Involuntary Crimes, Voluntarily Committed

CLAIRE FINKELSTEIN

A famous Australian case involved one Mrs Cogdon, who killed her sleeping daughter by bringing an axe down on her head.\(^1\) Luckily for the defence, the daughter was not the only one asleep at the time. Mrs Cogdon was apparently asleep throughout the entire incident as well. For this reason the court dismissed the charges, saying that Mrs Cogdon could not be guilty of murder because she had not killed voluntarily.

Voluntariness is fundamental to responsibility. Where it is lacking, we do not treat a person as the agent of his own bodily movements. While we may speak casually of an ‘involuntary action’, the movements of a person asleep, in a trance, suffering an epileptic seizure, or responding reflexively are no more ‘actions’ than the beating of one’s heart or the motion of a falling tree. What separates involuntary movement from human action is that actions are chosen, and as such they are more or less under the control of the agent.\(^2\)

More or less. But what should we make of a case in which a person arranges in advance to do something involuntarily? Suppose that, knowing she was subject to violent acts in her sleep, Mrs Cogdon had deliberately placed the axe next to her bed, opened the door between her room and her daughter’s and, just to make sure, had taken a sleeping pill to increase her chances of remaining asleep. Surely she cannot escape responsibility for her daughter’s death in this case. For unlike the case where the involuntariness is unexpected, Mrs Cogdon now controls the onset of the involuntary condition itself. Something

\(^{1}\) I wish to thank Peter Cane, Heidi Hunt, Sanford Kadish, Leo Katz, Sue Mendus, and Michael Thompson for conversations on the topic of this article as well as for comments on various drafts. Particular thanks are due to Andrew Simister and Stephen Shute, the editors of this volume, for their detailed comments on several drafts.

\(^{2}\) When I say that actions are ‘chosen’, I mean to refer quite generically to the fact that actions are in some sense the product of the will. I am not assuming any particular account in the theory of action about the line between actions and non-action events, or even any particular theory about what it means to say that an action is the product of the actor’s will. These issues are not important for present purposes, although I will turn to matters of action theory in the final section.
similar can be said of the person who is aware she may suffer from an involuntary condition, even if she does not seek to induce it. We might blame Mrs Cogdon for her daughter's death, for example, if she merely knew of her proclivity to perform violent acts in her sleep and did nothing to guard against it. She need not actually have tried to take advantage of that proclivity.

Exploring the problem of intended or anticipated involuntariness should provide a way of considering the nature of voluntariness more generally. What sort of thing could voluntariness be that a person's prior psychological state could affect it? In particular, does the intention to perform an involuntary act, or the knowledge that one will perform such an act, make voluntary what would otherwise be involuntary? It is hard to see how this could be, any more than a person's prior intention to become intoxicated could make his subsequent drunken movements acts of sobriety. It is hard to see, in other words, how having a certain mental state at one time could affect the voluntariness of one's actions at an entirely different time. But if intending or knowing that one will perform an involuntary act does not make the act itself voluntary, why would we blame the person who contrives to kill someone involuntarily for the resulting death?

A natural thought to have is that we blame a person who arranges to do a bad deed in an involuntary condition, not on the basis of the involuntary bodily movements themselves, but on the basis of earlier, voluntary acts that produce the later involuntary ones. In the modified Mrs Cogdon case, the argument would go, we should not seek to blame her on the basis of her somnambulatory behaviour, since that was involuntary. Rather, we blame Mrs Cogdon on the basis of her earlier, voluntary acts of procuring a murder weapon, ensuring easy access to the victim, and taking a sleeping pill. These acts produced her daughter's death, much in the way that hiring another person to kill would. Mrs Cogdon no more needs to bring the axe down on her daughter's head awake than she needs to wield the axe herself.

There are, however, several problems with looking back to a prior voluntary act to establish an agent's blameworthiness for his later involuntary conduct. The most significant of these is the fact that the earlier act and the later act are different acts. We need no technical definition of the notion of an 'act' to see that this is so. Placing an axe next to a bed simply is not the same as killing, even if the presence of the axe makes it possible to kill. Getting extremely drunk is not the same as assaulting a person, even if getting drunk causes the agent to assault. Subjecting oneself to a terrorist organization is not the same as robbing a bank, even if the organization brainwashes its subjects to rob banks. In each case, it is clear we are dealing with distinct acts from the fact that the two take place at different times and in different locations. The thing for which we wish to blame the agent is the second act, but it is only the first that the agent controls. Thus, if we wish to blame a person for doing Y, it is not clear that it will help us to focus on the fact that she did X,
and that X caused Y. If Y is not an action of the agent's, we cannot establish responsibility for it by showing that it was the product of something that was an action of the agent's. Action simply does not travel along causal lines, and ordinary morality does not accept responsibility without action.

The problem of contrived involuntariness raises a series of issues in moral philosophy, but it has gone largely unnoticed among philosophers. The small amount of attention it has received has been in the criminal law context. The problem naturally arises there because the criminal law forbids holding a defendant liable for a crime unless he has voluntarily performed the precise act prohibited by law. If, for example, the definition of a crime requires the defendant to 'cause the death of another human being', or to 'unlawfully enter a building at night with the intent to commit a crime therein', he must have caused a death or entered a building voluntarily. No other voluntary act will do. The strictness of the act requirement in the criminal law helps to underscore the difficulty with trying to base responsibility on an earlier voluntary act. Does a person who was himself hypnotized to rob a bank in a trance 'enter a building with intent to commit a crime therein' voluntarily? It is not clear he does.

Our discussion will proceed as follows. Section A will explore the structure of the typical form in which the voluntary act problem arises in the law, namely cases in which the defendant anticipated, rather than contrived, his involuntary condition. It will consider how what is sometimes called the 'orthodox approach' to the criminal law's act requirement handles such cases. While the 'definitional' requirement I noted above is the heart of the voluntary act problem, this section will address a preliminary difficulty that poses special problems for the orthodox approach, namely the role of proximate cause. Section B will then turn to the definitional issue in detail. It will explain why an earlier voluntary act probably cannot be used to satisfy the act requirement for a crime committed while the defendant is in the grip of an involuntary condition. Section C will consider two additional potential solutions to the voluntary act problem, both of which seem, at first blush, as though they avoid the

---

3 There is a different kind of case in which it does help to establish responsibility to show that the defendant performed the prohibited act in virtue of performing an earlier act that caused it. Suppose a person intentionally throws a ball and inadvertently breaks a window. If he was inattentive in doing the first thing—throwing the ball—it may not seem unfair to blame him for the second thing—breaking the window—if doing the first thing caused him to do the second thing. But this case is significantly different from our case, since breaking a window is an action of the agent's, despite being something done unintentionally. Killing, assaulting, and robbing are not actions of any sort, unintentional or other, if they are done in an involuntary condition. While ordinary morality does not extend responsibility to non-action, it does extend it to things done unintentionally that are still actions.

4 There are notable exceptions to this claim. For example, we sometimes blame a person for failing to act where he had a duty to act. Omission liability still requires voluntariness—the agent must have voluntarily failed to do something he had a duty to do—but the agent need not have performed any action during the time he was failing to do his duty. In what follows, I shall leave omissions to one side and simply treat them as an isolated exception to the 'so responsibility without action' principle.
causation and the definitional problems of the orthodox approach. Neither solution turns out to be entirely satisfactory. Finally, Section D will present an alternative framework for solving problems of voluntariness in the criminal law. My proposal will make use of a standard feature of philosophical action theory, namely that actions, like physical objects, are subject to different descriptions. The question we must ask, I shall argue, is whether the prior voluntary act is the same act as the later prohibited conduct. Is going to a hypnotist the same act as entering a building at night with intent to commit a crime therein? The answer will depend on whether entering a building, etc., is just another description of the act the defendant performs when he visits the hypnotist. I argue that the 'redescriptive test', as I shall call it, solves the causation problem. While it does not entirely solve the definitional problem, it will provide a helpful framework for thinking about it.

