

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ought to have been convicted, it is precisely because she could have done otherwise—it was within her control to leave the country earlier. Depending on the precise details of the case, then, *Finau* might be an example of the actus reus being voluntarily “completed” at an earlier point in time than when it was satisfied. See *supra* note 216 (providing another, more exotic example of the actus reus being completed before it was satisfied).

<sup>228</sup> Although we think this conclusion sound, we acknowledge that it may strike some readers as linguistically strange to describe results as involuntary. In the mountain climber

tus reus, as a whole (conduct plus result), involuntary when the underlying conduct is involuntary.

That leaves the set of cases in which the relevant conduct was voluntary. The conception of voluntariness as relating to whether it was within the control of the actor for things to have been otherwise, suggests at first blush that unavoidable consequences might be involuntary results. But we think it would be wrong to describe such results as involuntary—both by reference to the ordinary usage of “involuntary” and by reference to our conception of voluntariness.<sup>229</sup> The consequences *could* have been avoided because the actor could have done otherwise than perform the causing conduct. The result is therefore voluntary because at the time the voluntary conduct was done, the defendant could have done otherwise. Moreover, a result element is best defined as an objective circumstance that was caused by the defendant’s conduct. This suggests that, in the case of result crimes, for the purposes of the Voluntariness Requirement, the actus reus is “completed” when the conduct occurs, not when the result ensues.<sup>230</sup> The voluntariness analysis should thus be tethered to the conduct, not the result.

A careful reader will no doubt suggest that this approach appears too broad and that it threatens criminal punishment in circumstances where it is not justified. Specifically, one might argue that focusing the voluntariness inquiry on the relevant act or omission will result in criminal liability even in situations where the result is unavoidable, regardless of what the actor does.<sup>231</sup> A.P. Simester provides the following example:

E is sunbathing on the beach when he observes his young daughter entering the sea and starting to swim in shallow wa-

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example, perhaps it makes linguistic sense to describe the companion’s resulting death as involuntary. But perhaps not. We accept that linguistic intuitions may differ on this point; competent users of the English language may reasonably disagree about whether it makes sense to say, “The companion’s death was involuntary.” Thankfully, nothing turns on this. The linguistic uncertainty as to whether the result in isolation is involuntary creates no analytic problems for our version of the Voluntariness Requirement.

<sup>229</sup> See *Brown v. State*, 955 S.W.2d 276, 280 (Tex. Crim. App. 1997) (defining voluntary as the “absence of an accidental act, omission or possession”).

<sup>230</sup> This timing is consistent with the way we understand the timing of actus reus for other criminal law purposes. For example, when determining whether there was concurrence between actus reus and mens rea for a result crime, the issue is whether the defendant had the requisite mens rea at the time of the causing conduct, not at the time the result ensued. See, e.g., *State v. Govan*, 744 P.2d 712, 716–17 (Ariz. Ct. App. 1987) (affirming a manslaughter conviction where the victim died of pneumonia over four years after being paralyzed from a gunshot by the defendant).

<sup>231</sup> See Simester, *supra* note 1, at 418.

ter. Unfortunately, she encounters difficulty and is caught in an outgoing tide. E does not lift a finger to help, despite her cries to him, and watches as she is swept out to sea and drowned . . . . If in fact there was a riptide, and E would have been unable to save her anyway, then he is not responsible for the fatal consequence and cannot be convicted of a homicide offense.<sup>232</sup>

We concede that under our Voluntariness Requirement, E's failure to assist when under a legal duty to do so was voluntary because E could have done otherwise than omit to assist. Nonetheless, we agree that E cannot and should not be convicted of a homicide offense. But the Voluntariness Requirement is not what precludes E's responsibility. Rather, E is not liable because of the causation requirement. But for E's omission, E's daughter would nonetheless have drowned, and therefore E is not the cause of E's daughter's death. That is, criminal law's causation requirement for result crimes correctly precludes culpability in situations such as this one without resorting to the Voluntariness Requirement.<sup>233</sup> In situations of this type, or in situations where a mens rea defense is satisfied, criminal law can prohibit liability without declaring the result, or the actus reus as a whole, to be involuntary. Consequently, there may be instances where a defendant satisfies the Voluntariness Requirement as to all elements, but for which criminal liability does not attach because of the absence of mens rea or causation.

In short, the Voluntariness Requirement applies to result elements, but we conclude that voluntariness in this context is entirely derivative of the question of whether the conduct elements that caused the injury were voluntary. If the conduct causing the result was voluntary, then the result, even if unexpected, was voluntary; however, if the underlying conduct was involuntary, then even a foreseeable result is involuntary.

## 5. The Voluntariness Requirement Summarized

Having considered each of the three types of elements—conduct, circumstances and results—we are now in a position to define the Voluntariness Requirement more precisely and in a manner that incorpo-

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<sup>232</sup> *Id.*

<sup>233</sup> See MODEL PENAL CODE § 2.03. The Model Penal Code explains that “[c]onduct is the cause of a result when: (a) it is an antecedent but for which the result in question would not have occurred; and (b) the relationship between the conduct and result satisfies any additional causal requirements imposed by the Code or by the law defining the offense.” *See id.*

rates the complexities arising from different sequences of events. The definition is as follows:

1. The Voluntariness Requirement is satisfied if and only if the actus reus of an offense (the objective, or physical manifestations of the crime), taken as a whole, is voluntary.
2. The actus reus, taken as a whole, is voluntary if the defendant could have done otherwise at the time the actus reus was “completed.”
3. The time the actus reus is “completed” is the time that all conduct and circumstance elements are satisfied or become inevitable. If the actus reus contains a result element, the actus reus is completed at the time of the conduct that causes the result, not the time at which the result occurs.

The Voluntariness Requirement, so defined, is significantly more complex than conventional formulations of the “voluntary act requirement,” including the requirement stipulated by the Model Penal Code.<sup>234</sup> Nevertheless, our more precise and rigorous conception of the Voluntariness Requirement has several advantages that make it superior to other understandings of the role of voluntariness in a criminal offense. Taken together with the Actus Reus Requirement, the Voluntariness Requirement better effectuates the rationale for precluding criminal liability for mere thoughts, and for involuntary conduct. The Voluntariness Requirement also accurately reflects our intuitions about moral and criminal responsibility in a wider set of situations than traditional formulations that consider voluntariness only in relation to physical movements, including in situations combining voluntary acts and involuntary circumstances. Moreover, our conception of the requirement provides a principled rationale for preferring the *Martin* approach to voluntariness over the approach that merely requires that liability be based on conduct that includes *some* voluntary bodily movement.

