

Philosophical Analysis and the Criminal Law

L. A. Zaibert*

Philosophical analysis can be viewed as the attempt to clarify concepts by distinguishing their constitutive elements. This clarification seeks to identify the set of necessary and sufficient conditions for a given entity to be an instance of the concept being analyzed. As Anthony C. Grayling has eloquently put it: “philosophical analysis is best understood by analogy with analysis in chemistry, as being a process of investigation into the structure, functioning, and connections of a particular matter under scrutiny.”¹ The slogan has it that in this sense of ‘analytic’, Anglo-American philosophy is analytic and that continental philosophy is non-analytic. But it is not the case that all Anglo-American philosophers do analysis, or that all continental philosophers shun it. Though perhaps infelicitous, the label ‘analytic philosophy’ has stuck, and it is not the goal of this paper to discuss the appropriateness of the label. I wish to show some advantages that the application of rigorous conceptual analysis holds for the understanding of the criminal law and for the drafting of penal codes.

Analysis is useful for the discovery of the basic structure of a given concept (or set of concepts), and it is also useful in revealing problems with a given way in which a concept (or set of concepts) might have been structured. In drafting a penal code, philosophical analysis, in the sense just sketched above, should be of utmost importance. Although within philosophy it is commonly held that “continental philosophy” is not analytic, continental criminal law is more analytic than its Anglo-American counterpart. Continental criminal law

* Assistant Professor of Philosophy, University of Wisconsin, Parkside. With thanks to Elizabeth Millán-Zaibert.

1. Anthony C. Grayling, *Analysis*, in *The Oxford Companion to Philosophy* 27 (Ted Honderich, ed. 1995).

theory is thus a very interesting area of investigation. Though there exist many excellent analytical treatments of issues pertaining to the criminal law by Anglo-American scholars, very few discuss the continental legal tradition.²

There is nothing exclusively philosophical about analysis. Yet, rigorous 'philosophical' analyses of criminal law concepts are frequently seen as arm-chair contemplation or useless hair-splitting. A good example of the suspicion with which philosophical approaches to criminal law are sometimes met is seen in the recent debate between George P. Fletcher and Paul H. Robinson about the Model Penal Code.³ Fletcher argues that the Model Penal Code "ventures precise definitions on matters where many philosophers fear to tread,"⁴ and he celebrates the fact that the 1975 German Criminal Code wisely avoided entering into philosophical controversies.⁵ Robinson reacts to the suggestion that a penal code must not enter into deep philosophical waters by pointing out that "more troubling about Professor Fletcher's proposal [to leave 'philosophical themes' to philosophers] is the fact that . . . one can find conflicting arguments on nearly any point regarding substantive criminal law theory."⁶ It seems to me that there is a tacit recognition by both Fletcher and Robinson that what philosophers do and what criminal law theorists do are different activities.

There are some concepts that a penal code must define if it seeks to be intelligible. Much has been written on the nature of mental states, the concept of an action, and a host

2. There are, of course, contemporary Anglo-American philosophers who apply analytical tools to the analysis of criminal law. Amongst these philosopher-lawyers, it is worth mentioning James B. Brady, R.A. Duff, Douglas Husak, and Michael Moore. None of them, however, is conversant with continental criminal law. Even amongst criminal law theorists, concern for non-Anglo-American substantive contributions is limited; notable exceptions to this isolationism are the works of Markus Dubber and George Fletcher.

3. George P. Fletcher, *Dogmas of the Model Penal Code*, 2 *Buff. Crim. L. Rev.* 3-24 (1998); Paul H. Robinson, *In Defense of the Model Penal Code: A Reply to Professor Fletcher* 2 *Buff. Crim. L. Rev.* 25-44 (1998).

4. Fletcher, *supra* note 3, at 4.

5. *Id.* at 6-7.

6. Robinson, *supra* note 3, at 29.

of other issues in the “philosophical” literature. It is true that it is very difficult to define, say, an act, and that ignoring the traditional problems behind this definition is a mistake, as Fletcher suggests. And it is true that there are many competing philosophical theories of what an act is, and so Robinson is correct in pointing out that just taking a look at the philosophical literature will not solve the problems of criminal law. But criminal law theorists cannot just dispense with analysis. Criminal law theorists, particularly when recommending ways to draft a comprehensive penal code, have to take sides on certain issues. And taking sides sometimes entails defining concepts or drawing distinctions with an eye to analytic rigor.

There exist long-lasting and far-reaching disputes amongst philosophers regarding substantive issues pertaining to the criminal law, and it would do no harm to examine these debates in search of light. But ultimately, criminal law scholars must be in a position to put forth autochthonous views regarding the nature of the fundamental concepts of a penal code. The Model Penal Code, for example, seems to have paid little attention to some of these philosophical disputes, and in many areas this neglect has been detrimental, though in other areas it has, paradoxically perhaps, brought about a beneficial sort of freshness and originality.⁷ Sometimes the Model Penal

7. Luis Jimenez de Asúa, for example expresses surprise at the fact that “it was the English language, ‘the poorest in legal essences and in scientific elaboration’ the one who succeeded in having two distinct expressions in order to designate what we nowadays call ‘unconscious *culpa*’ and ‘conscious *culpa*,’ given that the English terms ‘negligence’ and ‘recklessness’ correspond to our terms.” Luis Jimenez de Asúa, V Tratado de Derecho Penal 1111 (1963) (quoting Antonio Quintano Ripolles). And arguably the distinction between recklessness and negligence reaches its most clear and sophisticated formulation in the Model Penal Code. Luis Jimenez de Asúa is “surprised” at this due to the influence of another label: that Anglo-American criminal law is not well-developed. But this label is no more accurate than the one that has it that only Anglo-American philosophy is analytic. Jimenez de Asúa specifically claims that he does not understand why Gerhard O. W. Mueller thinks so highly of the Model Penal Code section on culpability. Jimenez de Asúa claims that the four modes of culpability of the Model Penal Code’s section 2.02 are none other than the four classical continental modes of culpability: *dolus*, *dolus eventualis*, conscious *culpa*, and

Code has, unwittingly perhaps, sided with contested philosophical theories without paying sufficient attention to the problems that the theories in question might engender. One of these philosophical theories, the theory that holds that an action is a willed bodily movement, shall occupy my attention later on. I shall claim that this theory is fraught with difficulties.

But, above all, if a code is to fulfill its functions, it better make sense. And making sense requires precise definitions. Attention to philosophical, historical, psychological, sociological, etc., treatments of certain key concepts of the criminal law could be helpful in the drafting of penal codes.

I wish to examine here a few areas in which the Model Penal Code could gain in coherence, intelligibility, and even elegance. Some of the shortcomings of the Model Penal Code might be attributable to a sort of “inhibited . . . refinement of Anglo-American criminal law and its underlying theory,” to use Fletcher’s famous indictment.⁸ Fletcher mentions several reasons for this arrested development of Anglo-American criminal law, like the fact that utilitarianism has been “the prevailing philosophy of criminal law” or the “progressive legitimation of discretionary judgments within the formal criminal process.”⁹ While I find Fletcher’s reflections on these and other issues quite illuminating, I will focus on some strictly *analytic* shortcomings of the Model Penal Code, that is, on the way in which the Code attempts to define (or fails to define) some basic concepts of the criminal law.

The neglect of philosophical analysis in the Anglo-American criminal legal tradition is apparent at two different levels. The first is at the general level and

unconscious *culpa*. See Luis Jimenez de Asúa, *I Tratado de Derecho Penal* 669 (1964). To be sure, there are areas in which Anglo-American criminal law theory could benefit from taking account of developments in the continent. This is, after all, part of what I try to do here. But there should be no doubt either that the continental legal tradition can benefit from taking account of developments in Anglo-American criminal law theory.

8. George P. Fletcher, *Rethinking Criminal Law* xix (1978).

9. *Id.* at xix-xx.

regards the very definition of crime. Within the Anglo-American legal tradition, systematic attempts to present the set of necessary and sufficient conditions for something to be a crime are rare. The question: 'What is the set of necessary and sufficient conditions for something to be a crime?' might sound too theoretical, too philosophical, and at any event, useless to most Anglo-American legal scholars. I wish to argue that attempting to answer this question can be of great value for bringing organization into a penal code. Analyzing the concept of crime can be helpful in clarifying both internal relationships between different concepts within the criminal law, and external relationships between the criminal law and other fields such as ethics and politics.