A. The Causation Problem

The problem of contrived involuntariness is the most extreme version of a more general problem, namely the problem of defendants who culpably create the conditions of their own involuntariness. The most common form in which this problem arises in the law is where the defendant is aware of a risk that the involuntary condition will occur. Like cases of contrivance, courts typically deny the involuntariness in such cases. In People v Decina, for example, the court denied a lack of voluntariness defence to a defendant who killed four children when he suffered an epileptic seizure while driving. The court found that the defendant was aware he suffered from epilepsy, and that his decision to drive under these circumstances deprived him of the ability to claim that killing the children was involuntary. It made clear, however, that matters would have been otherwise had Decina suffered an epileptic seizure for the first time: 'To have a sudden sleeping spell, an unexpected heart or other disabling attack, without any prior knowledge or warning thereof, is an altogether different situation, and there is simply no basis for comparing such cases with the flagrant disregard manifested here'.

Cases like Decina have led scholars to charge that the criminal law's voluntariness requirement is arbitrary. In particular, they suggest that the outcome

5 138 NE 2d 799 (1956).
6 138 NE 2d 799, 804. The dissent thought Decina was entitled to the defence. It thought that Decina could not be guilty of recklessly operating a vehicle, because 'recklessness' refers to the manner or style of operating the vehicle, meaning an erratic and uncontrolled pattern of vehicle movements: 138 NE 2d 799, 807 (Desmond concurring in part and dissenting in part). This argument is confused. There is no reason to suppose that driving cannot be controlled and still be reckless. For it might be that what makes a vehicle reckless is not the manner of driving prior to the seizure, but the fact of driving at all, given the defendant's knowledge that he is subject to epileptic seizure.
of the cases depends entirely on what 'time-frame' courts adopt. If courts adopt a narrow time-frame, focusing only on the defendant's conduct at the time of the criminal violation, they will exonerate the defendant, since all they perceive is a person performing a criminal act in the grip of an involuntary condition. If, on the other hand, they adopt a broad time-frame, they will find the defendant liable, since they see a defendant engaged in conduct he intends or knows will eventually produce a prohibited result. The problem, these scholars argue, is that the choice of time-frame cannot be made in any principled way.

According to Michael Moore, however, the criminal law has a response to this issue, and this response, he argues, is not subject to the time-framing problem at all. According to what Moore calls the 'orthodox approach', all that is necessary to solve the problem of anticipated involuntariness is the concurrence of act and mental state that the criminal law traditionally requires. In order to determine whether the defendant should have a lack of a voluntary act defence, we need only locate some voluntary act that causes the prohibited conduct, and then ask whether that act coincides with the requisite blameworthy mental state:

Every competent teacher of elementary criminal law that I know teaches the act requirement in the following way: if, from the big bang that apparently began this show to the heat death of the universe that will end it, the court can find a voluntary act by the defendant, accompanied at that time by whatever culpable mens rea that is required, which act in fact and proximately causes some legally prohibited state of affairs, then the defendant is prima facie liable for that legal harm.

Moore's approach is roughly the same as an approach we find in German law to the more general problem of contrived defences. That problem, known as actio libera in causa, is not just limited to the involuntariness defence. It applies equally to defendants who contrive defences like self-defence and necessity. In each case, the preferred solution is to look back to an earlier act of the defendant's by which he caused himself to have a defence. Applying this strategy to involuntariness, Moore would say that the reason Decina is liable

---


8 Kelman (n. 7 above) 603.


10 See Joachim Hruschka, 'Imputation' (1986) Brigham Young University LR 669; see also Mirum Gur-Arye, Actio Libera in Causa in Criminal Law (Jerusalem, 1984). The German distinguish contrived from recklessly anticipated conditions of defence. They reserve the term actio libera in causa for the former, and give the label actio ilicita in causa to the latter.

11 While American writers are mostly unaware of the actio libera in causa doctrine, some have made law-reform proposals that would duplicate its effects. See Paul Robinson, 'Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine' (1985) 71 Virginia LR 1. On the problem of contrived justifications and excuses generally, see Leo Katz, Ill-Gotten Gains (Chicago, 1987) Pt I.
for manslaughter is that he performed a voluntary act (driving), which proximately caused the deaths of the children, and his act coincided with a blame-worthy mental state (recklessness). Had Decina suffered an epileptic seizure for the first time, Moore would allow Decina the defence, on the grounds that he lacked the mens rea required for manslaughter. For Decina, then, unanticipated involuntariness would provide him with the basis for a lack of mens rea defence.

But lack of voluntariness simply is not a mens rea-negating defence. Instead, the defence negates the actus reus required for the crime. We know this because lack of voluntariness is a defence to strict liability crimes, and these have no mental state requirement. A defendant who coasts across a double yellow line, asleep at the wheel, has a defence to the resulting traffic violation, even though that offence contains no mens rea requirement. Similarly, a defendant has a defence to disorderly conduct if he committed the disorderly acts during an epileptic seizure, even if the offence requires no mens rea. The defence is also available where the defendant is behind the wheel of a car whose brakes fail, or where he is attacked by a swarm of bees while driving. Lack of voluntariness is thus substantially different from defences like mistake, extreme emotional disturbance, and insanity, which either apply to the mental state with which a criminal act was performed, or supply normative excuses that deprive an intentional mental state of culpable effect. The orthodox approach, however, would end up treating involuntariness as on a par with the above defences. As such, it is hard to see how it can extend the defence to strict liability crimes.

Perhaps a better way to think about the problem is to see that making room for strict liability would saddle the orthodox approach with an unacceptable account of causation. Imagine that the crime with which Decina had been charged were a strict liability homicide offence. Can we now grant Decina a defence in the case in which he did not know he suffered from epilepsy under the orthodox approach? Since in a strict liability case, there can be no mental state by coincidence with which one can fix a time-frame, the only grounds on which we could grant the defence would be to say that the seizure broke the chain of causation. That is, we would have to say that his driving was not the proximate cause of the deaths of the children. But this solution would make

---

12 The actual crime under consideration was negligent homicide, but the difference is unimportant for our purposes, since we can assume that had Decina suffered an epileptic seizure for the first time, he would not have been negligent either.

13 Courts have been responsible for a great deal of confusion on this point, sometimes saying the defence defeats mens rea and sometimes saying that it defeats actus reus.


15 People v Magnan 155 NYS 1013 (1915).

16 State v Kremen 114 NW 2d 88 (Minn. 1962).


18 See Model Penal Code, Comment to s. 2.04[1].

19 Moore would probably favour this approach, since it is his preferred solution to an actual strict liability case, Martin v State: Moore (n. 9 above) 36–37. See discussion below.
the orthodox approach to causation inconsistent. For if Decina’s epileptic seizure broke the chain of causation in the case in which he experiences a seizure for the first time, why would it not also do so where Decina was aware of a risk of seizure in advance? Surely causal chains cannot be established or broken depending on what the actor knew or intended. When we return to the original Decina statute requiring recklessness, moreover, the inconsistency is particularly striking. For Decina cannot be said to have proximately caused the deaths of the children, even assuming he was reckless, if he could not have done so in a strict liability case. If Decina would not be liable in the strict liability case, he cannot be liable in the original case either. So the only way the orthodox approach can avoid ending up with an inconsistent account of causation is to insist that the involuntariness defence negates only mens rea. And this would require the rejection of the line of cases in which the defence is allowed in strict liability crimes.

But let us back up a moment. Why can’t causation vary with mental state? A detractor might make the following points. First, he might suggest that the traditional test for proximate cause—foreseeability—is itself mentalistic. The proposition here would be closely related to that test. Instead of saying that proximate cause depends on foreseeability, it would be the claim that proximate cause can sometimes turn on whether the defendant anticipated the harm. Secondly, the detractor might argue that in any event the notion of proximate cause is essentially a normative concept, one that is more about tracking a defendant’s responsibility for an occurrence than about some sort of physical relation between himself and it. From this vantage point there would be no difficulty saying that the fact that the defendant intended the harm could make the difference to whether he proximately caused it. And indeed, how else would we account for principles such as ‘intended consequences are never too remote’? Is it not generally assumed that intention can make a difference to causal relations? If we were to allow that proximate cause could vary with mental state, there would be no difficulty here. For we could simply say that whether or not Decina caused the children’s deaths depends on whether he anticipated he would kill them. With anticipation, there is causation, and without it, there is none.