### C. *The Voluntariness Requirement as an Element of the Offense*

As mentioned above, it is completely uncontroversial that the prosecution bears the burden of proving every actus reus element contained in the definition of a crime.<sup>235</sup> Also well settled is that to release

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<sup>234</sup> See *id.* § 2.01 (explaining that criminal liability only attaches if the relevant conduct includes a voluntary act or omission).

<sup>235</sup> See *supra* note 89 and accompanying text.

the prosecution from the burden of proving *some* actus reus (usually, but not always, a positive act) would violate the federal Constitution.<sup>236</sup> This consensus does not extend to whether “voluntariness” should be understood as an element of the offense or whether criminal law should treat involuntariness as an affirmative defense. Similarly, neither courts nor scholars are united on whether the federal Constitution precludes punishment in the absence of proof of voluntariness.<sup>237</sup> As we mentioned in Part II, the disagreement about the proper place of voluntariness, and its constitutional valence, results in part from confusion and misunderstanding about the “voluntary act requirement.”<sup>238</sup> Having now clarified the Actus Reus Requirement and the Voluntariness Requirement, we are better equipped to determine the role of voluntariness. As we demonstrate below, the fundamental principles of moral and criminal responsibility demand that the Voluntariness Requirement be an element of the actus reus.<sup>239</sup> Placing the duty to prove voluntariness on the defendant contravenes these principles and therefore violates the Due Process Clause of the federal Constitution.<sup>240</sup>

Our argument in this Section consists of three parts. First, we present our rationale for insisting that the Voluntariness Requirement be an element of the offense.<sup>241</sup> Second, we respond to two prominent arguments for treating the Voluntariness Requirement as an affirmative defense.<sup>242</sup> Third, we show that due process demands that criminal punishment be contingent on proof that the Voluntariness Requirement has been satisfied, and that our position provides the best reading of the Supreme Court line of precedent on this issue.<sup>243</sup>

### I. Positive Arguments for Voluntariness as an Offense Element

The Actus Reus Requirement, as we employ the term, serves the purpose of prohibiting punishment for mere thoughts.<sup>244</sup> An offense must have some physical component, be it behavior, circumstances, or

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<sup>236</sup> See *In Re Winship*, 397 U.S. at 364.

<sup>237</sup> See *infra* notes 298–304 and accompanying text (explaining the constitutional status of the actus reus requirement).

<sup>238</sup> See *supra* notes 50–134 and accompanying text.

<sup>239</sup> See *infra* notes 254–275 and accompanying text.

<sup>240</sup> See *infra* notes 308–330 and accompanying text.

<sup>241</sup> See *infra* notes 244–275 and accompanying text.

<sup>242</sup> See *infra* notes 276–290 and accompanying text.

<sup>243</sup> See *infra* notes 308–330 and accompanying text.

<sup>244</sup> See *supra* notes 151–153 and accompanying text (explaining that criminal liability is not imposed for mere thoughts).

results.<sup>245</sup> The Voluntariness Requirement has the separate but complementary purpose of prohibiting punishment unless a person is responsible for the physical component of the offense.<sup>246</sup>

The existence of actus reus only justifies criminal liability and punishment to the extent that it is attributable to the defendant.<sup>247</sup> Behavior, situations, and results justify punishment because, and to the extent that, they are the actions, conduct, behavior, and situations of the defendant. The traditional focus on actions is instructive in this context, for “actions” are the paradigmatic contrasts to “events.”<sup>248</sup> Actions are things actors do, events are things that happen to actors. Most offense definitions involve verbs—things that a person does, not things that are done to a person.<sup>249</sup> We could argue that the proper understanding of the word “act” presupposes voluntariness; to refer to an “involuntary act” is a contradiction in terms. But such a “definitional stop” argument is neither necessary nor productive.<sup>250</sup> What matters is not the linguistic limits of the word “act,” but the significance of voluntariness to moral responsibility. Criminal law focuses on acts because voluntary acts are paradigmatic examples of things for which we are responsible.<sup>251</sup>

Although criminal law’s focus on acts is myopic, it nonetheless demonstrates that to the extent the law cares about actions as the basis of liability, it cares about *voluntary* actions. The same applies to other elements of actus reus. It therefore does not make sense to insist that a defendant may only be convicted if the prosecution proves beyond a reasonable doubt that the actus reus occurred, and then nevertheless allow a conviction even though the prosecution has not proved the actus reus was voluntary. An action or other actus reus, sans voluntariness,

<sup>245</sup> See *supra* notes 147–172 and accompanying text (defining Actus Reus Requirement).

<sup>246</sup> See *supra* notes 173–180 and accompanying text (defining the Voluntariness Requirement).

<sup>247</sup> See Corrado, *supra* note 180, at 1529–30.

<sup>248</sup> See *id.* at 1530 (defining the traditional view as well as “act” and “event”).

<sup>249</sup> See *id.* (explaining criminal law’s act requirement). Corrado argues:

No one should be punished except for something she does. She shouldn’t be punished for what wasn’t done at all; she shouldn’t be punished for what someone else does; she shouldn’t be punished for being the sort of person she is, unless it is up to her whether or not she is a person of that sort. She shouldn’t be punished for being blond or short, for example, because it isn’t up to her whether she is blond or short.

*Id.* at 1529.

<sup>250</sup> HART, *supra* note 155, at 5.

<sup>251</sup> See Husak, *supra* note 1, at 2434 (explaining that acts are paradigmatically those things which are under our control).

is a mere event; it is not something done by the defendant in any relevant sense. The requirement that the prosecution prove actus reus, stripped of the requirement that the actus reus be voluntary, allows criminal punishment to be imposed absent the fundamental minimum precondition of moral responsibility.<sup>252</sup> This is most clear in the case of actus reus that involves bodily movements:

What purpose might be served by “defining” an act simply as a bodily movement regardless of whether or not it is voluntary escapes me. It is not helpful for the application of the [Model Penal Code] or for laying down a basic theoretical construct needed for the code to operate. The act requirement, obviously, is not a requirement for mere bodily movements (whether voluntary or not); otherwise someone pushed down the stairway would satisfy this most useless requirement. Obviously, criminal law needs more than this; it needs the “voluntary act requirement.”<sup>253</sup>

In our terminology, this “something more” needed by criminal law is the Voluntariness Requirement, the rule that the actus reus as a whole must be voluntary.<sup>254</sup> Given that the purpose of the rule is to ensure that the “indispensable minimum” for moral responsibility is satisfied, it makes no sense to lift the burden of proving voluntariness from the prosecution and place it on the defendant.<sup>255</sup> If the prosecution must bear the burden of proving anything, surely it should have to prove that this minimum requirement is satisfied. The rationales for the presumption of innocence and for demanding that the prosecution prove the elements of the offense apply at least as forcefully to the Voluntariness Requirement as they do to proving the physical dimensions of the crime (considered independently of voluntariness).