Second, the absence of analysis makes itself felt at the level of the discussion of specific concepts. The Model Penal Code's analytical quality is not uniform. Some concepts are better analyzed than others. To discuss here all, or even many, of the concepts in the Model Penal Code would obviously be far too onerous a task. I shall focus on the concept of a human act, and I shall try to make sense of the view that the analysis of an act is somehow objective, and somehow independent from analyses of thoughts. The concept of an act is important to establish many important distinctions in the criminal law, such as the *actus reus/mens rea* distinction and the objective/subjective distinction. Section 1.13(2) of the Model Penal Code allegedly defines an act. But I shall show that this "definition" together with other related "definitions" in the Model Penal Code (those found in sections 2.01(1), 2.01(2), 1.12(3), 1.12(4), 1.12(5)) are inadequate, and that they thus challenge the Model Penal Code's coherence. And I shall conclude by suggesting a promising way of analyzing human acts, a way that avoids the difficulties of the approach which currently informs the Model Penal Code.

I. CONCEPTUAL SCHEMES

I would like to begin by calling attention to the differences between the conceptual schemes of the criminal law in the Anglo-American tradition and in the continental legal tradition. I have no special penchant for the comparative approach, just as I have no special penchant for philosophical approaches, but I think that in this case comparison can be a valuable resource. Robinson presents a rendition of the conceptual scheme of the Anglo-American legal tradition, and I shall contrast this to Luis Jimenez de Asúa's rendition¹⁰ of continental law.

Robinson's rendering of the current structure of Anglo-American criminal law (which informs the Model Penal Code) is the following: (This is just Robinson's rendering of "the current conceptual scheme of American criminal law," not his own favored conceptual scheme.¹¹)

10. Choosing Jimenez de Asúa as a representative of the continental tradition might seem like a bold, if not unhappy choice. After all, many, if not most, of the original criminal law theorists on the continent were of German origin, and so an original German scholar, say, Ernst Beling or Edmund Mezger, would have been a better choice. The main reason why I think that focusing on Jimenez de Asúa is an excellent choice is that, while it might be true that he lacks the creativity and originality of some of the German authors, his treatise on criminal law is arguably the most comprehensive ever written. It draws considerably from the German sources, but also from the Argentinean, French, Hungarian, Italian, Spanish, Swiss, Venezuelan, etc. Jimenez de Asúa is not well known in the Anglo-American legal tradition, and this is a most regrettable situation. Gerhard O. W. Mueller, who has done so much for the advancement of comparative criminal law has described Jimenez de Asúa as "probably the world's most prolific author on criminal law." Gerhard O. W. Mueller, *Crime, Law and the Scholars: A History of Scholarship in American Criminal Law* 249 (1969). Jimenez de Asúa's publications near one thousand, and his *Tratado de Derecho Penal*, is a monumental work of over eight thousand small-printed pages. Moreover, one of the reasons Jimenez de Asúa's *Tratado* is of such value, is precisely due to its non-original nature: the *Tratado* is a compilation of most non-Anglo-American contributions to criminal law in the last two centuries.

11. See Paul H. Robinson, *Structure and Function in the Criminal Law* 5 (1997).

2000]

PHILOSOPHICAL ANALYSIS

107

PLEASE INSERT TABLE 1 HEREFig. 1¹²

Let us contrast this scheme with Jimenez de Asúa's, a good representative of the sort of approach typical within the continental tradition.¹³

PLEASE INSERT TABLE 2 HERE

Fig. 2

12. Id. at 5.

13. See Luis Jimenez de Asúa, III Tratado de Derecho Penal, 320 (1963).

Each of the items listed under “positive aspects” is a necessary condition for something being a crime, and all of them, taken together, form the set of necessary and sufficient conditions for something being a crime. Of course, each of the items listed under “negative elements” is a sufficient condition for there being no crime. Before I move on, I wish to make three important clarifications.

First, neither Jimenez de Asúa nor other continental legal scholars speak of necessary and sufficient conditions, and certainly no penal code speaks in this way. This is the jargon of analytic, Anglo-American philosophers. I am, in a way, imposing this jargon because I think that this conceptual scheme does seek to come up with the set of necessary and sufficient conditions of the concept of crime, even if those who created it were not concerned with analysis understood in just this fashion. After all, these conditions seek to be comprehensive and exhaustive, in a way that, say, the conditions one could derive from the distinction between *actus reus* and *mens rea* do not.

Second, Jimenez de Asúa’s conceptual scheme is one amongst many. One interesting difference between scholars belonging to the continental legal tradition¹⁴ and those belonging to the Anglo-American legal tradition is that the former typically have their own conceptual schemes regarding the definition of crime, whereas the latter rarely have such schemes. Discussing whether there are six, five, or three necessary conditions is a typical doctrinal discussion in the continental legal tradition. A survey of different continental authors reveals all sorts of minor, and sometimes not so minor modifications to this structure. In an accordion-like effect, these seven elements are sometimes collapsed into six, five, four, three, two or

14. Within the scope of the ‘continental legal tradition’ I include the Latin American legal tradition. The roots of Latin American criminal law theory are found in Europe, and more extensively the roots of legal philosophy in general are European in origin and essence. See L.A. Zaibert & Jorge J.E. Gracia, *Philosophy of Law in Latin America*, in 2 *Philosophy of Law: An Encyclopedia* 483-86 (Christopher Gray ed., 1999).

even one.¹⁵ Jimenez de Asúa's scheme reveals, like many others on the continent, the concern with necessary and sufficient conditions which I think Anglo-American penal codes might benefit from considering or incorporating. Of course, very similar sets of issues are discussed by Anglo-American legal scholars, but in piecemeal fashion. For example, whether or not the *actus reus* and the act requirement are one and the same element, as, say Douglas Husak and P.J. Fitzgerald would have it, or two different requirements, as Michael Moore and others would have it, is not usually seen as having any impact on the final number of conditions that a given event must meet in order to be considered a crime.¹⁶ Identifying the nature and number of necessary conditions for an event to be a crime is not a common concern within Anglo-American criminal law.

Finally, and obviously, not every problem of the criminal law is resolved *deus ex machina* by adopting a better conceptual scheme.¹⁷

15. Jimenez de Asúa claims that the attempt to collapse the different aspects, the different necessary conditions that make up a crime, into one single notion was a favorite strategy of the totalitarian regimes in the 1930's Italy and Germany. Jimenez de Asúa identifies the spirit behind his conceptual scheme (which I claim it is the spirit of coming up with the set of necessary and sufficient conditions for something being a crime) with liberal criminal law, which is naturally opposed to totalitarian/fascist criminal law. See, e.g., Jimenez de Asúa, *supra* note 13, at 302-19. Sadly, however, Jimenez de Asúa does not explain sufficiently what makes the synthesizing approach 'totalitarian,' though his explanation of what makes the analytical approach 'liberal' is *somewhat* better. Jimenez de Asúa was very much concerned with the connections between the criminal law and political philosophy, but not too explicit about them.

16. See, e.g., P.J. Fitzgerald, *Voluntary and Involuntary Acts*, in *Oxford Essays in Jurisprudence* 1-27 (A.C. Guest ed., 1961); Douglas Husak, *Philosophy of Criminal Law* 9 (1989); Michael Moore, *Act and Crime* 1 (1993).