But there are good reasons to reject a mentalistic account of causation, and in particular, good reasons to reject the two points raised in its favour above. First, causation should never have been conceived in terms of foreseeability in the first place. The best reason for this has to do with strict liability. If proximate cause is understood in terms of foreseeability, then strict liability effectively becomes a negligence standard, since the notion of proximate cause applies to strict liability as well as to mental state crimes. Secondly, the notion of proximate cause cannot have any independent meaning from mental state on this view. For if intending a harm can serve to establish that

---

the defendant caused the harm, this would entail that ‘intention’ imparts all the information we need to hold the agent responsible. Since neither Moore nor I is prepared to dispense with causation as an independent concept, neither of us is prepared to accept the normative view of causation this approach would suggest. Slogans, then, like ‘intended consequences are never too remote’ simply cannot be accepted. Manifestly intended consequences can be too remote, such as when there is an intervening event that breaks the chain of causation. In what follows, I shall assume that it is problematic to think of causation as dependent on mental state, and I shall not argue the point further.

While Moore’s brief discussion of voluntariness does not advert to the orthodox approach’s difficulty with causation, his writings on causation show that he is aware of it. In ‘Causation and Responsibility’, Moore discusses what he calls the problem of ‘contrived coincidences’, namely the ‘purposive exploitation of a natural event coincidence’. Imagine a defendant who foresees that a strong wind will carry a roof to where it will injure a workman, and he wants to exploit that occurrence. The law treats such cases as ones in which what would normally be an intervening cause—the strong wind—no longer breaks the chain of causation. Yet, as Moore notes later on, this is problematic, because ‘it cannot be the case that the very same storm is an intervening cause, or is not, depending on the state of mind of the defendant . . . [O]ur minds do not have these kinds of telekinetic powers’.21 The same difficulty arises where the intervening cause is not an abnormal natural event, but the independent voluntary act of another human agent. Just as we want to deprive the defendant of a defence when he exploits an abnormal, natural event, so we will want to do the same where it is based on the intervening voluntary act of another agent, if the defendant plans in advance to take advantage of that act. The problem, then, is that if we do not allow proximate cause to be a function of the defendant’s mental state, we will have to give up one or the other of these conclusions. We cannot say both that the defendant’s acts are not the proximate cause of the harm where there is an intervening abnormal event or act, and that the defendant’s acts are the proximate cause of the harm where the defendant exploits the intervening condition.

Moore concludes that ‘we ought to say that the criteria for an intervening cause do not include contrivance by the defendant’. By this, he seems to mean that where the defendant would normally be considered the cause of a prohibited act or state of affairs, his conduct remains the cause, even if he brought the event about by exploiting an abnormal intervening factor or the independent act of another agent. Thus, if the defendant would normally be responsible for the death of the workman, he remains responsible even if he brought the death about by exploiting an abnormally strong wind that

displaces a roof. As Moore says, 'th[e] contradiction is easily eliminated if we but seize one horn of the dilemma or the other in any given case'. That is, we must simply choose whether or not the abnormal event or the intervening act of another agent is sufficient to break the chain of causation. If we conclude that the intervening abnormal event or act does break the chain of causation, we would not be able to reinstate causation on the grounds that the defendant exploited the event or act. So if the strong wind was sufficient to break the chain of causation in the absence of contrivance, it will be sufficient to do so where there is contrivance as well.

In light of his discussion of contrived coincidences, we can assume that Moore's considered solution to the voluntary act problem would be that we must bite the bullet: either the defendant's prior conduct was the proximate cause of the harm or it was not, and it makes no difference to the inquiry if he contrived the involuntariness. If Decina caused the deaths of the children in the original case (the case where he was aware of his condition), he must have caused their deaths in the case in which he suffered an epileptic seizure for the first time. Presumably, then, Moore would also deny the lack of a voluntary act defence where the defendant coasts through a red light while having a seizure, since the seizure could not break the chain of causation in that case either. If Moore were to bring his account of voluntariness into line with his account of causation, he could avoid having to say that whether the prior voluntary act was the proximate cause of the prohibited result varies with the defendant's mental state. He would, however, avoid this difficulty at the cost of encountering two other important problems.

The first problem is that the orthodox approach will now require us to make a series of extremely fine distinctions among different possible intervening involuntary conditions, and I can see no principled basis for making these distinctions. For example, if we think Decina was correctly decided, we must also think that in general epileptic seizures do not break the chain of causation. But Moore does not appear to accept the proposition that involuntary conditions never break the chain of causation. For example, he wants to allow a defence in another case, Martin v State, on precisely these grounds. 22 In that case, police officers forcibly removed the defendant from his home while he was intoxicated and forced him to accompany police onto a public highway. Martin was then arrested for public drunkenness, to which he raised a lack of voluntariness defence. Moore thinks the act of the officers in dragging him onto the highway breaks the chain of causation. 23 We must ask: would Moore be happy with the results of his account in the case in which Martin knew the police were to appear at his doorstep at a particular time, and knew also that they would drag him onto the highway? Does the behaviour of the police still break the chain of causation if Martin intentionally

22 17 So. 2d 427 (1944).  
23 Moore (n. 9 above) 36–37.
got drunk in his living room in order to appear on the highway in an intoxicated condition? Moore will presumably stick to his claim that Martin's getting drunk in his living room was not the proximate cause of his appearing drunk on the highway. But I find this conclusion troubling. For once again, it is hard to see what distinguishes Martin's contrived involuntariness from Decina's.24

In light of Moore's admission that cases of contrived causation require us simply to 'seize' one horn of the dilemma or other, one might wonder how effective the orthodox approach is at combating the arbitrariness charge we considered above. For while it would eliminate the need to stipulate a time-frame, Moore would now be committed to having to stipulate which intervening factors break the chain of causation and which do not. This stipulation is every bit as arbitrary as the time-frame stipulation. Indeed, I think it is the time-frame stipulation in other guise. The arbitrariness is inherent in any account that approaches the problem of voluntariness via the notion of proximate cause.

Notice also that the orthodox approach will be highly revisionary with respect to existing law. In effect, it will always result in the rejection of one of the results the cases standardly yield. Depending on whether the involuntary condition is deemed to break the chain of causation, the orthodox approach will either abandon the standard treatment of contrivance the case law reflects, or it will abandon the standard treatment of strict liability crimes. If the condition does break the chain of causation, as in Martin, then contrivance will no longer inculpate. If the condition does not break the chain of causation, as in Decina, there will be no possible defence to strict liability crimes for unanticipated involuntariness. Both seem problematic. To abandon the line of cases that denies the defence to defendants who contrive or anticipate the involuntary condition would surely be too lenient. Defendants would be able to carry out serious offences without fear of penalty, if they could somehow arrange to do so in an involuntary state. On the other hand, to abandon the lack of voluntariness defence in cases of strict liability seems unduly harsh. Should a person who runs a red light while suffering an epileptic seizure for the first time really be guilty of a criminal offence? It is one thing to deny a defence to agents who perform a prohibited act accidentally, but quite another to deny it to agents who perform no act of any kind.