Consider the 2012 Washington Supreme Court case *State v. Deer*, described in Part II, which is illustrative of a growing body of cases that treat voluntariness as irrelevant or unrelated to the core elements of a

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<sup>252</sup> See Zaibert, *supra* note 166, at 124. Individuals are no more responsible for involuntary actions or circumstances than they are responsible for consequences they do not cause. To place the burden of proving voluntariness on the defendant makes no more sense than to give the defendant the burden of disproving causation.

<sup>253</sup> *Id.*

<sup>254</sup> At the risk of redundancy, we emphasize that this is a distinction that matters. The traditional call for a “voluntary act” implies that only conduct can or need be voluntary, which as we have already shown, understates the role of voluntariness by seemingly excluding its operation in the realm of circumstance or result elements.

<sup>255</sup> Simester, *supra* note 1, at 413.

prosecution's case-in-chief.<sup>256</sup> Let us suppose for the sake of argument that the defendant was telling the truth: Deer was asleep while sexual intercourse with a minor took place.<sup>257</sup> The *Deer* court's position was that the prosecution bears the burden of proving that sexual intercourse took place, yet the prosecution does not have to prove that the defendant voluntarily took part in sexual intercourse with a minor.<sup>258</sup> But if the prosecution need not prove that the sexual intercourse was voluntary on the part of the defendant, what is achieved by requiring that the prosecution prove that there was sexual intercourse at all? Unless the conduct was voluntary, it is no more morally assignable to the defendant than conduct performed by someone else. For the *Deer* court, the voluntariness requirement is little more than a theoretical, academic exercise that is often unnecessary and unreasonable.<sup>259</sup> But as this Article makes clear, this position is untenable. Proof of the occurrence of some conduct, absent proof that the conduct is morally assignable to the defendant, is not a sufficient basis for justified imposition of punishment.<sup>260</sup>

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<sup>256</sup> See *supra* notes 105–110 and accompanying text.

<sup>257</sup> See *State v. Deer*, 287 P.3d 539, 542–43 (Wash. 2012).

<sup>258</sup> See *id.* If the offense did not impose strict liability, the prosecution would also have had to prove that the requisite *mens rea* was satisfied. *Id.* It is worth noting that a legislature may dispense with the *mens rea* requirement and impose strict liability—at least for less serious offenses. See, e.g., *Staples v. United States*, 511 U.S. 600, 617–18 (1994) (declaring that imposing strict liability for crimes violates the Constitution unless the penalty is slight, that the conviction does not convey substantial stigma, and that the regulated conduct is inherently dangerous or deleterious). Nevertheless, it does not follow from the fact that if a legislature may dispense with a *mens rea* requirement, it may also dispense with a requirement of voluntariness. As several commentators have pointed out, voluntariness is more fundamental than intent, or other mental states, when it comes to culpability. Simester, for example, points out that “involuntariness is not merely a denial of intention, or of other forms of *mens rea*, or even a denial of fault in general.” Simester, *supra* note 1, at 413. A defendant's denial of voluntariness is “much more profound” than a claim that a death was an accident. *Id.* It is “a claim that the movements of her body which caused [the victim's] death did not belong to [her] as a reasoning person.” *Id.* at 414; see also KADISH ET AL., *supra* note 1, at 262 (“[T]he absence of a voluntary act . . . [is] a defense to a strict liability offense.”); Corrado, *supra* note 180, at 1544 (“The same, I believe, is true even of strict liability crimes; we cannot be held liable when no intentional action is involved.”); Nemerson, *supra* note 189, at 1531 (“State courts have steadfastly maintained the necessity for *actus reus* . . . . If the behavior involved was not voluntary—not the product of the effort or determination of the actor, either conscious or habitual—then no penal liability can accrue.”).

<sup>259</sup> *Deer*, 287 P.3d at 542. Recognizing that academic “theory and practice sometimes diverge,” the court explained that “[b]reaking criminal responsibility into its component parts of *actus reus* and *mens rea* is fine in theory, but requiring the prosecution to establish volition . . . is unreasonable.” *Id.*

<sup>260</sup> See ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 95 (2d ed. 1995). As Andrew Ashworth has put it:

Requiring proof that something occurred, such as sexual interaction, but not requiring proof that it was done voluntarily by the defendant, dissolves the distinction between what is done *to* a person and what is done *by* a person. This can perhaps be seen even more clearly by tweaking the facts of *Deer* slightly, so as to make the defendant's involuntariness more vivid, or facially obvious. Suppose that while the defendant was in a coma, a minor had sexual intercourse with her. Proving the existence of that sexual intercourse alone would achieve nothing in relation to justifying punishing the defendant. In fact, in such a case, the defendant would be punished for doing even less than merely thinking, for the punishment would be imposed due to neither thought nor action on the part of the defendant, but rather as a result of something done *to* the defendant.<sup>261</sup>

Stated more directly, the Voluntariness Requirement is “the irreducible minimum requirement of responsibility” and thus must be distinguished from affirmative defenses.<sup>262</sup> Defendants who argue that they should not be convicted because an affirmative defense applies do not claim that they are not responsible for what happened.<sup>263</sup> Rather, an affirmative defense involves the claim that the defendant should not be convicted, *despite* being responsible.<sup>264</sup> The affirmative defenses recognized in American criminal law are either justifications or excuses, or some combination of the two.<sup>265</sup> Justification defenses, such as self-defense, consist of the claim that even though the elements of the offense have been satisfied, the defendant was justified under the circumstances in acting as he did.<sup>266</sup> That is, his conduct was not wrongful.<sup>267</sup>

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To proceed to conviction without proof of a voluntary act would be to fail, in the most fundamental way, to show respect for individuals as rational, choosing beings. More generally, if people were liable to conviction despite doing nothing, or if something had been done to them, this would fail to respect their autonomy.

*Id.*

<sup>261</sup> *Id.*

<sup>262</sup> Simester, *supra* note 1, at 404–05.

<sup>263</sup> See ROBINSON, *supra* note 1, at 478 (explaining the elements of an affirmative defense).

<sup>264</sup> See *id.* (explaining that under an excuse defense, the actor may admit that the deed was wrong); *id.* at 401 (discussing justification defenses).

<sup>265</sup> See Mitchell N. Berman & Ian P. Farrell, *Provocation Manslaughter as Partial Justification and Partial Excuse*, 52 WM. & MARY L. REV. 1027, 1031 (2011) (arguing that provocation manslaughter is best understood as requiring both a partial justification and a partial excuse).