17. It is very interesting to see how many similar problems arise in the two traditions. It is downright shocking to see how by and large each tradition is ignorant of (or indifferent to) the fact that the other tradition is grappling with the very same sorts of issues as her own tradition is. Much can be learned by examining different attempts to solve what is essentially the same problem. The problem of whether negligence is a *bona fide* mode of culpability is very similar to the continental problem of whether or not (unconscious) *culpa* is a *bona fide* mode of culpability; how to draw the distinction between *dolus eventualis* and conscious *culpa* is very similar to the distinction between the Model Penal Code's "knowledge" and "purpose." Model Penal Code § 2.02 (Proposed Official Draft

Let me turn, then, to a brief explanation of each of Jimenez de Asúa's necessary conditions for something to be a crime. It goes as follows. Condition 'a' satisfies the *moral* principle that acting is a necessary condition for punishment: no crime without an act. Condition 'b' satisfies the *political* principle that puts a limit on the state's punitive power by demanding that punishment only be inflicted for actions previously described as crimes. This is the famous principle of legality: no punishment, no crime, without a pre-existing law.¹⁸ Condition 'c' stipulates that an act should be antijudicial, that is, that it must truly violate the law, and this is not automatically entailed by the fact that a given action is subsumable under a legal description. Killing a human being, for example, a *prima facie* crime, could, under certain circumstances, say, acting in self-defense, or participating in a boxing match at the Olympic games, etc., be permissible. In such a case, the act is not antijudicial, it is *justified*. The absence of a justification entails that the act is antijudicial, and the fact that the act is antijudicial entails that there are no justifications. Condition 'd' requires that the defendant had, at the time she acted, some minimal mental *capacities* to understand the nature of her action. Sometimes agents could act, and the act could be amongst those previously described as crimes, and it could be the case that the act is antijudicial (i.e., that there is no justification) but a deficiency or impairment in the agent's mental capacities impedes reproach, and thus there is no crime.¹⁹ Excuses

1962). There are many such examples.

18. This is the famous *Nulla poena, nulla crime, sine lege*. The Model Penal Code's allegiance to this principle is peculiar, for want of a better word, as George P. Fletcher, amongst others, has recognized. See, e.g., Fletcher, *supra* note 3, at 11-12. Distinguishing whether the principle that informs a necessary condition for something being a crime is a moral or a political principle has some analytic importance, in that it helps to emphasize the distinction between different necessary conditions. Below I shall discuss the unique role that the principle of legality has in other legislations and contrast this role to the one in the Model Penal Code.

19. Unlike the other conditions, accountability admits of degrees. So, an agent can be more or less accountable. The necessary condition is that there is some accountability, however small.

pertain to the agent; an agent might or might not be excused, but the act cannot be either excused or not excused (acts can either be justified or unjustified). The condition is, then, that the defendant must be capable of reasoning, of distinguishing between right and wrong, etc. Condition 'e' requires that the defendant's mental state at the time she acted was such that it renders the action blameworthy. Assuming that all the previous conditions have been obtained, it is still important to decide how much blame we attach to the defendant for what she did. We do this by focusing on the relationship between the defendant's thoughts, her mental *states*, and the outcome of her action. In some cases, the relationship between mental states and states of affairs is so tenuous, or the agent was mistaken about facts or laws to such an extent, that the judgment of blame is very lenient or even non-existent. Like accountability, there are degrees of culpability. And also like accountability, there could be cases in which there is no culpability whatsoever and thus these cases would not be crimes. The important difference between accountability and culpability is that regarding the former, the focus is on mental capacities, whereas regarding the latter, the focus is on mental states. Condition 'f' gathers a group of possible states of affairs that might prevent the phenomenon from being a crime. It is possible that all the previous conditions are obtained and yet the defendant is not convicted.²⁰ A diverse gamut of elements could enter into this catch-all condition: spatial and temporal aspects of the application of the penal law, provisions protecting defendants from being brought to trial twice for the same act, and diverse sorts of procedural provisions.²¹ Finally,

20. An indication that Jimenez de Asúa and others in the continental legal tradition were aware of the fact that each one of these 'aspects' was a necessary condition on equal footing is the fact that Jimenez de Asúa agrees with Leopold Zimmerl and Erich Land in criticizing the very name of this positive aspect. The argument is that every single one of the positive aspects of crime is a necessary condition, and then calling just one of these aspects a condition might be misleading. See, e.g., Luis Jimenez de Asúa, *La Ley y el Delito* 418 (1954).

21. There is admittedly some looseness in this condition. I think that the sort of looseness present with condition 'f' resembles the general looseness of Anglo-

condition 'g' requires that the conduct which has been described as a crime, which is neither justified nor excused, is not punished. A diplomat, for example, might enjoy certain immunity, in such a way that even if she satisfies all the previous conditions, she still not would not have committed a crime.²²

Having described the main characteristics of Asúa's conceptual scheme, let us now turn to the comparative appraisal of each of these schemes.

II. APPRAISAL OF THE ANALYSIS OF CRIME

Instead of a clear and finite set of necessary and sufficient conditions for something being a crime,²³ such as the one we see in continental legal systems, in Anglo-American criminal law we have a hodge-podge of loose, and loosely related, overlapping, and imprecise 'doctrines'. How many doctrines are there? Is a doctrine a hypothesis, a thesis, a view, a rule of thumb, or a requirement? I have not yet figured it out. What the difference between the doctrine of the voluntary act and the doctrine of the *actus reus* might be is by no means clear, as there are as many opinions as authors writing on the subject.²⁴ Thus, some problems with the conceptual scheme of Anglo-American

American criminal law, where doctrines of diverse nature and functions are grouped together under very general and misleading headings.

22. Two traditional objections have been raised against punishability. First, that this requisite is already included in the description/legality. Second, that punishment is most accurately a consequence of a crime, and not one of its constituents. See, e.g., Luis Jimenez de Asúa, *supra* note 20, at 427.

23. With the exception of Condition 'f'.

24. The Introduction to Michael Moore's *Act and Crime* contains excellent and copious references to the diversity of views regarding these matters. Moore, *supra* note 16, at 1-13. As for the issue of what is the meaning of the term 'doctrine', it is very hard to find systematic treatments of it. One of the few such attempts is carried out by Jerome Hall, but it is rather obscure. Jerome Hall distinguishes between 'principles' and 'doctrines' according to the degree of "abstraction" present in each—principles being more abstract than doctrines. The problems of course arise from the fact that the meaning of 'abstract' or the criteria for establishing boundaries between 'more abstract' and 'less abstract' are not clear. Jerome Hall, *The Three Fundamental Aspects of Criminal Law*, in *Essays in Criminal Science* 159 (Gerhard O.W. Mueller ed. 1961).

criminal law are immediately apparent. First, while the items grouped under “defenses” can perhaps be seen as defenses (though in a loose sense of ‘defense’), the items grouped under “offenses” can hardly be seen as offenses; rather, they are conditions, or aspects of offenses. Thus, only the segment corresponding to “offenses” has at least some potential to be an analysis; the segment corresponding to “defenses” contains a mere list of possible “defenses.” Both segments, moreover, exhibit a sort of randomness, insofar as it is not clear what unites these different aspects under one heading.

If, for example, acting voluntarily is indeed a requirement for something being a crime, let us stop referring to this as “the general doctrine of the voluntary act,”²⁵ and let us call it univocally the requirement of the voluntary act. I would suggest, moreover, that in order to further dispel ambiguities, we should not even call it a ‘requirement’ but a ‘necessary condition.’ This should be stated unequivocally. “A necessary condition for there to be a crime is that the defendant acted” seems to me a much better rendering of the “fundamental predicate of criminal liability” clumsily stated in section 2.01 of the Model Penal Code.²⁶ (I shall come back to this “predicate” in the next section).

In addition to the much needed unity which approaches such as Jimenez de Asúa’s bring to our understanding of the structure of criminal law, there are, I think, specific advantages to this sort of approach.

I. The mere fact that the primary distinction in Asúa’s scheme is between “positive” and “negative” aspects avoids the sloppy talk of “defenses.” As Robinson notes, to refer to all that is typically gathered under this heading as “defense” is just a remnant of casual language; it is the idea that “everything that prevents conviction of a defendant” is a defense.²⁷ But under this heading we typically find

25. As it is commonly referred by H.L.A. Hart et al., *Punishment and Responsibility* 90 (1968).

26. Model Penal Code § 2.01 (Official Draft and Revised Comments 1985).

27. Robinson, *supra* note 11, at 11.

“included doctrines which are very different from each other.”²⁸ In his seminal and influential *A Plea for Excuses*, J.L. Austin made a similar mistake, for he used the term “excuse” in a loose way, at odds with the standard, technical sense that it has within criminal law theory.²⁹ But J. L. Austin (not to be confused with John Austin) was not a legal scholar, and thus his infelicitous choice of words might be perhaps *excused*. Criminal law theorists have no such excuse; they can and should do better: They should seek to be as accurate as possible in the terms they use, and careful to make distinctions wherever these might be helpful. But once it is seen that the fundamental distinction between defenses and offenses is crude, primitive, and misleading, we would be well served if we abandoned it.