It is important to notice that the problem we are discussing is not entirely of the orthodox approach's making. It stems from the fact that there are two apparently incompatible lines of cases that apply to the lack of voluntariness

---

24 Perhaps the difference lies in the fact that Decina's seizure involved his own bodily movements, whereas the intervening cause in Martin's case was the act of another agent. But the same agent/other agent distinction seems ad hoc, given that we often are liable for results where the causal chain passes through another agent (as in some forms of accomplice liability). Moreover, it seems harsh to hold agents liable for everything their bodies do, when many bodily movements are not in any way the product of the 'effort' or determination of the actor': MPC s. 2.01.
Involuntary Crimes, Voluntarily Committed

defence: the line that says that a defendant loses the defence based on contrivance, and the line that makes the defence available against strict liability crimes. The latter means that the defence negates actus reus, and that is not consistent with saying that the defendant loses the defence on mental state grounds. It looks, then, as though we must either abandon the approach to contrivance and anticipation, and say that the defendant who contrives to commit a crime in an involuntary condition can still claim the defence, or we must abandon the defence in crimes of strict liability. If we attempt to account for both lines of cases, as the orthodox approach initially attempts to do, we find ourselves committed to what I have argued is an incoherent view of causation: the view that whether or not the defendant caused the prohibited conduct or result depends on whether he intended or anticipated that result.

We may put the point, then, as a challenge: is there any way to understand the voluntariness requirement in criminal law that would allow us to retain both the contrivance and the strict liability lines of cases, without running afoul of basic principles of causation?

B. The Problem of Definition

In our discussion thus far, we have implicitly treated every crime as though it were what we call a 'result' crime, namely a crime with a causal element. We have done this in order to consider the hypothesis that a defendant can be held liable for a prohibited act performed involuntarily if it was caused by a prior voluntary act. This strategy, we saw, is problematic because it makes it hard to think of contrivance on the defendant's part as inculpatory without adopting an incoherent account of causation. But there is a second difficulty with this strategy that has special force for crimes whose definitions do not contain a causal element, so-called 'conduct' crimes.

Consider a crime like burglary, which requires the defendant to 'enter ... a building or occupied structure ... with purpose to commit a crime therein.' And suppose the defendant decides to visit a hypnotist in order to be placed in a trance and told to enter a jewellery store with a weapon, demanding to be handed over its riches. In order to side-step the difficulty we considered in

25 Alexander makes the point forcefully by saying that the tension is a structural conflict between two important principles of the criminal law—what he calls the strict liability principle and the voluntary act principle. See Alexander (n. 7 above); see also Ingrid Patern, 'Some Remarks About the Element of Voluntariness in Offences of Absolute Liability' [1968] Criminal LR 23.

26 We have even somewhat misleadingly done this with Martin (n. 22 above), despite the fact that the case quite clearly involved a conduct crime.

27 MPC s. 221.1 (1).

28 In order to avoid problems of complicity, we should assume that the hypnotist is himself innocent with respect to the bank robbery. Let us say, for example, that he gives the hypnotized subject commands in German, at the subject's prior request, but does not himself understand the instructions and speaks no German.
the previous section, let us assume that the trance does not break the chain of causation. It should be clear that there is a second problem with the strategy of trying to locate the voluntariness of one act in an earlier voluntary act that caused it, a problem that has nothing to do with proximate cause. This is the problem of definition: visiting a hypnotist simply is not the same act as 'entering a building'. Thus, even if seeing a hypnotist is the proximate cause of entering a building, it is not entering a building in the relevant sense, and so does not satisfy the actus reus for burglary.

As we shall see, this 'definitional' problem turns out to be far more difficult than the problem with causation. The causation problem, I shall argue, disappears on the correct account of voluntary action, for it will turn out that agency is not in fact a causal notion after all. The definitional problem, by contrast, is implicit in the very idea of a prohibition: there is something specific the agent is prohibited from doing, and that is usually not the same as the act by which he causes himself to do the prohibited act. In other words, causing oneself to enter a building is not itself entering a building; causing oneself to alter a writing is not itself altering a writing; causing oneself to inflict injury is not itself inflicting injury.

Granted, the problem may seem to be limited to conduct crimes, since there is a way of thinking of result crimes that avoids the difficulty altogether. Suppose a murder statute makes it a crime to 'cause the death of another human being'. And suppose a man goes to see a hypnotist in order to be placed in a trance and receive a suggestion that he poison his wife's tea. Assuming once again that the trance does not break the chain of causation, it looks as though there is no problem here: seeing a hypnotist is an act the defendant performs whereby he 'causes' the death of his wife. The defendant can satisfy the actus reus for murder in this case by seeing the hypnotist. The later act of poisoning the tea is not required for the defendant to satisfy the definition of the prohibited act. At least at first blush, then, the problem is serious, but only for a segment of offence definitions, namely conduct crimes.

Moore notices the definitional problem in his recent work on causation, but he dusts over it lightly. In discussing the case of a defendant who induces an innocent agent to commit a crime, for example, he correctly says that the fact that the crime is committed through the agency of an innocent does not break the chain of causation. But he recognizes the 'linguistic oddity' of saying that a defendant can 'rape', 'hit', 'maim', or 'take' even though it is technically someone else who did the raping, hitting, maiming, or taking. That is, Moore has noticed that even if we allow that one person can sometimes cause another person to act without breaking the chain of causation, we have a further question about whether the defendant fits the definition of the crime. Arguably, a defendant cannot fit the definition if he commits the crime through the act of another agent. The same could be said of the case in which the defendant is his own innocent agent, where he arranges for himself to commit a crime while in the grip of an involuntary condition.
Moore's answer to this problem is that there is no reason to cleave to 'stereotypes' we have about how various criminal acts are performed: 'Just as one kills by causing death, so one rapes by causing penetration, one hits by causing contact, one maims by causing disfigurement, and one takes by causing movement of the object taken'. But I think Moore moves too swiftly here. For how does a defendant who induces another, whether innocent or not, to burgle a house satisfy the offence definition of 'unlawfully entering a building...?' It is hardly just a stereotype that a person cannot enter a building without physically placing his body inside it. Moreover, the innocent agent doctrine, and accomplice liability more generally, should lead us to precisely the opposite conclusion from the one Moore reaches: if a defendant could satisfy the actus reus for a crime like burglary without physically entering the building himself, we would not need accomplice liability provisions in the first place. No criminal code, for example, would need a provision like Model Penal Code section 2.06, which establishes the liability of one agent for the conduct of another. If a defendant could burgle without entering a building, we could find a person liable for burglary when he sends another person into a building on his behalf without having to invoke a special provision called 'liability for the acts of another'. Thus, far from being able to use the existence of accomplice liability as support for the claim that a person can satisfy the definitions of an offence without performing the prohibited conduct, accomplice liability shows that a statute's actus reus is a real requirement, one that cannot be satisfied metaphorically.

Moreover, notice that Moore's definitional move effectively turns every conduct crime into a result crime. If the actus reus of every conduct crime can be satisfied by a defendant who causes himself (or another) to commit that act, then it is as though every offence definition contains a causal element. While this would avoid the definitional problem, by eliminating conduct crimes altogether, it will only serve to exacerbate the causation problem. For every time a defendant causes himself to 'kill', 'penetrate', or 'take', the problem will arise whether the defendant's act was the proximate cause of the killing, penetration, or taking. What is gained on the definitional side appears to be lost on the causal side. Even apart from its implausibility, then, Moore's definitional solution does not particularly advance the defence of the orthodox approach.