<sup>266</sup> *Id.*

In contrast, an excuse defense is a claim that the actor was not blameworthy for the wrongful conduct.<sup>268</sup> Excuse defenses, such as duress, for example, do not involve a denial that the relevant conduct or circumstances are assignable to the defendant.<sup>269</sup> Nor are excuses claims that the conduct was justified, and therefore not wrongful.<sup>270</sup> Rather, an excuse defense is a claim that the actor was not *blameworthy* for the wrongful conduct.

Crucially, neither justifications nor excuses involve a denial of the minimum requirement of responsibility.<sup>271</sup> Both sets of affirmative defenses accept that the minimum requirement of responsibility may be present, but assert that there nonetheless exists an additional reason for concluding that criminal culpability ought not be imposed.<sup>272</sup> Given that justifications and excuses have this structure—denying either blameworthiness or wrongfulness due to reasons additional to the minimum requirements of responsibility—treating them as affirmative defenses makes sense. Because the prosecution has *arguendo* already established the minimum requirements of responsibility, it is reasonable for the defendant to bear the burden of proving the additional excusing or justifying conditions. Affirmative defenses are secondary, or responsive claims, made in response to the prosecution's primary claims that responsibility for the offense has been established. The Supreme Court has even gone so far as to recognize that some or all affirmative defenses are gratuitous in the sense that the State could eliminate the defense entirely without offending the Constitution.<sup>273</sup>

By contrast, to claim that the Voluntariness Requirement is not satisfied is to claim that the minimum foundation of responsibility is lacking. If the prosecution ought to bear the burden of proving anything, and adherence to this principle is fundamental in American

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<sup>267</sup> ROBINSON, *supra* note 1, at 401 (“Under the special justifying circumstances [the harm] is outweighed by the need to avoid an even greater harm or to further a greater societal interest.”).

<sup>268</sup> *Id.* (“Excuses admit that the deed may be wrong but excuse the actor because the actor’s characteristics or situation suggest that the actor is not blameworthy for the violation.”).

<sup>269</sup> *See id.* at 478.

<sup>270</sup> *Id.*

<sup>271</sup> *See id.*

<sup>272</sup> *See id.*

<sup>273</sup> *Patterson*, 432 U.S. at 207–08; see John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1346–47 (1979) (discussing *Patterson* and arguing that when “the state considers a gratuitous defense, that is, one that it may grant or deny as it sees fit, a constitutional insistence on proof beyond reasonable doubt no longer makes sense”).

criminal law, then it ought to bear the burden of proving the basic condition of responsibility.<sup>274</sup> A claim of involuntariness is not a claim that some additional factor is applicable; it is a claim that an initial, basic requirement of responsibility is lacking.<sup>275</sup> The rationale for requiring that the defendant prove affirmative defenses, of either justification or excuse—does not apply to the Voluntariness Requirement.

## 2. Involuntariness Within the Knowledge of the Accused

The most influential, but ultimately inadequate, proposed rationale for treating the Voluntariness Requirement as an affirmative defense is that placing the burden of proof on the defendant is appropriate because, first, involuntary conduct is an “abnormality,” and second, “the relevant facts are peculiarly within the knowledge of the accused.”<sup>276</sup> As discussed in Part II, these two factors are the basis for the argument that that “involuntariness should be viewed as a general excuse rather than as a universal offense element.”<sup>277</sup> This argument has been invoked, for example, by the *Deer* court, holding that a defendant accused of statutory rape bears the burden of proving that she was asleep at the relevant time.<sup>278</sup> These two factors, however, do not justify placing the burden of proving involuntariness on the defendant.

To begin with, the issue of voluntariness is not alone in being primarily within the knowledge of the accused. The same could be said of most, if not all, mens rea elements. Absent a confession, there will rarely be direct evidence of a defendant’s mental state at the time of the offense. Nevertheless, this does not lead criminal law to place the burden of proof on the defendant.<sup>279</sup> Rather, the prosecution bears the burden of proving the mental elements of an offense, with the jury in-

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<sup>274</sup> See *In Re Winship*, 397 U.S. at 397 (explaining that the prosecution bears the burden of proof).

<sup>275</sup> See Corrado, *supra* note 180, at 1560–61 (“The ability to choose otherwise is a basic condition of responsibility for action, whereas excuses mark circumstances in which we are neither blamed nor punished for which we are responsible.”).

<sup>276</sup> ROBINSON, *supra* note 67, at 266.

<sup>277</sup> *Id.*

<sup>278</sup> See *Deer*, 287 P.3d at 542–43 (citing *State v. Utter*, 479 P.2d 946, 946 (Wash. Ct. App. 1971) (explaining that numerous authorities hold that involuntary act defenses are similar to incapacity defenses in that they amount to an affirmative defense and that it is generally recognized that the defendant bears that the burden of proof for an affirmative defense)).

<sup>279</sup> See *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (“Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the fact finder of his guilt.”); see also *State v. Pierson*, 514 A.2d 724, 728 (Conn. 1986) (explaining that the state bears the burden of proof).

structed that they must believe beyond a reasonable doubt that the mental elements were satisfied.<sup>280</sup>

Of course, the use of permissive inferences is allowed in the mens rea context and should be adopted in the voluntariness context.<sup>281</sup> The Supreme Court has held that a jury may infer the accused's mental state, beyond a reasonable doubt, from the circumstantial evidence; indeed, it is permissible to presume certain mental states in particular circumstances.<sup>282</sup> Take, for example, the "natural and probable consequence" and "deadly weapon" rules.<sup>283</sup> The jury may presume an intent to kill "where the natural and probable consequence of a wrongful act is to produce death," or where the defendant has used a deadly weapon.<sup>284</sup> Courts could and ought to accept similar inferences in the voluntariness context. For example, we think it appropriate for the jury to infer voluntariness from the circumstance surrounding the alleged conduct. Indeed, the fact that involuntary conduct is a statistical anomaly tends to justify such permissive inferences.<sup>285</sup> But as in the case of inferring mens rea, allowing the jury to make this inference is not inconsistent with recognizing voluntariness as a fundamental element of every crime. The presumption of innocence is protected and the voluntariness principle enforced when the jury is instructed properly that it may infer voluntariness. That is, the jury can simply be instructed that (a) they should only convict the defendant if the prosecution has proven beyond a reasonable doubt that the actus reus was voluntary; and (b) voluntariness can be inferred from the surrounding circumstances.

