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VOLUNTARY ACTS AND THE CRIMINAL LAW: JUSTIFYING CULPABILITY BASED ON THE EXISTENCE OF VOLITION†

Kevin W. Saunders*

A voluntary act, or a volition, is an essential requirement for criminal culpability. The requirement of volition, however, appears to raise certain philosophical difficulties. Scholars suggest that the lack of a volition should not prevent an act from being criminal because acts are generally not accompanied by volition. Another problem is that allowing culpability to turn on the existence of a volition appears to assume a solution to a core philosophical problem—the mind-body problem. Professor Saunders addresses these issues in two parts. First he argues that volition accompanies normal acts and the lack of volition is a reasonable basis for refusal to find culpability. Professor Saunders then demonstrates that criminal law circumvents the mind-body problem without assuming a solution to that problem.

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I. INTRODUCTION

The concept of the voluntary act† lies at the very foundation of

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1 Some commentators would consider “voluntary act” to be redundant in that an act always involves volition. See, e.g., O.W. Holmes, The Common Law 54 (1881) (“An act . . . imports intention. . . . A spasm is not an act. The contraction of the muscles must be willed.”). Under this
the criminal law, since "[t]here cannot be an act subjecting a person to ... criminal liability without volition." This requirement can be found in both the Model Penal Code (Code), which states that "[a] person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable," and in the statutes of various states. Thus, the law treats volition or the voluntary act as crucial in the decision to impute culpability. Yet, the philosophical problems inherent in a view that treats volition in this manner must be examined before that position can be taken as justified.

In attempting to find the central role of volition, one might try to treat volition and mens rea as identical, but, while overlapping, these

view, if there is no volition, there may be action, but there is no act. The dispute is semantic—whether the names to be attached to two types of events are "actions" and "acts" or "acts" and "voluntary acts"—and, so long as terminology is used consistently, no problem should arise from either choice. Here, "voluntary act" will be taken as nonredundant. Acts will include actions while unconscious, during a seizure, etc. Voluntariness, rather than being necessary to an act, will be taken as a property of certain acts.

2. Bazley v. Tortorich, 397 So. 2d 475, 481 (La. 1981). See People v. Grant, 71 Ill. 2d 551, 377 N.E.2d 4, 8 (1978) ("Certain involuntary acts, i.e., those committed during a state of automatism, occur as bodily movements which are not controlled by the conscious mind. ... [A] person, in a state of automatism, who lacks the volition to control or prevent his conduct, cannot be criminally responsible for such involuntary acts."); Corder v. Commonwealth, 278 S.W.2d 77, 79 (Ky. 1955) ("[A] person can not be held criminally responsible for acts committed while he is unconscious."); People v. Carlo, 46 A.D.2d 764, 361 N.Y.S.2d 168, 170 (1974) ("Criminal liability requires at the very least a 'voluntary act'."); People v. Marzulli, 76 Misc. 2d 971, 351 N.Y.S.2d 775, 776 (1973) ("[A]n involuntary act is not criminal."); State v. Peterson, 24 N.C. App. 404, 210 S.E.2d 883, 886 (1975) ("[A] person cannot be held criminally responsible for acts committed while he is completely unconscious ...."); Greenfield v. Commonwealth, 214 Va. 710, 204 S.E.2d 414, 417 (1974) ("Where not self-induced, unconsciousness is a complete defense."); State v. Utter, 4 Wash. App. 137, 479 P.2d 946, 950 (1971) ("An 'act' committed while one is unconscious is in reality no act at all. It is merely a physical event or occurrence for which there can be no criminal liability.").


4. Id. § 2.01(1).

5. See, e.g., Cal. Penal Code § 26 (West 1970 & Supp. 1987) ("All persons are capable of committing crimes except those belonging to the following classes: ... Persons who committed the act charged without being conscious thereof."); Nev. Rev. Stat. Ann. § 194.010 (Michie 1986) ("All persons are liable to punishment except those belonging to the following classes: ... Persons who committed the act charged without being conscious thereof."); N.Y. Penal Law § 15.10 (McKinney 1975) ("The minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which he is physically capable of performing."); Okla. Stat. Ann. tit. 21, § 152 (West 1983) ("All persons are capable of committing crimes, except those belonging to the following classes: ... Persons who committed the act charged without being conscious thereof."); S.D. Codified Laws Ann. § 22-3-1 (Supp. 1987) ("Any person is capable of committing a crime, except those belonging to the following classes: ... Persons who committed the act charged without being conscious thereof.").