I suggest, moreover, that an even better way of referring to these positive and negative aspects of crime is to refer to each of the positive aspects as a necessary condition for there being a crime, and to each of the negative aspects as a sufficient condition for there not being a crime. I think that the necessary and sufficient conditions approach would bring intelligibility and order into criminal law theory and eventually into penal codes as well. Not all necessary conditions for there being a crime are exhausted by the elements of an offense mentioned in section 1.13(9) of the Model Penal Code, or by the conjunction of the actus reus and mens rea requirements. Similarly, not all sufficient conditions for there not being a crime are defenses.

II. The proper theoretical place for “justifications” is much more clearly assigned in Asúa’s scheme than in whatever counterpart might exist in the Anglo-American

28. *Id.* at 11.

29. Austin was reluctant to use this term, and he wanted to avoid a mere war of words. And if one puts aside the terminological aspect, Austin’s paper is indeed illuminating. For my purposes here, however, these terminological affairs have importance, as they make explicit the ways in which we can better conceptualize the criminal law. See, e.g., J. L. Austin, *A Plea for Excuses*, in *Collected Papers* 125 (1967).

tradition. In the continental scheme, justifications are constituted by *facts, states of affairs* which render a certain behavior which at first sight might appear to violate the norms of a society, really a permissible behavior. Antijuridicity is a property of actions, not of people or of thoughts. But, since in the conceptual scheme of Anglo-American criminal law, justifications are lumped together with excuses, duress, statutes of limitation, and the like, their essence is diluted.³⁰

Moreover, Jimenez de Asúa's scheme makes it explicit that the presence of a justification is a sufficient condition for there not being a crime and that a justification is the logical counterpart of a necessary condition for there being a crime: antijuridicity. Recognizing the existence of the concept of antijuridicity helps prevent the tortuous formulation of section 1.13(9)(c) of the Model Penal Code. The closest equivalent to the continental concept of antijuridicity in the Model Penal Code would be "an attendant circumstance as negatives an excuse or justification for such conduct." This terribly inadequate section of the Model Penal Code conflates justifications and excuses.³¹

Amongst the numerous problems that arise from lumping justifications and other forms of defenses together, perhaps the one that most clearly reveals the difference between the continental and the Anglo-American treatment of justifications, are the so-called "putative justifications." Putative justifications obtain when someone wrongly (but somewhat sensibly) believes herself to be under an attack of such nature that her repelling the attack would be justified. But this is clearly a mistake.

30. The famous debate between Kent Greenawalt and George P. Fletcher well illustrates some of the problems associated with the conceptualization of justifications. See, e.g., George P. Fletcher, *The Right and the Reasonable*, 98 *Harv. L. Rev.* 949 (1985); Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 *Colum. L. Rev.* 1897 (1984).

31. Not surprisingly, in the debate between Fletcher and Robinson on the Model Penal Code, they both agreed on the infelicity of this section, though they disagree on the motives and implications of the error. See Robinson, *supra* note 3, at 41.

The defendant in cases such as these might be excused, or otherwise diminished in her punishment, but it is a logical impossibility for her action to be justified if the objective state of affairs required for the justification to exist does not obtain. What in Anglo-American criminal law is wrongly called “putative justification” is called in the continental legal tradition “putative defense,” and it follows from conceptual schemes such as Jimenez de Asúa’s that cases like this cannot be justifications.³²

III. The distinction between culpability and imputability helps to avoid a certain amount of ambiguity that exists with the term ‘culpability’ in the Anglo-American tradition. Sanford Kadish has distinguished between general mens rea and special mens rea.³³ General mens rea includes accountability and culpability, whereas special mens rea is composed exclusively of culpability. Accountability and culpability can be easily confused because they are both gradational concepts. There are, however, important differences between them. Being completely unaccountable entails that the defendant was not, at the time she acted, a moral agent, i.e., not a bearer of rights and obligations nor a recipient of praise and blame. Being completely lacking in culpability says nothing about the status of the defendant as an agent, it merely states that the connection between her mental states and the result she brought about does not warrant blame.

Moreover, and as we shall see in some detail in the last section below, the facts that the Model Penal Code (1) explicitly requires that the act be voluntary and that (2) it establishes that an act is voluntary if it is accompanied by a mental state, further complicates things. For then it seems that culpability permeates the act requirement (and the drafters of the Model Penal Code admit this).³⁴

32. For a discussion of the problem of putative justification, see, e.g., Fletcher, *supra* note 8, at 762.

33. See Sanford H. Kadish, *Blame and Punishment: Essays in the Criminal Law* 65-81 (1987).

34. In another distinction between different forms of culpability, Robinson

IV. This approach also casts doubts on the ‘residual definition of actus reus.’ For it makes evident the shortcomings of lumping together into a single but incoherent whole not only whatever disparate “doctrines” might be grouped together under the actus reus label but also issues pertaining to the antijuridical character of a given action and issues pertaining to the punishability. Of course, the residual approach to the definition of actus reus has a strong appeal, for it seeks to make a sharp distinction between actus reus and mens rea, and this would mean that at least *one* sharp distinction between *any two things* in Anglo-American criminal law had been successfully made. But the price is too high.³⁵ The price of this maneuver is the cogency of the general part. Both remainders, the actus reus defined as everything which is not mens rea, and the mens rea, conversely defined as everything that is not actus reus, turn out to be collections of vastly different elements (doctrines, if you will).

V. Asúa’s way of analyzing the concept of crime constitutes a natural and valuable sub-division within the well-known “general part” in criminal law. We can divide the criminal law into the general part and the special part. The former deals with issues which hold for all (or most) crimes in the code, whereas the latter has to do with specific provisions affecting specific (groups of) crimes. So issues regarding, say, the spatial and the temporal application of the criminal law, or general issues about statutes of limitation, or about venue and jurisdiction, and so on, properly belong to the general part, but not to the analysis of crime itself. The analysis of crime itself, of course, also belongs to the general part, but it is an independent topic within this general part as well and obviously, a very important one.

The closest analogue in the Model Penal Code to this

suggests that “present conduct intention” of base culpability is “redundant with the voluntariness requirement.” Robinson, *supra* note 11, at 131.

35. I have espoused this view before, and, for the reasons made explicit here, I abandon it. See, e.g., L.A. Zaibert, *Intentionality, Voluntariness, and Culpability: A Historical-Philosophical Analysis*, 1 *Buff. Crim. L. Rev.* 489 n.53 (1998).

continental distinction between the general part and the specific analysis of crime is the distinction between “elements of an offense”³⁶, and the “material elements of the offense”.³⁷ But the Model Penal Code’s distinction is admittedly clumsy. The drafters have stated: “while the broad definition of ‘element’ is useful for the purposes of the procedural provisions, it is obviously too broad for the purpose of the culpability provisions.”³⁸ And I think that this is an admission of its inadequacy. Of course, the drafters claim that section 1.13(10) is supposed to “perform [the] function” of delineating “the types of elements to which requirements of *mens rea* must be applied.”³⁹ I think that the distinction between (immaterial) elements and material elements of an offense can be traced back to the Benthamite distinction between (immaterial) consequences and material consequences of an act.⁴⁰ The role played by the material/immaterial distinction, for Bentham at least, is simply that of the important/unimportant distinction, and thus the former distinction carries all the looseness of the latter.⁴¹ And I think this loose sense is preserved by the Model Penal Code. The distinction between material and immaterial elements, then, seems to be based on colloquial language, just as the distinction between offenses and defenses.

VI. Is there any advantage to having as many conditions as it is conceptually possible to make? Is analysis good in and of itself? How should analysis affect the drafting of a code? I hope that some answers can be gleaned from the preceding arguments. But I wish to conclude this section by focusing upon a further beneficial aspect of the analytic approach to the concept of crime. This system allows us to identify the sorts of principles

36. Model Penal Code § 1.13(9) (Official Draft and Revised Comments 1985).

37. *Id.* § 1.13(10).

38. *Id.* cmt. at 211.