Moreover, in a nod to administrative convenience and efficiency, one might accept that such a jury instruction need not be given in every case.<sup>286</sup> Involuntariness is sufficiently rare that one might accept that requiring the instruction in every case would be impractical, con-

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<sup>280</sup> See *Speiser*, 357 U.S. at 526; *Pierson*, 514 A.2d at 728.

<sup>281</sup> *Dripps*, *supra* note 96, at 1668–69 (discussing the relationship between presumptions and the burden of proof); see *Sandstrom v. Montana*, 442 U.S. 510, 519 (1979).

<sup>282</sup> *Dripps*, *supra* note 96, at 1668–69; see *Sandstrom*, 442 U.S. at 519 (holding that unlike permissive, rebuttable presumptions, mandatory inferences are unconstitutional).

<sup>283</sup> See *State v. Fugate*, 303 N.E.2d 313, 314 (Ohio Ct. App. 1973); *Dripps*, *supra* note 96, at 1668 n.7 (explaining that an example of a presumption is that a jury might be allowed to presume that a defendant intended to kill if the defendant used a deadly weapon).

<sup>284</sup> *Fugate*, 303 N.E.2d at 314.

<sup>285</sup> See *id.*

<sup>286</sup> See *Pierson*, 514 A.2d at 728.

fusing, and overly prejudicial to the prosecution's case.<sup>287</sup> For example, it might be recognized that the judge should instruct the jury on voluntariness only if the defendant provides some credible evidence that calls voluntariness into question. This approach has been taken with respect to a mistake of fact defense.<sup>288</sup> To the extent that the defendant's mistake of fact would negate a mens rea element of the crime, the prosecution bears the burden of disproving the mistake of fact.<sup>289</sup> A judge may make a jury instruction on mistake of fact, however, contingent to the defendant producing credible evidence of a relevant mistake of fact.<sup>290</sup> On the other hand, the jury must always be instructed on the proper mens rea element, even if it is not colorably in dispute, and thus parity might require a consistently applied voluntariness instruction. We need not take a position on this debate to conclude that it is possible to address the central objections to treating voluntariness as an element of every offense without fundamentally derailing the criminal justice system's current operation.

In sum, concerns about the statistical and subjective abnormality of involuntariness do not require that involuntariness be viewed as an affirmative defense. Basic notions of culpability require that the prosecution bear the onus of proving beyond a reasonable doubt that the actus reus was voluntary.

#### D. *Actus Reus and Voluntariness as Constitutional Requirements*

A final question that we think is necessary to address in this effort to add coherence to the voluntariness doctrine is the extent to which, if at all, the doctrine has a constitutional grounding. Concluding that there is a constitutional aspect to the voluntariness inquiry would add substantial support for the two prescriptions we have offered regarding the practical application of the voluntary actus reus principle. In this Section, we acknowledge the historical uncertainty as to the constitutional status of actus reus principles, but ultimately conclude that there

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<sup>287</sup> See, e.g., *id.* (reasoning that, because the state has no burden of disproving involuntariness as part of its prima facie case, a court is not required on its own to instruct the jury about these defenses when the evidence gives no suggestion of their applicability); Mike Horn, Note, *A Rude Awakening: What to Do With the Sleepwalking Defense?*, 46 B.C. L. REV. 149, 150 (2004) (explaining that the defense of sleepwalking is rarely asserted).

<sup>288</sup> See, e.g., *State v. Sexton*, 733 A.2d 1125, 1127 (N.J. 1999) (“[O]nce the defendant, as here, presents evidence of a reasonable mistake of fact that would refute an essential element of the crime charged, the State’s burden of proving each element beyond a reasonable doubt includes disproving the reasonable mistake of fact.”).

<sup>289</sup> See *id.*

<sup>290</sup> See *id.*

is a strong basis in the Court's Eighth Amendment jurisprudence from which a constitutional underpinning for the voluntariness principle can be inferred.

### 1. Surface-Level Consensus

Any discussion of whether the Constitution provides a framework for resolving some of these questions of law must begin with an acknowledgement of the overwhelming, if generic, consensus that the actus reus doctrine is constitutionally grounded.<sup>291</sup> It is commonplace for commentators to unflinchingly describe the actus reus doctrine as constitutionally mandated.<sup>292</sup> Leading criminal law scholar Scott Sundby, for example, regards the notion that "criminal responsibility is relieved if the defendant did not do the act voluntarily" as a "constitutional requirement of *actus reus*."<sup>293</sup> Another leading scholar, John Jeffries, concluded that as a constitutional minimum, criminal punishment is not permitted in the absence of a finding as to the actus reus.<sup>294</sup> Similarly, Wayne LaFave's criminal law treatise laconically states

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<sup>291</sup> See *supra* notes 292–300 and accompanying text.

<sup>292</sup> See, e.g., WAYNE R. LAFAVE, 1 SUBSTANTIVE CRIMINAL LAW § 6.1 (2d ed. 2012); Jeffries & Stephan, *supra* note 273, at 1370; Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 483 (1989). Thus, the common law crimes are defined in terms of act or omission to act, and statutory crimes are unconstitutional unless so defined. To qualify as an act forming the basis of criminal liability, a bodily movement must be voluntary. LAFAVE, *supra*, § 6.1.

<sup>293</sup> Sundby, *supra* note 292, at 483. On the other hand, the requirement of voluntariness in practice does very little work because "defendants who act while sleepwalking or while unconscious do not constitute a large percentage of the criminal docket." *Id.*

<sup>294</sup> Jeffries & Stephan, *supra* note 273, at 1370. As two commentators suggest:

The state is generally free to define the actus reus as it will, but it may not dispense with the requirement of conduct as a prerequisite of criminal liability. The conduct specified need not be affirmative; it may consist of an act or a failure to act. It may even consist of possession—a relationship created by an act of acquisition and continued by a failure to divest. But because of the requirement of conduct as an essential component of crime definition, the state may not punish the bare desire to do wrong, nor may it premise liability on a mere personal characteristic or status.