There is a final wrinkle in setting out the definitional problem we should consider. I have said that causing oneself to enter a building is not itself entering a building, but causing oneself to cause a death, I suggested, is itself causing a death. On closer inspection, however, it is not entirely clear that this

20 Moore (n. 21 above) 39.
21 It might of course be the case that accomplice liability exists as a separate doctrine for other reasons, and not to solve this definitional problem. But I suspect this is not the case. The main reason to have accomplice liability provisions, it seems to me, is that the accomplice does not satisfy the definition of the offence on the basis of his own conduct.
is so, and thus it is not entirely clear that result crimes are immune to the definitional difficulty in the way we thought. It may turn out that there are cases of contrivance where one wants to find liability, but where voluntarily causing oneself to bring about a prohibited result does not mean that one brings about that result voluntarily. In other words, causing oneself to cause is not always causing, in criminal law terms. Consider again the person who sees a hypnotist in order to receive a suggestion that he kill his wife by putting poison in her tea. Suppose further that being in a hypnotic trance does not break the chain of causation. Does the visit to the hypnotist cause the death of the wife, in the relevant sense? Upon reflection, it is not clear it does. While the visit to the hypnotist is the ‘but for’ cause of the death, it is not the proximate cause. And visiting a hypnotist might fail to be the proximate cause of a person’s death even if there is no intervening cause that breaks the chain of causation. It might simply be too remote or incidentally related to the resulting death, quite apart from the involuntary intervention.31

In order to see this more clearly, it might be helpful to consider whether the defendant would be guilty of an attempt on the basis of his visit to the hypnotist. For if the hypnotic trance does not break the chain of causation, the visit to the hypnotist ought to constitute a completed attempt, since the visit must then be the last act required on the defendant’s part to cause death. After the visit to the hypnotist, the remaining events are all causal, including the acts performed involuntarily. But visiting a hypnotist would almost certainly be insufficient to constitute attempted murder on a completed attempt theory if the defendant husband never did end up putting the poison in his wife’s tea. Visiting a hypnotist is simply too remotely related to the potential death of the victim, and too unlikely to result in death, to count as a last-step attempt. I even doubt that it would be sufficient grounds for an attempt on a substantial step test. Seeing a hypnotist in order to kill one’s wife is a little like buying a ticket on a fledgling airline company for a person one hopes will die in a crash. Thus, even where the involuntary condition itself does not break the chain of causation, there is no reason to think that causing a person to cause is the same as causing. The definitional problem we noted with conduct crimes arguably applies to result crimes as well.

31 Under the American Model Penal Code, for example, this would arguably be the case. See MPC s. 2.03. Someone might reject this example and claim that visiting a hypnotist is really not too remote from killing one’s wife. There should, however, be other examples of cases in which causing oneself to cause is simply not the same as causing. Suppose a person causes himself to delight in burning things by taking a certain medication. The medication does not render him irresponsible; it simply increases his desire to set things around him on fire. He subsequently sets fire to a building. Did the act of taking the pill cause the building to burn? I would think not, despite the fact that by taking the pill, the agent caused himself to cause the building to burn.
C. Two Possible Solutions

Before proceeding to sketch an alternative way of thinking about voluntariness in the criminal law, I wish to consider two alternatives to the orthodox approach, both of which would, if successful, surmount the difficulties with causation and definition we have discussed. I shall argue that there are nevertheless good reasons to reject both.

1. The 'Causing-the-Conditions' Solution

The first alternative is a variation on the actio libera in causa approach, as suggested by Paul Robinson. Like the German doctrine, Robinson’s approach treats the problem of contrived involuntariness as an instance of a larger problem, namely the problem of defendants who manufacture the conditions of their own defense.32 Robinson’s primary focus is on justifications that defendants cause themselves to have, particularly justifications defendants culpably cause themselves to have. The question is whether the person who culpably sets a forest fire solely in order to be entitled to burn a firebreak to protect a town may avail himself of the justification he would have without the contrivance for burning the firebreak. As Robinson points out, existing criminal codes vary widely in their approach to such cases, with some denying the defence altogether on the basis of even non-culpably caused conditions, and others making no provision for depriving a defence based on full contrivance. Robinson, for his part, thinks the right approach is to grant the defence, irrespective of contrivance, but then to hold the defendant liable at the level of his culpability at the time of the earlier voluntary act:

Where the actor is not only culpable as to causing the defense conditions, but also has a culpable state of mind as to causing himself to engage in the conduct constituting the offense, the state should be [sic] punish him for causing the ultimate justified or excused conduct. His punishment, however, is properly based on his initial conduct of causing the defense conditions with his accompanying scheming intention, not on the justified or excused conduct that he subsequently performs.33

Robinson, in short, suggests that the defendant who sets the forest fire may still avail himself of the lesser evils defence, despite the fact that he arranged for it in advance. But the defendant is nevertheless punishable on the basis of his earlier, culpable conduct, since he did something that he intended would require him to burn a firebreak, and that is not justified. This approach has the advantage of allowing us to tailor the defendant’s liability to his actual culpability: if the defendant intentionally created the conditions that he knew would require him to burn a firebreak, we can hold him liable for a crime of intention or knowledge. If the defendant had instead been negligent with

32 Robinson (n. 11 above) 1.  
33 ibid. at 31 (emphasis in original, citations omitted).
respect to that risk when he performed the earlier act, he can be held liable for a crime whose \textit{actus reus} is satisfied by burning the firebreak and whose \textit{mens rea} is negligence.

Robinson calls his solution the ‘causing-the-conditions’ approach to culpably caused defences. It effectively solves the problem by rejecting the concurrency requirement of the orthodox approach: it takes the \textit{mens rea} from the earlier non-criminal act and links it to the \textit{actus reus} performed innocently at a later time. In theory, it differs from Moore’s approach because Moore retains concurrency. But the two views end up with the same results, an indirect product of the expansive view Moore takes on the second of the two problems we considered, the definitional question. About \textit{Decina}, for example, Robinson would say that Decina retains the involuntariness defence, despite the fact that he caused the conditions of that defence. He can be held liable, however, because he performed the required prohibited act—causing a death—and he had the requisite mental state for manslaughter. To determine the \textit{actus reus} element, Robinson is willing to accept the later, involuntary conduct, as long as the defendant also created the conditions that caused him to engage in this conduct. Moore would reach the same result, except that he would insist that the \textit{actus reus} be satisfied on the basis of the act Decina performed at the earlier moment in time—the time at which he was reckless. Both accounts would hold Decina liable. If one would normally expect to see a difference between Robinson’s and Moore’s accounts in conduct crimes. For example, in the case in which I have myself hypnotized to burgle a house, Robinson would say that I may avail myself of hypnotism as a defence to the burglary, but that I am guilty on the basis of my earlier contrivance. He is willing to find me guilty on the basis of my earlier mental state, along with my involuntary act of entering a building. Since Moore restricts himself to the earlier act, one would expect him to find no liability in this case, since seeing a hypnotist should not satisfy the \textit{actus reus} of burglary. But Moore is willing to stretch the definition of offences in conduct crimes and say that a person who causes himself to enter a building can satisfy an act requirement of ‘entering a building’. The two accounts therefore give the same results in conduct crimes as well.

Another difference between Robinson’s and Moore’s accounts is also ultimately only superficial. Unlike Moore, Robinson reaches his results by stipulation, namely by adding a separate basis for liability to existing criminal codes. Robinson’s provision would say that a defendant who creates the conditions of his own defence does not thereby forfeit the defence: if the defendant created the conditions of a justification his illegal conduct is justified, and if he created the conditions of an excuse, he is excused.\textsuperscript{34} It would then provide:

\textsuperscript{34} Robinson (n. 11 above) at 50–51.
An actor is guilty of an offense if, when acting with the culpability required by the offense definition, he causes the circumstances that justify his [or another's] engaging in the conduct that constitutes the offense or causes the conditions that excuse himself [or another] for engaging in the conduct that constitutes the offense, and he [or such other person] engages in the conduct constituting the offense.\textsuperscript{35}

In other words, just as in the firebreak case, Robinson simply stipulates that where a contrived excuse is concerned, the defendant 'may properly be held liable for the ultimate offense on the basis of his causing the excused conduct and his accompanying culpable state of mind with respect to his commission of the ultimate offense'.\textsuperscript{36} Now, this second divergence from Moore does make something of a difference with regard to our two problems, for this move seems to allow Robinson to avoid both the causation and the definitional problems we saw on the orthodox approach. First, with regard to causation, it is not necessary on Robinson's account to consider whether the intervening voluntary condition breaks the chain of causation, since the liability Robinson establishes is not causal. While it is important for Robinson that the agent cause the condition that provides his justification or excuse, it does not seem to matter whether that condition itself defeats the further causal relation between the agent's conduct and the prohibited act or result. Instead of explaining the defence of a defendant who suffers an epileptic seizure for the first time and thereby violates a criminal statute by saying that the seizure breaks the chain of causation, Robinson would give such a defendant an excuse on normative grounds: the actus reus of whatever offence he commits may be satisfied, but the defendant has a defence based on lack of culpability.