39. *Id.*

40. See, e.g., Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* 70 (1980) (1789).

41. Bentham even has a footnote in which he explicitly indicates that this is the sense in which he uses these terms. See, e.g., *id.* at 70 n.1.

that the criminal law advances, and by doing this, this system helps us better to understand the relations between the criminal law and moral and political principles.

The basic categories of criminal law, which a scheme such as Jimenez de Asúa's exhibits, have the advantage of emphasizing and distinguishing different connections between criminal law and moral and political philosophy. There is an important difference between the principle that requires that for there to be a crime the agent must act, and the principle that requires that for there to be a crime the defendant must engage in conduct that has been previously described as a crime by law. The first requisite is the action requirement of continental law, and the second requisite is the description/legality requirement of the continental law. Though many authors in the Anglo-American legal tradition would perhaps agree with the fact that these are two different requisites, it is nevertheless harder to see the differences between them if one just looks at the conceptual scheme of "Fig. 1," above.

The action requirement of the continental tradition corresponds to the act requirement of the Anglo-American legal tradition, and the description/legality requirement corresponds to the actus reus requirement. In this much I agree with Michael Moore's definitions of each of these requirements. Moore distinguishes the two requirements as follows. The act requirement holds that "there can be no criminal liability without the doing of a voluntary act."⁴² The actus reus requirement requires "that the accused must do an act that has the properties required by some complex act description contained in some statute in force at the time the act was done."⁴³

But then it becomes clear that the 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

42. Moore, *supra* note 16, at 4.

43. *Id.* at 170.

predicated only upon actions is a basic moral intuition. Requiring that liability only be imposed for those actions which had already been legally described is a political requirement.

Imagine, for example, a given act which has not been legally described as a crime, though it is an atrocious act.⁴⁴ If someone were to engage in this behavior, and this person were later brought to trial, and was not justified, excused etc., and was eventually punished, this punishment would arguably be morally justified. This intuition, assailable as it might be, has little to do with political institutions, and it would stand or fall independently of political institutions. But it is part and parcel of political philosophy, and is part and parcel of the establishment of the state, that people be told in advance what are the actions that the state could punish.⁴⁵ The actus reus functions as a check on the punitive power of the State, whereas the act requirement is a moral principle.

The Model Penal Code, in treating the act requirement as the fundamental principle of criminal liability distinguishes itself from most contemporary penal codes in which the legality/description requirement—if any single requirement—is considered to be fundamental.⁴⁶ Sadly, however, the way in which this principle is presented in the Model Penal Code is confusing. I shall now turn to the discussion of this principle.

44. The obvious reference here is to the Nuremberg trials, for it is frequently argued that the trials violated the principle of legality. But, even if they did, this might not offend our moral intuitions—quite the opposite: Our moral intuitions would have been affected had the Nuremberg trials not violated the principle of legality (if indeed the principle was violated). A recent, perhaps not as well-known example, is the revisionist attitude toward the principle of legality exhibited by Latin American scholars regarding atrocities committed by dictators who otherwise might enjoy a much-irritating impunity.

45. The double jeopardy principle, for analogous reasons, is properly speaking a political principle and not a moral one. It too, is best viewed as an independent principle and not as ‘part of’ or ‘identical to’ the principle behind the act requirement.

46. I take it that the most important principle in other modern codes is the principle of legality: *nulla poena, nulla crime, sine lege*. The principle is stated in the first article of the Austrian, German, Israeli, Italian, Spanish, and Swiss Penal Codes, to mention just a few.

III. THE MODEL PENAL CODE AND THE FUNDAMENTAL PREDICATE OF ALL CRIMINAL LIABILITY

There are things we do and there are thoughts we have. It seems natural to distinguish these two realms. And I think that it is indeed a good idea to distinguish these two realms, though current distinctions such as the actus reus/mens rea distinction or the objective/subjective distinction miss the mark.⁴⁷ It makes sense, at least theoretically, that a penal code would distinguish thoughts from actions. Again, one possible and good explanation for this is that since the criminal law only punishes actions, a penal code ought to be quite explicit about what it considers an action to be. I will take for granted that punishing only actions is the appropriate stance; so I will avoid the normative discussion of why this should be the case.⁴⁸ In distinguishing thoughts from actions, it might seem natural to expect the penal code to put forth definitions of each of these concepts. But it is by no means clear amongst scholars whether or not the penal code should define concepts such as “action.”

Fletcher, for example, in addition to what he says regarding the definitional stance of penal codes in his debate with Robinson, states that:

because the problem of human action is so subtle, most criminal codes sensibly avoid the problem. The codes do contain formulae for assessing sanity and insanity, but they leave the task of fathoming human action to scholars with a philosophical bent. The Model Penal Code (MPC) boldly breaks from this pattern and tries to define action as it seeks to define other concepts typically thought to be beyond

47. See generally George P. Fletcher, *Basic Concepts of Criminal Law* 16-24 (1997); Paul H. Robinson, *Should the Criminal Law Abandon the Actus Reus-Mens Rea Distinction?*, in *Action and Value in the Criminal Law* 187-212 (Stephen Shute et al. eds., 1993).

48. I shall assume that a proper definition of ‘action’ can accommodate omissions, certain possessions, and other problematic cases.

the definitional powers of legislatures.⁴⁹

But Fletcher merely refers to the attempt of the Model Penal Code to define the concept of causation, not the concept of action.⁵⁰ The closest the Model Penal Code comes to defining human action is the scanty remark in section 1.13(2).⁵¹ Baldly to say that an “act or action means a bodily movement whether voluntary or not,” is not to define anything. A different way of expressing the same thought is to say “act, action, and movement will be used interchangeably.” So, it is hard to see what the boldness regarding the definition of action in the Model Penal Code might be. What is quite evident is the Model Penal Code’s looseness regarding the concept of an action.

Section 1.13 of the Model Penal Code purports to lay down some of the basic definitions that the code employs. Sadly, however, these “definitions” are neither accurate nor useful. I will focus on the definitions related to the apparently basic category of the things that we do, insofar as these constitute the essential concepts involved in the “fundamental predicate of all criminal liability.”⁵² These are the relevant terms:

1. An “act” (or an “action”; the two terms are equated) is defined as a “bodily movement whether voluntary or involuntary.”⁵³

2. The term “voluntary,” “has the meaning of section 2.01.” Section 2.01, however, does not define this crucially important term, it merely mentions a few examples of acts (or are they movements?) which are not voluntary.⁵⁴

49. Fletcher, *supra* note 47, at 51.

50. See *id.* at 57 n.22; Model Penal Code § 2.03 (Official Draft and Revised Comments 1985).

51. Model Penal Code § 1.13(2) (Official Draft and Revised Comments 1985).

52. *Id.* § 2.01.

53. *Id.* § 1.13(2).

54. *Id.* § 2.01(2).

3. "Conduct," is defined as "an action or omission and its accompanying state of mind, or where relevant, a series of acts and omissions."⁵⁵

4. Finally, an "omission" is defined as "failure to act."⁵⁶

I have nothing against abandoning the classical Benthamite distinction between "acts" and "actions."⁵⁷ I think the Model Penal Code is correct in equating these two terms. But then why not just use one of these terms, particularly in light of the possible ambiguity created by using both? Now, since according to the definition of an act, it does not matter whether the bodily movement is willed or not, i.e., it does not matter whether the movement is voluntary or not, then this "definition" would be stated more clearly if the code simply said: "an act is a bodily movement." And then it would be obvious that "acts" and "bodily movements" are synonyms, and thus, that this is no definition of the term "act." It is merely an indication of the fact that "act" and "bodily movement" are synonyms. The important question which remains unanswered is: What is the set of necessary and sufficient conditions for something to be an act? Merely to answer this question by saying "to be a bodily movement" is to push the question one step further: What, then, are the necessary and sufficient conditions for something being a bodily movement?

The lack of precision found in the definition of action extends to a host of other related concepts. We are inescapably in the dark as to the necessary and sufficient conditions for a certain event to be an instance of "conduct" or of "omission." After all, these concepts refer back to the concept of action, and the necessary and sufficient conditions for something being an action are by no means clear in the Model Penal Code.