6. The mens rea or "guilty mind" is the mental state required as an element of a crime. See, e.g., W. LaFave & A. Scott, Criminal Law § 3.4, at 212 (2d ed. 1986).
concepts are actually distinct. *Mens rea* seems to require volition. If an act (or omission) is not even voluntary, it could not have been done (or omitted) with the degree of intent required for *mens rea*. However, volition does not require *mens rea*, that is, an act may be voluntary and yet *mens rea* may be lacking. For example, an individual may throw a javelin with only the intent to participate in an athletic competition. After making sure that no one is in his path, the athlete throws the javelin and impales a bystander who runs across the range after the javelin has left his hand. The athlete has no intent to cause the death of the bystander, nor is he even negligent. There is no *mens rea*, yet the throw seems to be a voluntary act. Volition, then, is logically a necessary, but not a sufficient condition for finding *mens rea*.

Although there is a logical relationship between volition and *mens rea*, the existence of any relation between volition and *actus reus* is of particular interest. This is not because volition must be viewed as part of one but not of the other. Professor Glanville Williams argues that volition is necessary for both *mens rea* and *actus reus*, and that it is sufficient for neither. The particular importance of volition to *actus reus* springs, instead, from other sources.

First, any relation between volition and *actus reus* adds a new element to the analysis of *actus reus*, whereas the relation to *mens rea* does not require further analysis that is different in kind. Since the analysis of volition and *mens rea* both require insight into mental states, a conclusion that volition was absent could just as easily be

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9. See infra notes 51-70 and accompanying text.

10. The *actus reus* or “guilty act” is the act that must occur before criminal liability may attach. Thinking about burglarizing a home is not a crime until the thinker acts on the thought. In some cases an omission rather than an affirmative act may serve as the basis for criminal liability. See generally W. LaFAVE & A. SCOTT, supra note 6, §§ 3.2-3.3, at 195-212.

11. See G. WILLIAMS, CRIMINAL LAW §§ 8, 17, 157, at 11, 36, 482 (2d ed. 1961). Williams is, however, critical of some applications of this view. See id. § 9. See also infra notes 7-9 and accompanying text for the necessity of volition to *mens rea*, and infra notes 51-70 and accompanying text for a discussion of the necessity of volition to *actus reus*.

12. The insufficiency of volition as *mens rea* is discussed in the text accompanying supra note 9. The insufficiency of volition as *actus reus* should be clear. Simply willing an act, assuming acts are willed, is not an adequate basis for even an attempt conviction. See infra notes 48-101 and accompanying text. Volition must be accompanied by at least some motion—criminality requires an act, and whatever else it may be, “[a]n act is a muscular contraction.” O.W. HOLMES, supra note 1, at 54.
phrased as the more general conclusion that there was no mens rea. In contrast, the inclusion of volition as a part of actus reus adds a mental element to what would otherwise be purely a question of the occurrence of physical events.

Second, not all crimes require mens rea. It is to these crimes of strict liability that the relation between volition and actus reus is particularly important. If volition is necessary to actus reus, then there is a mental element necessary even to strict liability offenses. Without volition, there is no act attributable to the individual on which liability may be based.13

Finally, the relation between volition and actus reus may have an effect on the admissibility of evidence in a criminal trial. For example, in one case, the defendant in a burglary trial claimed that he entered the dwelling in a state of automatism.14 In response to that defense, the prosecution offered evidence of the defendant’s prior burglary convictions. On appeal, the conviction was overturned because similar prior convictions were admissible only to refute a claim of lack of mens rea, and in this case the defendant claimed he lacked actus reus.15

This importance of volition to actus reus is of academic interest only, unless the concept has some effect in the application of the law. Despite blanket hornbook claims, such as “it is clear that criminal liability requires that the activity in question be voluntary,”16 and the Model Penal Code position17 that appears to require a voluntary act