Secondly, the stipulative aspect of Robinson's account would probably also mean that he is impervious to the problem of definition: he simply proposes a new statutory provision as the basis for liability. In this regard, it is as though Robinson had solved the definitional problem by drafting a new offence. His provision has the same effect it would if we simply rewrote the definition of burglary to make a defendant guilty of burglary if he 'entered or caused himself to enter a building'. This solution to the definitional problem comes full circle with Moore's solution: Robinson suggests drafting a provision to accomplish what Moore thinks is already implicit in the language in which offence definitions are presently couched. But by drafting a new provision, Robinson avoids making the implausible claim that Moore does, namely that 'causing oneself to take' is conceptually the same as 'taking', and that 'causing oneself to rape' is the same as 'raping'.

It is important to see, however, that Robinson has only superficially avoided the problems with Moore's account. For the causation and definitional problems will crop up in other forms. The causation problem will appear when we go back to strict liability crimes. Suppose once again that Decina had been charged with a strict liability homicide offence. It would

\textsuperscript{35} ibid. at 50.
seem to follow that if Decina innocently got in his car and drove, subsequently having a seizure for the first time, he would be guilty of homicide on the ‘causing-the-conditions’ analysis. After all, did he not cause the condition of his involuntariness defence by getting in his car and driving—precisely as he would have on Robinson’s account if he had been negligent or reckless? Robinson will probably want to deny that Decina would have caused the conditions of his own defence in this case. But on what basis can he do so? It would be ad hoc to say that a person only causes the conditions of his own defence when he is culpable in some way, since the analysis is supposed to be separate from mens rea. So, once again, the problem with arbitrariness and causation we saw on Moore’s account will reappear in Robinson’s account in the question of when a person has caused the conditions of his own defence.

Secondly, where the problem of definition is concerned in particular, there is reason to think that the difficulties have only been brushed under the rug. For even if Robinson’s approach achieves the desired outcome, this result is achieved on the basis of stipulation, rather than on the basis of existing doctrine. Indeed, notice that Robinson actually loses something to Moore by suggesting an entirely new provision to reach this result, since that seems to affirm that we cannot presently hold an agent liable for illegal conduct engaged in on the basis of contrived or anticipated involuntariness (a suggestion Moore would reject). Because I suspect that the legal cases of contrived involuntariness reflect a more fundamental moral problem with the notion of voluntariness, I do not think we can truly solve the problem by legislative fiat. Unfortunately we cannot solve moral difficulties by just drafting a new ‘morality’ provision.

Finally, while I shall not explore the matter here in any detail, someone might want to question whether the causing-the-conditions approach is even correct for justifications. Should a person who joins the police force hoping to have a chance to kill on valid law-enforcement grounds be guilty of murder on the basis of his culpable mental state in combination with his later prohibited act?\footnote{37} Should a person who intentionally enters a bad neighbourhood hoping for the opportunity to kill someone in self-defence be guilty of murder when he does? Allowing liability for later, prohibited conduct to be based on earlier conduct (i.e. rejecting concurrency) in the way that the causing-the-conditions analysis does creates a significant expansion of liability for what is on the face of it wholly legal conduct. Because Moore ultimately reaches the same results (albeit by a different route), this may be a drawback of his approach as well.

2. Treating a Person as His Own Accomplice

A second alternative to the orthodox approach would handle the problem of contrived involuntariness by making use of accomplice liability. We might

\footnote{36} Robinson (n. 11 above) at 33. \footnote{37} I am indebted to Leo Katz for this example.
think of the person who arranges to commit a crime while in a trance as analogous to someone who hires another to burgle or kill for him, with the difference that the person who actually commits the criminal act is the defendant himself. Instead of two separate people, we just have one person in two very different states of mind. Moore himself makes a suggestion along these lines. Referring to the earlier example of the person who wants to take advantage of the storm that blows a roof off a house and onto a workman, he says that it should be 'enough for liability' that 'one has made it easier ... for the storm to cause its harm, and one has done so with the specific intent that this happen'. Moore suggests the move to accomplice liability because it is 'non-causal' in the relevant sense. If a person can be his own accomplice, it will not matter if his plan involves an involuntary act that breaks the chain of causation; the principal's act always breaks the causal link between the accomplice's conduct and the prohibited result, assuming that the principal is not an innocent agent. By invoking accomplice liability, we eliminate causation altogether.

There are, however, several problems with this suggestion. First, in a normal case of accomplice liability, the principal is also responsible for the crime. In the case of contrived involuntariness, however, we want to hold the 'accomplice' liable precisely because the 'principal' is not himself a responsible agent. Secondly, as Moore himself admits, arguably non-causal liability should only be available where the defendant intends the harm. In accomplice liability, for example, Moore says that 'we can relax our normal causation requirement ... only because of the high level of culpability with which the aider acts'. Thus Moore's suggestion would treat cases of contrivance differently from cases of anticipation like Decina. For defendants like Decina, Moore is in agreement that we cannot determine whether the involuntary condition is an intervening cause by looking at the defendant's prior mental state. Turning to accomplice liability to find a non-causal basis for liability would not entirely solve the problem even if successful, since it would not cover the range of cases we need it to cover.

There is, however, a version of Moore's appeal to accomplice liability that may be more helpful here. The form of accomplice liability where the principal is an innocent agent, such as a child or an insane person, may capture the contrived and anticipated involuntariness cases better than the ordinary accomplice doctrine. First, many innocent agents are not responsible for their own conduct, and that is particularly why we must be able to hold the accomplice liable. Secondly, innocent agent liability does not require the accomplice to have the mens rea of intent. A person who arranges for a child or an insane person to commit a crime is as guilty of the crime as he would be had it been committed by his own hand. But a person who is merely aware that

---

38 Moore (n. 21 above) 30.
39 ibid.
40 I am here concerned with the paradigm case of the innocent agent—the irresponsible agent. Not all innocent agents are irresponsible, however.
a child will commit a crime, where he is responsible for the behaviour of the child, can be held liable for that crime at a level of culpability that matches his mental state.\textsuperscript{41} The parent who is aware of a risk that his child will commit a criminal act may be liable for a crime of recklessness on the basis of the child’s behaviour. Unlike ordinary accomplice liability, the innocent agent becomes an extension of the defendant’s will.\textsuperscript{42} Thirdly, innocent agent liability is causal: the intervening act of the innocent agent is not thought to break the chain of causation. If we think of a defendant who contrives his own involuntariness defence as an accomplice to an innocent agent, we would not need to worry that the involuntary act broke the chain of causation. And under this approach, we would still avoid the definitional problem we would face with ordinary principal liability. Liability for defendants who procure innocent agents to commit crimes is not based on the offence definitions themselves, but on separate accomplice liability provisions that create a basis for liability for the accomplice. Thus we would not lose the central advantage we might have hoped to gain by turning to accomplice liability in this context.

There are, however, a number of difficulties associated with thinking of a person as his own innocent agent. First, it is not clear that the innocent agent doctrine fits cases of contrived involuntariness very well, for precisely one of the reasons mentioned as a benefit above, namely that the innocent agent doctrine is causal. If we wish to maintain that involuntary conditions sometimes break the chain of causation, then we do ultimately need to find a basis for liability that is non-causal in order to hold people liable who contrive their defences. Secondly, the innocent agent doctrine seems unduly broad if it allows a defendant to be convicted for the conduct of an innocent agent on the basis of a lower \textit{mens rea} than purpose or intent. In particular, holding a defendant liable for conduct he merely suspects the innocent agent will engage in is tantamount to imposing an extensive duty to rescue on defendants who learn of innocent agents who inflict harm. True, a person must have a special relationship to an innocent agent in order to be responsible for his actions. But, apart from mental state, those requirements do not seem terribly robust.\textsuperscript{43} The natural response would be to restrict the \textit{mens rea} for accomplices to purpose or intent. But in this context that would be problematic, since it would create an asymmetry between cases of contrived involuntariness and cases of merely anticipated involuntariness.