55. Id. § 1.13(5).

56. Id. § 1.13(4).

57. See, e.g. Bentham, *supra* note 40, at 81.

In addition to the fact that these definitions are defective, the drafters of the Model Penal Code also managed to make them collide with each other. In section 1.13(2), the drafters are quite explicit in separating the issue of the voluntariness of a given movement from the fact that this movement is an action. After all, when the code specifically states of a given movement that it is an action “whether [it is] voluntary or not,” it is saying that the bodily movement is an act (action) regardless of whether it is willed or not. But this thesis is at odds with the spirit behind section 2.01(1), where it is clear that a necessary condition of liability is that the defendant’s conduct includes a voluntary act (i.e., a “willed” bodily movement).

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 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.’

We cannot solve this problem, however, simply by focusing on the Model Penal Code’s treatment of the voluntary act requirement⁵⁸ while ignoring the obscure identification of acts with bodily movements whether voluntary or not.⁵⁹ For the Model Penal Code’s treatment of the concept of ‘voluntary’ is also problematic. If the definition of ‘act’ is deficient, so too is the Model Penal Code’s treatment of ‘voluntary.’ As we just saw, in section 1.12(3) we are told that ‘voluntary’ has the meaning stipulated in section 2.01. And what is this meaning? I am not sure. Clearly, mentioning a few actions that are not voluntary is not enough to specify the meaning of

58. See Model Penal Code § 2.01 (Official Draft and Revised Comments 1985).

59. See *id.* § 1.13(2).

voluntary. Of course, sometimes we can know what a thing is by knowing what it is not. For example, of a natural number, we know that it is odd if we know that it is not even. But this is not the case with instances of voluntary actions and instances of involuntary actions, since these instances do not constitute a dichotomy.⁶⁰ For the fact that a given movement is not an instance of an epileptic seizure does not allow us to infer that we are in the presence of a voluntary act.

Voluntariness, according to the Model Penal Code, is both a property of acts and a property of movements. An act is a movement, even if the movement is involuntary.⁶¹ What about a voluntary act? Can a voluntary act be based on involuntary movements? What is the difference between a voluntary movement and a voluntary act? Or what is the difference between an involuntary act and an involuntary movement? If there is no difference, as I suspect, then it becomes even clearer that the Model Penal Code should abandon talking about two different things here. And it also becomes clear that the alleged definition of act in section 1.12(2) is really no definition at all; it is just a misleading identification of acts with movements.

Perhaps our best bet in trying to fathom the Model Penal Code's definition of voluntariness is to speculate and turn around the negative formulation of section 2.01(d) by entertaining the idea that voluntary means a bodily movement that is the product of the effort and determination of the author, either conscious or habitual.⁶² But, obviously, we would then need to know what counts as being the 'product' of the agent's 'determination' (is this the will?), and what is the nature of the opposition between conscious and habitual (is this supposed to be the distinction between conscious and unconscious?). (The best

60. The technical sense has it that a pair of concepts is dichotomous if the pair is mutually exclusive and jointly exhaustive.

61. See Model Penal Code § 1.13(2) (Official Draft and Revised Comments 1985).

62. Fletcher has aptly referred to this section as a "catch-all provision." See Fletcher, *supra* note 3, at 4.

way to explain voluntariness is to challenge the dogma that this explanation requires that we pay attention to states of mind, which I shall do in the last section. The view that the analysis of the act requires analyses of mental states is a perspicuous and pernicious dogma of the Model Penal Code.

Let us move on and try our luck with the concept of 'conduct'. Section 1.13(5) of the Model Penal Code defines this concept as "an action or omission and its accompanying state of mind."⁶³ But the question necessarily arises: What is the difference between action and conduct? Seemingly, there are two differences according to the drafters of the Model Penal Code. First, conduct could be constituted by omissions, but acts cannot be constituted by omissions, since omissions are failures to act, and then they are by definition non-acts. Second, conduct includes consideration of "its accompanying mental state." I have no idea what "its" is supposed to mean. Is it the view of the drafters of the Model Penal Code that each act has a (one) "corresponding" mental state? I suspect that perhaps this might be either a "volition" or they might mean some other mental state (like those relevant to culpability). But this is even more confusing, as I shall show in the last section of the paper.

What should be clear by now is that the "fundamental predicate of all criminal liability" is an obscure principle indeed, appealing as it does to a wide variety of obscure concepts.⁶⁴ The principle is stated in section 2.01(1) of the Model Penal Code: "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."⁶⁵ In addition to the obscurities that this principle inherits simply in virtue of making reference to the panoply of ill-defined concepts we have just discussed, there are new problems in the formulation of this principle as well.

63. Model Penal Code § 1.13(5) (Official Draft and Revised Comments 1985).

64. See *id.* cmt. at 213 .

65. *Id.* § 2.01(1).

The first problem that I wish to point out in the formulation is perhaps trivial, but in light of my overall goal of emphasizing the advantages of seeking to reveal the necessary and sufficient conditions for something to be a crime, I think that it serves at least a pedagogical purpose. It is quite remarkable that a principle which the drafters of the Model Penal Code consider to be so fundamental would be put forth in such a sloppy way, particularly when a better formulation is so easily attainable, and the drafters themselves seemed to have noticed its deficiencies.

Statements of the form ‘p unless q,’ which is the form of this fundamental predicate, mean the following: “if p then not q,” which is equivalent (via transposition) to “If q then not p,” which is equivalent (via material implication) to “not q or not p,” which is equivalent (via De Morgan’s rule) to “it is not the case that p and q.” Let us see a less formal example of the structure of section 2.01(1) of the Model Penal Code. Let ‘p’ be impunity, and ‘q’ be ‘voluntariness’; the formulation in the Model Penal Code would be “if impunity then no voluntariness,” which is equivalent to “if voluntariness then no impunity,” which is equivalent to “either no impunity or no voluntariness,” which is equivalent to “it is not the case that both impunity and voluntariness obtain.” The point is that this formulation leaves open the interpretation that engaging in conduct which includes a voluntary act is a sufficient condition for liability, when it really is a mere necessary condition. The drafters of the code naturally and rightly correct this in the commentaries: “This [the fundamental predicate] is not, of course, to say that these conditions are enough for the establishment of liability but only that they are essential elements when liability obtains.”⁶⁶ But if this is such a matter “of course,” if it is so obvious, why not simply formulate the fundamental predicate in a straightforward way and so avoid both possible misunderstandings (however unlikely they might be) and avoid the need to comment on something which is so

66. Id. cmt. at 214.

obvious? Why not simply say, “engaging in conduct that includes a voluntary act etc., is a necessary condition for liability”? This sort of formulation of the act requirement is another manifestation of the disdain toward analysis that the drafters of the Model Penal Code exhibit, and also of their disdain regarding the importance of defining concepts in terms of necessary and sufficient conditions.

Now, let us put aside the merely formal problem and tackle a substantial problem. I find it hard to avoid the conclusion that the Model Penal Code has two requirements here: first that there be conduct, and second, that there be a voluntary act. But why should there be two requirements? Why is it not enough to claim that a voluntary act is required? The drafters seem very proud of this construction, but I think that it is flawed. They state: “it will be noted that the formulation does not state that liability must be based on the voluntary act or the omission *simpliciter*. The requirement is that conduct which *includes* such action or omission need occur. The distinction has some analytic importance.”⁶⁷

But conduct is simply an act (or omission) together with ‘its’ mental state, or a collection of acts (or omissions) with ‘their’ mental states. Putting aside for the moment, but only for the moment, problems associated to the mental state which needs to be added to the act (or omission) in order to turn it into conduct, it is still the case that what is required is a voluntary act. The term ‘conduct’ simply complicates things. There is only one condition here: the defendant must do a voluntary act. The introduction of the concept of conduct and the way in which “it must include” a voluntary act, has given rise to misunderstandings. For this formulation might be interpreted in such a way that it leaves too much to the State’s discretion. The State, it is feared, could extend or compress the chain of individual acts (or omissions) which constitute conduct. I think that Michael Moore’s debunking of these interpretations, in a section of *Act and Crime* entitled “Some Critical Legal

67. *Id.* cmt. at 217.