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13. Furthermore, the relation of volition to actus reus may have an effect on the use of the insanity defense. If the insanity defense negates only mens rea, while a lack of volition negates actus reus, then the proper verdict, when volition is lacking, is an unconditional acquittal rather than an acquittal by reason of insanity. See J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 449 (2d ed. 1960); Fox, Physical Disorder, Consciousness, and Criminal Liability, 63 COLUM. L. REV. 645, 652 (1963). The distinction between insanity and automatism is not always easily drawn. For a discussion of this distinction and its difficulties, see Holland, Automatism and Criminal Responsibility, 25 CRIM. L.Q. 95 (1982-1983); Lederman, Non-Insane and Insane Automatism: Reducing the Significance of a Problematic Distinction, 34 INT’L & COMP. L.Q. 819 (1985).
16. W. LAFAVE & A. SCOT, supra note 6, § 3.2(c), at 197 (citing MODEL PENAL CODE § 2.01(1) (1962)). See Patient, supra note 7, at 28 (“Lack of voluntariness . . . negatives even actus reus.”).
17. See supra text accompanying note 4. See also MODEL PENAL CODE § 2.01(2) (1962) (cataloging nonvoluntary acts as “(a) a reflex or convulsion; (b) a bodily movement during unconsciousness or sleep; (c) conduct during hypnosis or resulting from hypnotic suggestion; (d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual”).
for *actus reus*, some scholars question the applicability of the doctrine. Most notably, Professor H. L. A. Hart has claimed that the "doctrine has only rarely been considered by the courts" and that he is "not convinced that the courts actually do accept [the] general doctrine." Some of Hart's skepticism may have been due to his failure to "find in any legal writings any clear or credible account of what it is for conduct to be voluntary . . . in the sense required." But, before turning to Hart's challenge to provide a credible account for the theory, the first charge—that the courts do not accept the doctrine—should be addressed briefly.

Hart is certainly correct in asserting that the courts do not often consider the doctrine that a voluntary act is a requirement for criminal liability. The issue arises in some instances, but courts often "seem . . . to dispose of the cases by quite a different technique," with the result that few appellate decisions reverse a conviction because of the lack of volition in the alleged *actus reus*. But, such cases exist, and in some cases in which convictions were upheld, they were affirmed based either on the existence of sufficient evidence for the jury to have found volition behind the defendant's acts, the self-induced nature of the unconsciousness which would otherwise have negated *actus reus*, or the failure to raise the issue at trial. In each

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21. See *supra* note 2.
23. See People v. Carlo, 46 A.D.2d 764, 361 N.Y.S.2d 168 (1974) (defendant, who had been given a hallucinogen, could not be convicted of assault and weapons possession since his acts were not voluntary); People v. Newton, 72 Misc. 2d 646, 340 N.Y.S.2d 77 (1973) (defendant, who had been a passenger on a Bahamas-Luxemburg flight diverted to New York, was not guilty of possessing a concealable firearm without a license, despite the fact that intent was not an element of the offense).
24. See Corder v. Commonwealth, 278 S.W.2d 77 (Ky. 1955) (jury instructions on involuntariness not required due to lack of evidence of unconsciousness); State v. Paterson, 24 N.C. App. 404, 210 S.E.2d 883 (1975) (sufficient evidence for jury to believe defendant was conscious at time of shooting).
of these cases the court at least considered the doctrine and felt compelled to explain why the doctrine did not apply.

Other possible explanations may account for the lack of appellate decisions turning on the concept of voluntary act. First, since the prosecution cannot appeal an acquittal, any case in which the defendant was successful with an involuntariness defense would not result in an appellate opinion. Second, it is not clear how often a prosecutor believed that there was no volition, and, either guided by a statute, or in an exercise of prosecutorial discretion, chose not to bring charges.

Even if there are very few cases in which a lack of volition plays a part in a decision not to press charges or is the basis for a verdict or an appellate decision, the concept is important in application. The analysis of what is missing in an involuntary act that leads to a finding of no criminal liability is inextricably tied to the analysis of what is present in the voluntary act that leads to imputation of criminal liability. The analysis provides some insight into the application of the law to the more common cases.

This Article is concerned with the analysis of the voluntary act. Section II isolates and defines the concepts involved in a thorough analysis of the voluntary act. The concept of act is defined, and volition compared and contrasted to intention. Section III discusses the relation between willing or volition and the voluntary act. A reply is offered to Hart’s argument that bodily motion generally is not willed and it is thereby shown that the distinction between voluntary and involuntary acts is meaningful.