\textsuperscript{41} See MPC s. 2.06(2): ‘A person is legally accountable for the conduct of another person when: (a) acting with the kind of culpability that is sufficient for the commission of the offense, he causes an innocent or irresponsible person to engage in such conduct’.

\textsuperscript{42} The Model Penal Code holds a defendant liable for the behaviour of an innocent agent that he causes, as long as the defendant is ‘legally accountable’ for the innocent agent: MPC s. 2.06(1), (2)(a).

\textsuperscript{43} This difficulty is admittedly not specific to the innocent agent solution. Indeed, in the context of self-induced irresponsibility, the duty to rescue is arguably more palatable than it would be in an ordinary case of accomplice liability across persons, because at least here the defendant would have caused the harm to the victim in his role as innocent agent. Nevertheless, it remains an objection to the innocent agent approach.
We have explored two different approaches to the lack of a voluntary act defence that purport to avoid the problems with causation and definition we saw on the orthodox approach: first, an account that would treat lack of voluntariness as analogous to a culpably caused justification and, secondly, an account that would treat the defendant as his own innocent agent. Both approaches are problematic, as we have seen. Like these two accounts, the solution I shall present in section D seeks to avoid making the availability of the lack of voluntariness defence hinge on whether we say that the involuntary condition breaks the chain of causation. The greater difficulty will be the definitional hurdle—how to find that a defendant satisfies an offence definition on the basis of prior non-criminal conduct that causes it.

D. The Redescriptive Test

According to the prevailing account of action in the philosophical literature, an action is a type of event, and events are ‘particulars’, meaning that they are individual items or unrepeatable things, identifiable by phrases like ‘the accident that occurred on the Bay Bridge at four o’clock yesterday’. Like other particulars, such as chairs and tables, events can be described in many ways, depending on which of their various aspects enter into the description. I might describe the chair on which I am sitting as a black leather object commonly found in offices, or an item to accompany a desk, or in any number of other ways, depending on its various attributes. Similarly, events can be described in terms of their attributes, such as the time or the place of their occurrence. A solar eclipse might be described as the event that occurred at two o’clock, or the event that was visible from such-and-such location, or the event that caused the sun’s light temporarily to disappear, and so on.

Now actions can be picked out from other events by a particular feature they have: every action has at least one true description under which it is something someone did intentionally. For example, I might back down my driveway and run over the newspaper lying in the way. ‘Running over the newspaper’ is one way of describing the action I perform, but it is not the description under which my action is intentional. ‘Backing down my driveway’, ‘releasing my foot from the brake pedal’, and other descriptions do pick out things I intended to do. They consequently yield descriptions under which my action is intentional. Generally, then, we can say that an event is an action as long as there is a description of it under which it is an agent’s doing something intentionally.

---


45 This test for the identity of actions is the dominant one among philosophers, and I fully subscribe to it for present purposes.
How, then, does this framework apply to the kinds of bodily movements a person makes in her sleep or while suffering an epileptic seizure? The question is whether there is a description under which such movements can be understood as intentional. Clearly there cannot be. At the moment that the agent suffers an epileptic seizure, there is nothing she is trying to do, no purpose her movements seek to fulfil. We can now see that the expression ‘involuntary action’ is confused: the movements of a person experiencing an involuntary condition, like epilepsy, are not intentional under any description, and consequently they cannot be regarded as actions of any sort. This should also help clarify why I have been insisting that we cannot treat lack of voluntariness as a mens rea defence: to say that the person has a mental state defence presupposes that what she does is an action, and that would mean that there is a way of describing the defendant’s behaviour under which it is something she did intentionally. Where movements performed in the grip of an involuntary condition are concerned, however, there is no possible intentional description, and thus there is no action and no prohibited action (actus reus) either.

Now that we have clarified the notion of voluntariness, the problem of contrived or anticipated involuntariness can also be usefully clarified. Suppose a person performs a voluntary act—visiting a hypnotist—for the purpose of committing a crime later while in an involuntary state—poisoning his wife’s tea while in a trance. The question we must ask is whether the prohibited conduct, ‘causing the death of another human being’, is one description of the action the defendant performed at the earlier time. The question, in other words, is whether the act describable as ‘seeing a hypnotist’ can also be described as ‘causing the death of another human being’. If so, the defendant killed voluntarily, since killing is one description of an action the defendant performed. If not, the defendant did not kill voluntarily, since ‘killing’ does not identify an event that has a description under which it was something done intentionally. The question, then, is how we decide whether visiting a hypnotist can be described as ‘killing’, when it leads to a person’s death.

Here is the standard answer in the philosophy of action. A moves his index finger on a particular occasion, with the result that a gun he is holding fires, causing the death of a person he was targeting, and frightening a squirrel. The action of A’s moving his finger can be redescribed in terms of each one of these consequences, respectively: A fires a gun, kills a human being, and frightens a squirrel. In describing each consequence of a person’s action as something the agent does, we have eliminated the causal element from our description. Thus instead of causing the gun to fire, the agent can be said to have fired the gun. By describing an action in terms of its consequences, we expand the actor’s agency. Joel Feinberg once called this phenomenon the ‘accordion effect’: the further down the chain of consequences we move in describing a person’s act, the further we pull the accordion. In this way, we extend the scope of a person’s agency to encompass the consequences of his action.
How far does a person's agency extend? Can it be extended to cover all of the consequences of a person's action? Philosophers writing on this topic have traditionally assumed so: they have written as though an action can be redescribed in terms of any state of affairs the action helps to produce.\footnote{Donald Davidson, 'Actions, Reasons and Causes', Essays on Actions and Events (Oxford, 1980) 3. I am leaving overdetermination cases to one side, where matters are vastly more complicated.} If we take this view, then seeing the hypnotist would surely be 'causing the death of another human being', in the sense the murder statutes require, as long as seeing the hypnotist helped to produce the death. But we cannot accept this conclusion for purposes of criminal liability, since it casts the net of agency too broadly. To put the point in causal terms, it captures only (roughly) the notion of 'actual' or 'but for' causation. It does not capture the property that the further requirement of 'proximate cause' is meant to capture. Any causal term in an offence definition will normally be thought to imply the latter, and not just the former.

It should not, however, be necessary to add the rather imprecise requirement of proximate cause to this picture. For we can reach the same result on grounds of redescription alone. Roughly where the lawyer wants to say 'no proximate cause', the philosopher should notice that the redescription of an action in terms of its consequence seems to fail. Consider the following examples. Conceiving a child will (eventually) result in the child's death, but we would not want to describe it as 'killing the child'. Firing an employee may cause his minor children to starve to death. But we would not normally describe the act of firing the employee as 'starving some children to death'. Giving a depressed person a gun may result in the latter's death. But unless one wants to be rhetorical, it would be odd to describe the act of giving the gun as an act of 'killing'.\footnote{Of course, there is a trivial sense in which we can redescribe an act in terms of each one of its consequences: we can simply describe it as the action that produced that consequence. But that is not the sort of description that spreads agency in the relevant sense, and so is not what philosophers mean when they speak of redescription as the mark of agency.} Contrary to what philosophers of action tend to think, then, agency does not spread from an act to all of its consequences, since we cannot describe an act in terms of all of its consequences. If a consequence of an act is just some state of affairs produced by it, then we must conclude that some of the consequences of an action are simply beyond agency's reach.

The phenomenon we have been observing seems fundamental, and yet action theorists appear to have overlooked it. It is that limitations on our own responsibility are built into the linguistic expressions we use to capture agency—the same limitations the notion of proximate cause is meant to capture. When we translate impersonal causal statements into statements of agency, we can see that the latter fail to track. Agency simply is not reliably spread along (necessary) causal lines. The result is that in any case in which we have a sequence of events, each of which is a necessary cause of the next, we will sometimes want
to divide that sequence up into different redisscriptive segments. In the cases in which causal relations do not translate into agnissive relations, there appears to be a break, such that while redescription is possible on the near side of the break, we cannot redescribe in the relevant way across it. Rather than scrutinizing the obscure notion of proximate cause in order to determine whether an involuntary condition impairs responsibility, we can address the question of agency more directly. We can determine whether a defendant's voluntary performance of an earlier act is sufficient to make his performance of the later, prohibited act it causes voluntary by asking whether the earlier act can be redescribed in terms of the later one. The cases in which it can are the ones in which the performance of the prior act is sufficient to make the latter act voluntary. The cases in which it cannot are the ones in which the performance of the prior act is not sufficient.