*Id.*; see also D. Michael Crites et al., *A Congressional "Meat Axe"? New Legislation Would Broaden the Potential for Prosecutions Under the Federal Illegal Gratuity Statute*, 36 J. LEGIS. 249, 261 (2010) ("[S]ome have noted that due process requires . . . the government to prove the defendant's actus reus (wrongful act) and mens rea (the requisite level of intent) in order to meet constitutional requirements."); Martin R. Gardner, *Rethinking Robinson v. California in the Wake of Jones v. Los Angeles: Avoiding the "Demise of the Criminal Law" by Attending to "Punishment"*, 98 J. CRIM. L. & CRIMINOLOGY 429, 486 (2008) ("Finding the malishment in Robinson to be unconstitutional would establish the narrow holding that there can be no punishment without a criminal act, thus embracing the actus reus principle as a matter

that “statutory crimes are unconstitutional unless” defined to include an actus reus.<sup>295</sup>

This consensus regarding the constitutionalized status of the actus reus doctrine is predicated almost exclusively on a 1962 Warren-era Supreme Court case, *Robinson v. California*.<sup>296</sup> In *Robinson*, the Court held that a statute permitting the imposition of criminal punishment if one “was addicted to the use of narcotics” was unconstitutional.<sup>297</sup> Justice John Harlan noted in his concurrence that because the law permitted one to be punished for the fact of his addiction, even without evidence of any acts of drug use, the law “exceed[ed] the power that a state may exercise in enacting its criminal law.”<sup>298</sup> Condemning the punishment for one’s addiction as inconsistent with the Eighth Amendment, the majority explained, “Even one day in prison would be a cruel and unusual punishment for [a status] ‘crime.’”<sup>299</sup> There is, then, undoubtedly a connection between the Eighth Amendment and the physical, or external elements of the crime—that is, the actus reus of the crime.

In contrast, the constitutional status of the equally important and related concept of voluntariness is much more opaque. At first blush, *Robinson* supports only a constitutionalized status for an overt act requirement. And notably, the scholarly consensus tends to be similarly limited.<sup>300</sup> The scholarly comments referenced above are often made in passing, typically referring to an act or actus reus alone and rarely amounting to more than a declarative, subordinate clause. Rarely do

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of constitutional necessity.”); Kathryn Kizer, *Behind the Guise of Gang Membership: Ending the Unjust Criminalization*, 5 DEPAUL J. FOR SOC. JUST. 333, 357 (2012) (“[I]nvocations of the voluntariness approach essentially reflect one consistent principle: those who unknowingly contracted a condition should not be punished for it.”). See generally Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1272–99 (1998) (discussing the development of substantive criminal law); Markus Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509 (2004) (discussing the development of constitutional standards in criminal law).

<sup>295</sup> LAFAYE, *supra* note 292, § 6.1.

<sup>296</sup> 370 U.S. 660, 667 (1962) (holding that a law criminalizing drug addiction was a violation of the Eighth Amendment). As Professor Jeffries notes, however, *Robinson*’s requirement of an act cannot be so easily translated into a requirement of a “voluntary” act, at least not based on any conventional use of the term voluntary. Jeffries & Stephan, *supra* note 273, at 1371 n.129 (citing *Powell*, 392 U.S. at 532).

<sup>297</sup> 370 U.S. at 667.

<sup>298</sup> *Id.* at 679 (Harlan, J., concurring).

<sup>299</sup> *Id.* at 667 (majority opinion).

<sup>300</sup> See, e.g., LAFAYE, *supra* note 292, § 6.1; Jeffries & Stephan, *supra* note 273, at 1371. Very few cases tend to take up this issue, but this is likely due in substantial part to the fact that in the past, actus reus was regarded as sufficiently sacred that it was “not often called into question or disregarded by legislative enactment.” Jeffries & Stephan, *supra* note 273, at 1370–71.

scholars take seriously the task of unpacking the relationship between the Constitution and the foundational concept of voluntariness.

## 2. The Source of Constitutional Confusion

The blame for *Robinson's* inability to trigger a more robust conversation about the constitutional status of voluntariness lies squarely with the Supreme Court's 1968 decision in *Powell v. Texas*.<sup>301</sup> Just six years after *Robinson*, the *Powell* Court refused to extend the application of *Robinson* to a new set of facts, and in so doing, caused confusion and doubt about the scope of *Robinson's* constitutional command.<sup>302</sup>

In *Powell*, the Court upheld as constitutional the conviction of an alcoholic for public intoxication, distinguishing *Robinson* insofar as this was not a case of punishment for one's mere status, but rather for "public behavior which may create substantial health and safety hazards."<sup>303</sup> The plurality opinion states that the Cruel and Unusual Punishment Clause requires that criminal "penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some actus reus."<sup>304</sup> It thus "does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, 'involuntary' or 'occasioned by a compulsion.'"<sup>305</sup> To be sure, this language tends to undermine broad claims that voluntariness is constitutionally required.<sup>306</sup> In short, there

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<sup>301</sup> *Powell*, 392 U.S. at 533 (plurality opinion).

<sup>302</sup> *See id.*

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> Illustrative of the scholarly reaction to *Powell*, Jeffries and Stephan explain: "[T]he plurality [in *Powell*] made clear that it construed *Robinson* not as a broad requirement of 'voluntariness' but as a narrower insistence on conduct as an essential ingredient of crime definition." Jeffries & Stephan, *supra* note 273, at 1371 n.129. Notably, the definition of voluntariness as used in this Article probably does differ significantly from the term's conventional use. Furthermore, involuntariness, for purposes of criminal culpability, is "much narrower than the ordinary person's understanding of what counts as an involuntary act." KADISH ET AL., *supra* note 1, at 210; *see also* Bratty v. Attorney-General [1963] 3 A.C. 523 (H.L.) [532] (appeal taken from N. Ir.) (explaining that an act is not deemed involuntary "simply because the doer could not control his impulse to do it"); Lara, 902 P.2d at 1338-39 ("[We] use the term 'voluntary act' as a determined conscious bodily movement. . . . Used this way, 'voluntary act' means actus reus. [But] 'voluntary' has also been used to describe behavior that might justify inferring a particular culpable mental state. Used this way, 'voluntary' gets caught up in mens rea."). *But see Powell*, 392 U.S. at 535 (plurality opinion) (refusing to conclude that "chronic alcoholics in general, and Leroy Powell in particular, suffer from such an irresistible compulsion to drink and to get drunk in public

are longstanding questions about the extent to which voluntariness, as opposed to a mere overt act requirement, is constitutionalized.<sup>307</sup>

### 3. Recognizing a Constitutional Status for Voluntariness

Up to this point, we have acknowledged that the Court's decisions leave the constitutionally mandated role of voluntariness and actus reus in a state of substantial uncertainty. One of the reasons for this is that the Court's decisions on voluntariness and actus reus employed the confused conventional terminology of voluntary acts, status crimes, and the like.<sup>308</sup> The same can be said of subsequent commentary by scholars and applications of the decisions by lower courts.<sup>309</sup> Indeed, even a basic claim that *Robinson* stands for the proposition that the prosecution must prove an overt act in order for a defendant to be punished seems difficult to reconcile with the Court's later acknowledgement that punishment may be imposed for omissions.<sup>310</sup> But now that we are armed with more precise formulations of the Actus Reus Requirement and the Voluntariness Requirement described in this Article, we are in a better position to make sense of the constitutional landscape.<sup>311</sup> In this Subsection, we apply the vocabulary described in this Article to *Robinson* and *Powell* and extract a clear constitutional rule regarding voluntariness and actus reus.