Even having refuted Hart, however, a problem still remains. All that will be shown is that there is a correlation between volitions and voluntary acts. Yet, the establishment of culpability based on the existence of a volition appears to assume that the volition is also the cause of the act. That assumption ignores the mind-body problem, that is, the question of the relationships between mind and body and whether mental and physical events may cause one another. The long history of that problem as an unresolved philosophical question indi-

27. Such an appeal would violate the defendant’s guarantee against double jeopardy. See U.S. Const. amend. V. See also Fong Foo v. United States, 369 U.S. 141 (1962).
28. See supra note 5.
29. Prosecutors are allowed broad discretion in determining whether to press charges and are allowed to consider such factors as whether “a prosecution will promote the ends of justice, instill respect for the law” and comport with “policy [and] the climate of public opinion.” Pugach v. Klein, 193 F. Supp. 630, 634-35 (S.D.N.Y. 1961).
icates that it should not be swept aside lightly. In Section IV, criminal law concepts are employed to show that culpability may be based on volition without assuming any mind-body causation, thereby establishing a more philosophically secure basis for allowing culpability to turn on the existence of volition.

II. DEFINING THE TERMS

Before turning to an analysis of voluntary acts, the nature of act must be clarified. The volition involved in voluntary acts must also be distinguished from other mental events or attitudes that may accompany acts.

A. The Nature of Acts

General consensus is lacking regarding what constitutes an act. This dispute takes place on two levels. One level concerns the distinction between acts and actions, that is, whether the physical actions of a person are to be considered acts if they are not accompanied by volition. That question, too, may be viewed in either of two ways. It may be seen as a question of semantics—whether interactions of a human body with its environment should be split into two groups labelled “act” and “action” or whether the two groups should be labelled “voluntary act” and “act.” That semantic question will not be considered here, and this Article will simply call all human actions acts and will distinguish between those acts that are voluntary and those acts that are not. Alternatively, the question may be whether the act-voluntary act distinction is a meaningful one, that is, whether there really is a mental element, or any other foundation on which to base the distinction. That question is the focus of this Article and cannot be answered in this definitional Section without begging the question.

The dispute considered in this subsection is over the scope of the physical aspects of human acts. It is a dispute that may be laid out by considering the two extremes, as expressed by legal scholars. Justice Holmes takes the least complex view of acts: “An act is always a

30. See supra note 1.
31. This is the least complex view in the sense that other physical circumstances and consequences are not considered. In search of even less complexity one might argue that only a person’s mental acts should be considered. While such a view might be interesting to a philosopher of mind, it would be of little interest to criminal law, where a physical act is required before mental states become pertinent.
voluntary muscular contraction, and nothing else. The chain of physical sequences which it sets in motion or directs to the plaintiff’s harm is no part of it, and very generally a long train of such sequences intervenes.”³² Holmes’ view is not original; rather, it echoes Professor Austin, who states:

Most of the names which seem to be names of acts, are names of acts coupled with certain of their consequences. For example: If I kill you with a gun or pistol, I shoot you. And the long train of incidents which are denoted by that brief expression, are considered (or spoken of) as if they constituted an act, perpetrated by me. In truth, the only parts of the train which are my act or acts, are the muscular motions by which I raise the weapon, point it . . . and pull the trigger.³³

Contrasted to the Austin-Holmes view is that of Sir John William Salmond:

[For] some writers . . . the circumstances and consequences of an act are not part of it, but are wholly external to it. This limitation, however, seems no less inadmissible in law than contrary to the common usage of speech. We habitually include all material and relevant circumstances and consequences under the name of the act . . . not merely the muscular contractions by which the result is effected.³⁴

Salmond’s description of act thus includes: (1) a movement (or perhaps an omission); (2) certain circumstances existing at the time of the movement; and (3) certain consequences of the movement.

The advocates of Salmond’s view rest their position on two arguments. The first argument is that “[e]ven in common speech an act involves more than Holmes’s muscular contraction: it includes certain circumstances and consequences.”³⁵ The point is not without weight, but neither is it compelling. People commonly speak of moving a book or opening a door as acts. In these cases they are less likely to speak in terms of the contraction of certain muscles or combinations of muscles in a particular sequence. Rather, they refer to the consequence or the circumstance as the act. In other cases, however, people speak of acts in terms of the contraction of muscles. This speech is most likely to occur when coaching an athlete or describing aimless motion, that is, when the particular contraction requires con-

³². O.W. Holmes, supra note 1, at 91.
³³. 1 J. Austin, Lectures on Jurisprudence 290 (R. Campbell ed. 1874) (emphasis added).
³⁵. G. Williams, supra note 11, § 11, at 18. See supra text accompanying note 33.
centration or when it is difficult to select an identifiable consequence or goal in terms of which to describe the motion.