Let me be clear about what the redescriptive account does and does not do. First, what it does not do. Understanding the lack of a voluntary act defense in terms of failures of redescription does not give us any new substantive grounds for determining when the voluntariness of the earlier act carries over to the later. I am prepared to allow that something like Hart and Honore's criteria for determining when an intervening cause breaks the chain of causation will also determine when redescription succeeds or fails: it may fail in those cases involving a wrongful intervening act of another agent, as well as where the intervening factor is an abnormal event or 'coincidence'. So it is not intended to provide a new, substantive test for sorting the cases into the categories of 'liability' and 'no liability'.

What it does do, however, is to provide an explanation for the way we already do sort the cases. In particular, it allows us to explain why at least some of the problems we saw on the orthodox approach do not threaten to make the voluntariness requirement in criminal law entirely arbitrary, as the critics warn. On the orthodox approach, we saw that if we wish to retain both the treatment of contrivance and that of strict liability the case law reflects, we would have to say that whether the defendant's action was the cause of the prohibited harm may depend on his prior mental state. This is deeply problematic. But if we think of the relation that is broken as agentive, rather than causal, the cases may look less puzzling. For we can then say that the wrongful act of another agent or an abnormal intervening event prevents the defendant's agency from spreading from his prior voluntary act to the act prohibited by law. There is no problem with causation, since the only causal notion we require is 'but for' causation, and that is present in all the cases.

48 Once again, I am here ignoring the problem of overdetermination, and simply assuming that the preliminary causal notion is 'but for' causation. Ultimately we would have to refine the underlying causal story to take such cases into account.

49 See H.L.A. Hart and Tony Honore, Causation in the Law (Oxford, 1989) 68 ff. Moore modifies Hart and Honore's account in various respects, but these alterations are not relevant for our purposes.
In this way, we can reconcile the various cases without having to say that in one case Decina's driving is not the proximate cause of the children's deaths and in the other case it is. In both cases, Decina's driving is the 'but for' cause of the deaths. But in one case, the driving constitutes Decina's killing the children and in the other case it does not, given that in one case we can redescribe Decina's driving as killing and in the other case we cannot. On the face of it, we need not think it impossible that the two cases should differ as a function of Decina's mental state. For Decina's advance knowledge of his condition might plausibly make a difference to whether his agency spreads from driving to killing. We are thus able to retain the law's existing approach to contrivance and strict liability, without having to choose between them for each involuntary condition.

Let us now turn to the second problem we discussed, the definitional problem, and ask whether the redescriptive test allows us to make any headway here. Casting the problem in terms of redescription, instead of causation, helps make clearer the nature of the difficulty. Unfortunately, however, I do not think it will take us all the way to a solution. Indeed, it seems to drive home just how hard a problem it really is. Suppose a statute defines theft as follows: 'A person is guilty of theft if he unlawfully takes, or exercises unlawful control over, movable property of another with purpose to deprive him thereof'. The voluntariness requirement as applied to this crime means that the defendant must take or exercise control over movable property voluntarily. Now suppose a person goes to a hypnotist and has himself programmed to take someone else's property. The question with which we have been grappling is whether the defendant's voluntary act of visiting the hypnotist is sufficient to allow us to say that he voluntarily 'takes or exercises unlawful control over' the property of another. To put the problem in terms of redescription, the question is whether seeing a hypnotist can be redescribed as taking the jewellery. It seems difficult to locate the defendant's satisfaction of the actus reus in the performance of the earlier act. For it seems implausible to say that seeing a hypnotist is taking movable property.

I think it may be correct to suppose that if the defendant hypnotizes an innocent agent to take the jewellery, we might allow that the defendant has 'taken' it when the hypnotized agent removes it from its owner. The verb 'to take' is at least somewhat flexible with regard to the manner in which a person engages in it. And arguably one might extend this to cover ordinary accomplice cases. The person who engages another person to take jewellery has arguably 'taken' the jewellery when the jewellery is taken by his associate. But this does not seem to solve the hypnotist case. For even if someone else's taking the jewellery can constitute my taking it, seeing a hypnotist (or even hypnotizing oneself) cannot. What makes us comfortable saying that the defendant has taken jewellery when someone he has commissioned takes it, is

\[50\] MPC s. 223.2(1).
that other agent has taken it. That is, we can say the defendant engages in taking because his taking is parasitic on someone else's taking. The latter's act is an extension of his will. (Ironically, then, for certain verbs like 'take', it might be that a defendant can satisfy the actus reus without physically himself satisfying its requirements. For these offences, then, accomplice liability provisions would be redundant.) But where the 'taking' is done in a trance, there seems to be no taking at all by anyone. We cannot establish liability without special provisions. For we still need a way to say that a person voluntarily takes jewellery in virtue of having himself voluntarily programmed through hypnosis to take it, since the defendant's act of seeing a hypnotist does not itself satisfy the offence definition.

The reductive test allows us to see more clearly why there is a problem here, and in particular, why the problem is not limited to conduct crimes. A minimum condition for redescribing an act as one of taking property is that the time and place at which the act is performed are also the time and place at which the property is taken. Let us focus for the moment only on time. The time at which the defendant visits the hypnotist and the time at which the property is taken are not the same. The property is only taken after the visit to the hypnotist occurs, namely when the defendant removes it from its owner in his hypnotized state. Now compare this with a result crime. In a result crime like homicide, a time-lag between act and result seems to be less problematic for purposes of redescription. A person can poison another, thereby killing him, even if the latter does not die until a week after the poisoning. It is not hard to accept that the act whereby the man poisons his wife is the act whereby he kills her, even though the latter description does not emerge until she dies. But the accordion cannot be infinitely stretched to the left: if a man goes to a hypnotist to receive a suggestion that he poison his wife's tea, his act of seeing the hypnotist is not redescribable as an act of killing. Seeing the hypnotist is the act whereby he causes himself to perform the act whereby he kills her. The act whereby he kills her is still the act he performs when he poisons her tea.

The question still remains, then, whether the man poisons his wife's tea voluntarily when he does so in a trance. On the one hand, we probably want to say that in the case in which he has himself hypnotized to put poison in his wife's tea, he does poison her tea, and hence kills her, voluntarily. And I think we should say this, even though were someone else to decide to put him into a trance and cause him to put poison in his wife's tea, he would not have done so voluntarily. On the other hand, we probably also want to say that the moment at which he kills her is the moment at which he puts the poison in the tea, not the moment at which he visits the hypnotist. So what we want to be able to say is that he killed voluntarily on the basis of putting poison in the tea in an involuntary state. The problem is that we have no way of explaining how this could be so, given that at the moment that he poisons the tea he performs no action. The same goes for the contrivance version of Mrs Cogdon.
We want, on the one hand, to say that she killed her daughter voluntarily if she contrived to do so in her sleep. But she does this at the moment she brings the axe down on her daughter’s head, and not a moment before. It is not clear, then, how we can say she killed voluntarily, given that at the time she wielded the axe, she was sound asleep. Similarly, I suspect that the person who has himself hypnotized to burglar does enter a building voluntarily. But he does this at the moment at which he enters the building, despite the fact that he is in a trance, and not at the moment at which he has himself hypnotized. Nevertheless, we have no easy way of understanding how this can be so, given that the defendant’s seeing the hypnotist cannot be redescribed as his entering the building, and given that normally a person does not perform voluntary acts while in a trance. The causation problem may be surmounted, but the definitional puzzle, as far as I can tell, remains intact.