Silliness About the Act Requirement” is sound and eloquent. Instead of reproducing Moore’s disarmingly clear exposition, I refer the reader to it.⁶⁸

My main problems with the Model Penal Code’s distinction between conduct and act are the following two: First, the Model Penal Code unnecessarily multiplies the entities and the concepts needed for an adequate conceptual scheme. Since it is not the case that the separation between act and conduct extends the State’s discretion regarding time-frames, it seems to me that all it does is to allow for omissions to be punished. But it is theoretically possible to define action in such a way as to include omissions, and thus it would not be necessary to posit the existence of further concepts. Second, and more importantly, the fundamental predicate for all criminal liability crystallizes the confusion of mental and physical components of the Model Penal Code. Moreover, this specific problem is also present in the continental legal tradition. This is one of those problems that is not solved merely as a result of having the right conceptual scheme. This problem, simply put, is how should a penal code define an action? And, it seems to me, that even if the code does not contain an explicit definition of action, it cannot help at least tacitly *assuming* one. I would, in such scenario, reformulate the problem: which definition of action should a penal code assume?

IV. ACTIONS AND MENTAL STATES

The actus reus/mens rea distinction purports to serve as an organizing principle of the criminal law, separating the analysis of acts from the analysis of mental states. Yet, given the distinction between the actus reus requirement and the act requirement that we have discussed above, it is clear to see that it is the action/culpability distinction (in Asúa’s sense) that could serve as an organizing principle. But even this distinction is doomed, since the drafters of

68. See Moore, *supra* note 16, at 35-37.

the Model Penal Code tell us that that in order to establish that a certain event is an act we need to analyze mental states. Something would be obviously and inescapably wrong with the basic structures of criminal law, if we followed the drafters of the Model Penal Code's wisdom.⁶⁹ No special training whatsoever is necessary in order to see that this is a problem. If one were asked to analyze "X" and to analyze "Y" separately, and at the same time we were told that the analysis of "X" involves analyzing "Y," it would be patently clear that the request is unintelligible. The root of the confusion between the analysis of mental states and that of actions can be traced back to philosophical and psychological theories. The drafters of the Model Penal Code embraced a philosophical doctrine regarding the nature of human action, a theory which H.L.A Hart has traced back to "eighteenth century philosophy of conduct," and the long history of the theory can be traced even further back in time.⁷⁰ This theory is the well-known volitional theory action, and its main tenet is that a movement is an action if and only if it is preceded by a volition (or act of will). Within criminal law theory, the most famous upshot of the volitional theory of action, is that an action is a willed bodily movement. Elsewhere I have argued against some of the classical formulations of this doctrine,⁷¹ but here I wish to argue against its most recent, and also its most sophisticated defense, the one carried out by Michael Moore.⁷² In spite of my agreement with Michael Moore regarding the difference between the *actus reus* and the act requirements, and with his view concerning the alleged problem of discretion regarding the length of the chain of actions that constitutes conduct, I

69. And they unequivocally state this: "the demand that an act or omission be voluntary can be viewed as a preliminary requirement of culpability." Model Penal Code § 2.01 cmt. at 216 (Official Draft and Revised Comments 1985).

70. See Hart, *supra* note 25, at 90.

71. See, e.g., Zaibert, *supra* note 35.

72. See Moore, *supra* note 16; Michael Moore, *Placing Blame* 251-329 (1997) (replying to criticisms of his formulation of the volitional doctrine); see also Symposium, *Act & Crime*, 142 U. Pa. L. Rev. 1443 (1994) (stating criticisms to Moore's formulation of the volitional doctrine).

shall argue that his metaphysics of action can be improved. And I shall suggest that Moore's gallant effort to defend and improve the often assailed—and still highly assailable—volitional theory of action does not succeed.

The first obvious problem facing the willed bodily movement theory of action has to do with the “movement” aspect in it. If actions require movements, then non-movements cannot be actions. But then, according to the act requirement, non-movements cannot give rise to liability (unless an act is defined in such a way as to include omissions). Moore admits that “there is and should be an act requirement,” yet he admits as well that this requirement must “be subject to an exception in the case of certain omissions.”⁷³ Yet it seems to me to be a rather objectionable situation if a necessary condition for something being a crime has exceptions. For it would not then be easy to grasp what would be *necessary* about such a condition: to be a necessary condition means to admit of no exceptions. But objections to the movement/non-movement criterion for action/non-action abound in the literature, and so I am not interested in dwelling on this subject.⁷⁴

The aspect of the “willed bodily movement” theory of action in which I am interested is the aspect regarding the will. A willed action is an action preceded by a volition, and volitions are mental states. Volitions are a very special mental state, in that they range over a narrow spectrum of possible conditions of satisfaction: bodily movements. The condition of satisfaction of a mental state is that state of affairs which would satisfy (make true, in the case of a belief, fulfill in the case of desires and wishes, etc.) the mental state.⁷⁵ One traditional and convincing objection to the volitional theory of action is, precisely, the oddness of their conditions of satisfaction. For we rarely

73. Moore, *supra* note 16, at 59.

74. See, e.g., Fitzgerald, *supra* note 16 (discussing for some of many objections to the way in which the volitional theory of action fails to accommodate omissions); Fletcher, *supra* note 47 (same).

75. For more on conditions of satisfaction, see John Searle, *Intentionality* 79-140 (1983).

find ourselves just willing to move our limbs. Moreover, if we just form the mental state of, say, moving our hand, this does not seem at all different from other, garden variety mental states like desiring, wishing and the like. And then volitions (or willings) should not be different from mere desires or wishes or intentions.

Moore, trying to avoid the traditional shortcomings of the volitional theory of actions, tells us that we should take “volitions to name a species of intentions.”⁷⁶ He further tells us that, “conceiving of volitions as a kind of intentions helps to blunt this objection [that they are *ad hoc* mental states, whose only function is to explain human action], for intentions are a familiar and well-accepted type of mental machinery”⁷⁷ Moreover, Moore insists: “happily, we have no need to resort to a fourth kind of mental state in order to think of volitions, for bare intentions fit the bill nicely.”⁷⁸ While this move is effective in staving off classical objections to the volitional theory of action, it has nefarious consequences for criminal law theory. One consequence of Moore’s identification of volitions with intentions is that the distinction between *actus reus* and *mens rea* becomes even more difficult to explain than it had been for traditional defenders of the volitional theory of action.

Naturally, volitional theorists face problems when trying to distinguish sharply between acts and thoughts. Volitions are mental states, albeit strange ones. Moore’s equating of volitions with intentions makes it even harder for him to make a robust distinction between acts and thoughts. Yet, Moore wishes to preserve a sharp distinction between *actus reus* and *mens rea*, thus dispelling doubts which arise from what he calls “skepticism about borders.”⁷⁹ Moore describes this skepticism eloquently: it is the view that “no sensible or useful distinction can be drawn between the *actus reus* requirement, on the one hand, and the *mens rea*, the

76. Moore, *supra* note 16, at 120.

77. *Id.* at 121.

78. *Id.*

79. *Id.* at 171.

causation, the (absence of) excuse, and the (absence of) justification requirements on the other hand.”⁸⁰ But I think that Moore’s position is unusually ill-suited to dispel this form of skepticism.

Moore’s insistence on the fact that volitions are just garden-variety intentions, renders too tenuous whatever distinction between acts and thoughts his approach can support. Moore’s way of making the distinction between acts and thought deserves to be quoted in full:

The answer [to skepticism about borders] lies in the difference between the various mental states required by the mens rea requirement and the single mental state required by the act requirement. For there to be an act at all (and thus for there to be the actus reus for any crime), there must indeed be a mental state of volition causing the relevant bodily movements. As we have seen, many volitional theorists wish to call such mental states “intentions,” and volitions are then a kind of intention. But notice that the intention required to act at all—the intention to move one’s limbs—is not the same in its object as the intention described by the mens rea requirement. The latter intention has as its object (i.e., as its condition of satisfaction) complex act descriptions like “killing,” “disfiguring,” or “recording a confidential communication”; it does not have basic act descriptions like ‘moving my fingers’ as its object.⁸¹

It turns out that the only distinction between analyses of acts and analyses of thoughts is that the former are only concerned with thoughts which have as conditions of satisfaction bodily movements, and the latter have as conditions of satisfaction complex act descriptions.⁸² These are all identical mental states; they only differ regarding their condition of satisfaction. Thus, Moore cannot even appeal to the unique character of volitions, as classical volitional theorists have done, in order to try to make the

80. Id.

81. Id. at 173.

82. See Searle, *supra* note 75.

distinction between acts and thoughts. In trying to avoid the traditional and powerful objections to volitional theories of action, Moore has left himself bereft of just those theoretical tools he needs in order to make this distinction convincingly.