As an initial matter, a careful reading of *Robinson* suggests that the Court was concerned about both the Actus Reus Requirement and the Voluntariness Requirement, as those terms are defined in this Article.<sup>312</sup> First, the Court was clearly disturbed by the prospect of imposing punishment for the status of being a narcotics addict when such a status could be established by the prosecution without proof of any overt

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that they are utterly unable to control their performance of either or both of these acts and thus cannot be deterred at all from public intoxication").

<sup>307</sup> Robert L. Misner, *The New Attempt Laws: Unsuspected Threat to the Fourth Amendment*, 33 STAN. L. REV. 201, 218, 223 (1981) (discussing the constitutional minimum for an actus reus requirement in the context of criminal attempt liability and positing that "it is unlikely that the Supreme Court will strike down state attempt statutes for failure to meet a constitutional actus reus requirement" because the Court "has said little about actus reus outside of its discussion of voluntariness and acts of omission" and the lines are so difficult to draw).

<sup>308</sup> See generally *Robinson*, 370 U.S. 660 (utilizing these confused conventional terms).

<sup>309</sup> See *supra* notes 1–3 and accompanying text (demonstrating the inconsistent terminology used by commentators).

<sup>310</sup> *United States v. Park*, 421 U.S. 658, 666 (1975) (holding that an act of omission can satisfy the constitutional requirement of an act).

<sup>311</sup> See *supra* notes 285–287 and accompanying text.

<sup>312</sup> See 370 U.S. at 666–67.

act.<sup>313</sup> This indicates that the Court considered some actus reus necessary for criminal liability. There is, in other words, a clear Eighth Amendment barrier to punishing mere thought or status crimes.

In addition, the Court explicitly ties its concern for punishing “mere status,” absent overt action, with a related concern for the fact that a person can come to have this prohibited status involuntarily.<sup>314</sup> The Court emphasized that narcotic addiction “is apparently an illness which can be contracted *innocently or involuntarily*.”<sup>315</sup> One possible inference to be drawn from this language is that the Court was concerned that certain persons could be punished for something that is involuntary. In other words, *Robinson* may stand for the proposition that the Eighth Amendment only allows punishment to be imposed when both the Actus Reus Requirement and Voluntariness Requirement are satisfied. At the very least, we know that the combination of not requiring an overt act and of disregarding possible involuntariness defenses was constitutionally lethal for the “narcotics addict” offense addressed in *Robinson*.<sup>316</sup>

Our conceptualization of actus reus and voluntariness is enhanced, not undermined, by the *Powell* decision. First, in addressing the Texas law prohibiting intoxication in a public place, Justice Thurgood Marshall, writing for the plurality, distinguished *Robinson* on the basis that the Texas law involved overt conduct.<sup>317</sup> That is to say, *Robinson* further entrenches the constitutional requirement of an actus reus:

On its face the present case does not fall within that holding, since appellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion. The State of Texas thus has not sought to punish a mere status, as California did in *Robinson*; nor has it attempted to regulate appellant’s behavior in the privacy of his own home. Rather, it has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards.<sup>318</sup>

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<sup>313</sup> *Id.* at 666 (“California has said that a person can be continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State, and whether or not he has been guilty of any antisocial behavior there.”).

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* at 667 (emphasis added).

<sup>316</sup> *See id.*

<sup>317</sup> *Powell*, 392 U.S. at 532 (plurality opinion).

<sup>318</sup> *Id.*

On the other hand, at first blush, Justice Marshall's plurality opinion appears to expressly disavow a principle that bears a striking resemblance to the Voluntariness Principle. Rejecting an argument that being "powerless to change" was a defense, the plurality explained:

In [the "powerless to change"] view, appellant's "condition" of public intoxication was "occasioned by a compulsion symptomatic of the disease" of chronic alcoholism, and thus, apparently, his behavior lacked the critical element of *mens rea*. Whatever may be the merits of such a doctrine of criminal responsibility, it surely cannot be said to follow from *Robinson*. The entire thrust of *Robinson's* interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*.<sup>319</sup>

The above passage, however, indicates that Justice Marshall misunderstood the thrust of the "powerless to change" argument. Justice Marshall characterizes the "powerless to change" argument as a claim that the defendant lacked the requisite *mens rea*, but the "powerless to change" argument is not about *mens rea*.<sup>320</sup> Indeed, the "powerless to change" argument—that criminal penalties ought not to be imposed on a person for being in a condition that he is powerless to change—is essentially our formulation of the Voluntariness Requirement and should be analyzed separately from the elements of *mens rea*. The key issue in *Powell*, then, was one of voluntariness: whether a person should be punished if he was powerless to change or avoid completion of the *actus reus*. Because of Justice Marshall's mischaracterization, it is therefore difficult to draw stark conclusions about the scope of the *Powell* holding because Justice Marshall mischaracterized the "powerless to change." By characterizing *Robinson* as insisting that criminal responsibility requires *mens rea*, Marshall concluded that such a *mens rea* requirement could not follow from *Robinson*—because *Robinson* was about *actus reus*, not *mens rea*.

In contrast, there are passages in *Powell* that seem to confirm a constitutional underpinning to the Voluntariness Requirement.<sup>321</sup> For

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<sup>319</sup> *Id.* at 533.

<sup>320</sup> *See id.*

<sup>321</sup> *See id.* at 534.

example, Justice Marshall seems to distinguish between true involuntariness and actions that are simply difficult to avoid, recognizing only the former to be constitutionally protected.<sup>322</sup> As the plurality explains, holding Powell's conviction to be unconstitutional would lead to a prohibition on punishing any defendants who are subject to a strong, but not completely overpowering, compulsion: "If Leroy Powell cannot be convicted of public intoxication, it is difficult to see how a State can convict an individual for murder, if that individual . . . suffers from a 'compulsion' to kill, which is an 'exceedingly strong influence,' but 'not completely overpowering.'"<sup>323</sup>

The situation Justice Marshall described involves an influence that is *not* completely overpowering. Accordingly, such a situation is *not* involuntary, according to our conception of voluntariness. If a person is not completely overpowered by a compulsion, then it is possible for the person to do otherwise, no matter how difficult that may be. As a result, the person is acting voluntarily. A strong, but not completely overpowering, compulsion is analogous to duress: the actor *voluntarily* chooses to commit a crime, but under circumstances that make it "a hard and excruciatingly difficult choice."<sup>324</sup> A constitutional Voluntariness Requirement would therefore not prevent punishing people who are afflicted by a strong, but not completely overpowering, compulsion.<sup>325</sup>

Moreover, a dialogue between the dissent and the plurality in *Powell* lends further support for our view that voluntariness is a constitutional precondition to criminal liability. Consistent with our view of voluntariness, the dissenting judges concluded that imposing punishment on the appellant for public drunkenness would be cruel and unusual because the appellant did not complete the *actus reus* voluntarily: "This conclusion follows because appellant is a 'chronic alcoholic' who, according to the trier of fact, cannot resist the 'constant excessive consumption of alcohol' and does not appear in public *by his own volition* but under a 'compulsion' which is part of his condition."<sup>326</sup>

<sup>322</sup> See *id.*

<sup>323</sup> *Id.*

<sup>324</sup> Joshua DRESSLER, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1359–60 (1989); see *Takacs*, 768 F.2d at 126 ("The voluntary act requirement is a narrow one, removing only truly uncontrollable physical acts from criminal liability, and is easily satisfied even when a person acts under duress."); Christopher & Christopher, *supra* note 183, at 531 n.185.

<sup>325</sup> This is also consistent with the common law rule as announced in *Bratty*, 3 A.C. at 532–33 (holding that a person cannot be held criminally liable for acts done in a state of automatism).

<sup>326</sup> *Powell*, 392 U.S. at 570 (Fortas, J. dissenting) (emphasis added).

Notably, the plurality did not disagree with the dissent's underlying approach to voluntariness; rather, the dissenters and the plurality in *Powell* simply disagreed about the facts of the case.<sup>327</sup> That is to say, the two sides disagreed about whether an alcoholic's drinking is involuntary, but they do not appear to disagree that if there is true involuntariness, then criminal sanction is constitutionally problematic. Indeed, Justice Marshall based the Court's denial of Powell's constitutional claim on the belief that an alcoholic *does* have some control over whether to drink.<sup>328</sup> Justice Marshall explained:

We are unable to conclude, on the state of this record or on the current state of medical knowledge, that chronic alcoholics in general, and Leroy Powell in particular, suffer from such an irresistible compulsion to drink and to get drunk in public that they are utterly unable to control their performance of either or both of these acts and thus cannot be deterred at all from public intoxication. A fair inference to be drawn from these competing opinions, then, is that, if a defendant *was* utterly unable to control his conduct or decision making, then the conduct would be un-deterrable and punishment would not be justified.<sup>329</sup>

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<sup>327</sup> See *id.* at 559 (plurality opinion) (framing the question as whether the defendant may be punished for his "condition" of intoxication rather than his status as an alcoholic).

<sup>328</sup> See *id.* at 535.

<sup>329</sup> This reading of *Powell* is further supported by Justice Byron White's fifth-vote concurrence. See *id.* at 548 (White, J., concurring). Justice White insists that *Robinson* precludes punishment of a person who acts involuntarily as a result of a truly irresistible compulsion. *Id.* He accepts that for a chronic alcoholic, drinking may be involuntary and it would therefore violate the Constitution to punish a chronic alcoholic for drinking or being drunk. *Id.* at 549. But Justice White goes on to point out that the appellant was not convicted of such a crime, but rather "for the different crime of being drunk in a public place." *Id.* And since the appellant "had a home and a wife," he could have done otherwise than appear drunk in public, even if he could not have done otherwise than get drunk somewhere. *Id.* at 553. Justice White expressly considers whether the Eighth Amendment precludes punishing an alcoholic who cannot do otherwise than to get drunk in public. *Id.* at 551. He concludes that punishing in these circumstances would be cruel and unusual:

The fact remains that some chronic alcoholics must drink and hence must drink somewhere. Although many chronic alcoholics have homes, many others do not. For all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking. . . . For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places is also impossible. As applied to them this statute is in

In other words, *Powell* supports the view that punishment is prohibited by the Eighth Amendment in the absence of a voluntary actus reus. *Powell* is best understood as standing for the proposition that convicting a chronic alcoholic of public drunkenness is constitutional precisely because a chronic alcoholic who gets drunk in public is acting voluntarily. A strong impulse is not sufficient to convert one's conduct from voluntary to involuntary.

Read as whole, we believe the fractured plurality decision in *Powell* supports rather than contradicts the view that voluntariness has constitutional grounding. It is fair to say that all nine of the Supreme Court Justices in *Powell*—the majority, concurrence, and dissent—endorse the view that voluntariness is a constitutional requirement for criminal conviction for punishment. The Justices merely disagreed about whether the appellant or other alcoholics voluntarily completed the actus reus of public drunkenness.<sup>330</sup> We think it significant that not one of the Justices in *Powell* denies that convicting a person for genuinely involuntary conduct would violate the Constitution. Moreover, the prospect of a constitutional superstructure underlying the voluntariness requirement reinforces and highlights the importance of the proposals made in this Article.

## CONCLUSION

When it comes to understanding the so-called act requirement, modern students of American criminal law are left in a bit of a conundrum. They are taught that the actus reus is one of the touchstones of criminal liability, but the vocabulary surrounding this area of law is confusing and conflated, and the judicial application of this supposedly solemn requirement is often nonchalant, or even dismissive. This Article is an important step out of this paradox—that is, we take seriously the requirement of a voluntary actus reus and seek to explain the practical effects of such a recognition.

In our view, if a requirement of voluntariness, which we regard as the centerpiece of the so-called “act requirement,” is taken seriously,

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effect a law which bans a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk.

*Id.* at 551 (footnote omitted).

<sup>330</sup> Compare *Powell*, 392 U.S. at 535 (plurality opinion) (holding that the compulsion experienced by alcoholics does not rise to the level required for intoxication to be considered involuntary), with *id.* at 559 (Fortas, J., dissenting) (asserting that public drunkenness by alcoholics is involuntary), and *id.* at 553 (White J., concurring) (concluding that the appellant was voluntarily in public).

then certain changes are needed in the everyday adjudication of criminal cases. Criminal law's preoccupation with ensuring that only culpable parties face criminal sanction is premised in substantial part, perhaps primarily, on the requirement of voluntariness. Moreover, we derive from the Supreme Court's murky Eighth Amendment jurisprudence an overriding commitment to punish only voluntary conduct. Accordingly, in urging that voluntariness be taken seriously, we conclude that generally every element of a crime must evince volition and, like *mens rea*, the voluntariness must be treated as an essential element of every crime. These changes are modest insofar as they may impact the outcome of only a handful of cases per year, but they are profound in that they require a reworking of the approach to voluntariness currently employed by many lower courts.