Moreover, since Moore admits that volitions are intentions and all actions are preceded by volitions, it turns out that all actions are—at least in one sense—intentional. So, the unintentional killing of a person is nevertheless an intentional moving of the limbs in such a way as to carry out the complex act description of killing a person. The traditional problem with the volitional theory is exacerbated once the “unique” yet admittedly problematic character of volitions is rejected. There is a sense in which Moore would be forced to admit that all actions—including negligent, inadvertent actions—are intentional.⁸³ And this surely is a source of misunderstandings.⁸⁴

I think this should suffice to indicate the infelicities inherent in the attempt to define an act by means of mental states. And just as I think no special training is required to see that this is a problem, I think that no special training is necessary to realize that a first step toward the solution of the problem of how to define an action would be to define acts without appealing to mental states. Though this is admittedly easier said than done, it is also easier than is normally believed. Here again, the

83. Moore's view should not be confused with Donald Davidson's view that an event is an action if it is intentional under (at least) one description. See Donald Davidson, *Essays on Actions and Events* 3-20, 83-102, 163-180 (1980). For Davidson holds only that for any given action there is one description of it which renders it intentional. Moore's view, on the other hand, is that for any action-description whatsoever, it is true that that very description is two-tiered and that there is one tier in which every single action-description is intentional. That is if Susan accidentally drops a vase, Davidson would say that in order for this event to be an action, there must be a description of what Susan was doing that reveals that it was intentional, say, she was intentionally decorating the house. And though she was intentionally decorating the house, she unintentionally broke the vase. Moore would say that when Susan breaks the vase unintentionally, she still intended to move her limbs in such a way as to perform the complex-action of breaking the vase intentionally. Moore would be forced to say that Susan intentionally move her limbs in such a way as to unintentionally brake the vase.

84. See, e.g., Zaibert, *supra* note 35, at 481 n.39.

general analytic stance, such as the one exhibited in approaches such as Jimenez de Asúa's, is helpful in establishing important distinctions.

One typical source of skepticism regarding the very project of trying to separate completely acts from thoughts is that many act-descriptions in a penal code make reference to specific mental states. The very definition of murder makes reference to "malice aforethought," but there are many examples, such as "impersonating another who is entitled to vote," or "adhering to the enemy" and the like. There are also examples of plain verbs which include a mental state, such as "lying" or "cheating." Yet, it is a mistake to suppose that these sorts of act-descriptions and verbs which include mental states constitute a problem for the enterprise of defining acts without appealing to mental states. For the fact that Rose did not have malice aforethought as she killed Lilly only shows that the necessary condition of legality/description has not been met. I have equated this necessary condition with the *actus reus* requirement.⁸⁵ But this does not show that Rose did not act. The act requirement is one thing, and the *actus reus* is something else. And I think the difference between these two necessary conditions for something to be a crime is quite an obscure issue within Anglo-American criminal law. Yet it is presented straightforwardly in Jimenez de Asúa's and other continental conceptual schemes.

The fact that the *actus reus* requirement of some crimes might include reference to some mental states is not such an interesting or difficult issue. The fact that the *actus reus* of some crimes includes reference to mental states in no way suggests, as the drafters of the Model Penal Code explicitly accept, that the "demand that an act be voluntary . . . be viewed as a preliminary requirement of culpability."⁸⁶ I think that even the problem of the supposed blurring of the distinction between *actus reus* and (special) *mens rea* is not as serious as popular belief

85. See supra §§ I, II.

86. Model Penal Code § 2.01 cmt. at 216 (Official Draft and Revised Comments 1985).

would have it. For the analyses of mental states which might be necessary in the case of those crimes which include a mental state in the very actus reus seek to decide simply if the requirement is met or not. That is, if someone helps the enemy inadvertently, then there is no crime. Having this or that mental state becomes, in a sense, objectivized, inasmuch as, if the mental state is present, then the objective fact that the actus reus requirement has been met is proven, whereas if the mental state is absent, then the objective fact that the actus reus requirement has not been met is proven. When we discuss culpability, or special mens rea, the presence of this or that mental state gives us a guideline as to the severity of the judgment of blame that the agent deserves. The result of establishing the presence of a given mental state within the context of the actus reus requirement is an all-or-nothing decision (either the requirement has or has not been met). The result of establishing the presence of a given mental state within the context of the culpability requirement is to place the condemnation of the act within a spectrum of varying degrees.

The main point that I wish to stress is that even if distinguishing between actus reus and mens rea is sometimes complicated by the presence of mental states in some complex act-descriptions, this does not in any way entail that we should collapse the distinction between acts and thoughts. That is to say, the attempt to distinguish the necessary conditions for there to be an act from the necessary conditions for there to be a culpable mental state must not be abandoned. What makes this attempt difficult is the Model Penal Code's insistence on defining human action in terms of certain mental states.

I cannot here present a full account of what a non-mental theory of action would look like.⁸⁷ This strategy has, in any case, been advanced by many philosophers, and it would indeed be valuable to analyze the philosophical

87. See Zaibert, *supra* note 35 (sketching a full account of a non-mental theory of action).

literature on this topic with a view toward criminal legislation.⁸⁸ The main thesis of my view is that an event is an action if and only if an agent was involved in a given causal chain, and the agent could have (or believed he could have) avoided being involved in such causal chain, i.e., the agent had (or believed he had) another option. Some might quickly object to this view in the sense that it is over-inclusive, and that if a criminal code were to accept it, then far too many things would count as actions. But I think that even if it were true that such a theory of action would be over-inclusive (which I doubt: all the examples of involuntary conduct in, say, Model Penal Code section 2.01(2) would just as well be excluded from liability within a non-mentalistic framework such as the one just sketched), this would not be a serious problem. For establishing that a defendant acted is merely a necessary condition for something being a crime, and not a sufficient condition.

These few remarks about the generalities of a non-mental theory of action are by themselves hardly convincing, and I readily admit that this is insufficient evidence for a non-mental theory of action. But my main interest here is not to prove this theory, but to show that rigorous analysis points in this direction. For as long as a penal code defines an action by appealing to mental states, it will be hard, if not impossible to avoid mingling issues pertaining to culpability with issues regarding acts.

CONCLUSION

Trying to come up with the set of necessary and sufficient conditions for the relevant concepts of the criminal law is a valuable way of avoiding some of the obscurities of the Model Penal Code. This is not a panacea, however. It will not solve all problems. The attempt to

88. See Hart, *supra* note 25; Alan R. White, *Grounds of Liability* (1985); Ludwig Wittgenstein, *Philosophical Investigations* (1953); Ludwig Wittgenstein, *Remarks on the Philosophy of Psychology* (G.E.M. Anscombe & G.H. von Wright eds., G.E.M. Anscombe trans., 1980).

come up with the set of necessary and sufficient conditions for something to be a crime reveals important distinctions between concepts which all too frequently are gathered under one unintelligible rubric in Anglo-American criminal law. The analysis of the concept of crime, reveals, amongst many other things, that there is an important moral, political, and logical difference between requiring that the defendant perform an action, and requiring that the defendant's action had been previously described by law as a crime. Once this distinction is clearly seen, the attempt to distinguish the act requirement from the mens rea requirement becomes manageable and, I think, appealing. The "willed bodily movement" theory of action has been favored by criminal law scholars far too long and too uncritically.⁸⁹ Moreover, most of the criticisms to the willed bodily movement theory of action concern the fact that it cannot intelligibly accommodate omissions. True as that might be, I have discussed a much less popular, yet at least equally important problem: this theory wreaks havoc on the intelligibility of the criminal law.

89. Moore overstates his case when he says that the objections to the volitional theory of action have kept "legal theorists away from volitions." See Moore, *supra* note 16, at 155). It seems to me that Gilbert Ryle, Ludwig Wittgenstein, or Alan White, have not had much influence on the Model Penal Code, (or any other penal code for that matter). While volitional theorists, such as John Austin, Jeremy Bentham, or Oliver Wendell Holmes, have had undeniable influence on Anglo-American criminal law and on its laws.