The "common usage" argument need not force the conclusion that an act includes circumstances and consequences. To conclude that it does is to focus on one particular usage of a word that in popular speech has several uses. Sometimes acts are described in terms of circumstances and consequences simply as a form of shorthand. When an act is described as "placing a book on the desk," more information is conveyed more quickly than would be the case in describing muscular contractions or bodily motions. When exact knowledge of the sequence of motions is not required, for example, when there is nothing peculiar as to how the book was placed on the desk, the shorthand is justified. However, the conclusion that an act must include more than bodily movements is not justified, and is not logically sound.

Once circumstances and consequences are required to be included in an act, logical bounds to the act disappear. The bodily motions most concisely described as changing a spark plug may also be described as making a living. The only reason to conclude that changing a spark plug is the best description of the act is that it is better shorthand. It appeals to common experiences which lead the hearer to understand what movements took place with minimal reference to intention or motive. Any use of shorthand beyond that necessary to describe concisely the movements involved is an emphasis on the intent or motive behind an act rather than a description of the act. Such an emphasis may at times be important, but that does not mean that an act must include the surrounding circumstances and resulting consequences.

The second argument in support of Salmond's view is based on legal definition and theory. In Salmond's words:

The act of the murderer is the shooting or poisoning of his victim, not merely the muscular contractions by which the result is effected. To trespass on another man's land is a wrongful act; but the act includes the circumstances that the land belongs to another man, no less than the bodily movements by which the trespasser enters upon it.

Salmond would be correct if he were proposing only that the circumstances and consequences are legally relevant. There are cer-

37. J. Salmond, supra note 34, at 370.
tainly legal differences between performing those bodily movements most easily described as firing a rifle when no one else is present, and firing a rifle when another person is present and hit by the bullet. While the bodily movements are the same, the circumstances and consequences lead to different legal conclusions. However, intent and perhaps a view as to how a reasonable person would have behaved also affect the legal conclusion. These latter factors, while legally relevant, are not viewed as part of the act itself. Accordingly, the legal relevance of the physical circumstances and consequences does not seem to require that they be viewed as part of the act.

Williams, while supporting Salmond's view, provides the key for responding to the second argument: "The muscular contraction, regarded as an actus reus, cannot be separated from its circumstances." He correctly asserts that actus reus includes circumstances and consequences, but that does not mean that an act must also be so inclusive. Even those who argue that acts are simply bodily movements would have to admit that acts are accompanied by circumstances and consequences. Concluding that acts are bodily movements simpliciter can be consistent with agreeing that the law requires actus reus which includes relevant circumstances and consequences.

Since the arguments for the Salmond view do not succeed in requiring the inclusion of consequences and circumstances in an act, the question of their inclusion is semantic. Austin may define actions as bodily movements and muscle contractions without regard to circumstances and consequences. An adherent to Salmond's view, now forced to recognize the separability of bodily motion from circumstances and consequences, may yet choose to retain the term "act" as applicable only to the whole complex. But, he must recognize a separable bodily-motion portion of the act. The choice of terms is less important than the recognition of separability. One must now simply choose, and make clear, how "act" is to be used. This Article adopts a version of the Austin-Holmes approach and defines an act as a muscular contraction or perhaps a series of muscular contractions.

38. G. Williams, supra note 11, § 11, at 19 (emphasis added).
39. See J. Austin, supra note 33, at 293 ("But every act is followed by consequences; and is also attended by concomitants, which are styled its circumstances."); O.W. Holmes, supra note 1, at 54 ("All acts, taken apart from their surrounding circumstances, are indifferent to the law.").
40. For a discussion of complex sequences of movements as basic acts, see infra notes 62-67 and accompanying text.
B. Volition and Intention

The definition of act leads to a particular view of the distinction between volition and intention. Since this Article has adopted a definition of act similar to Austin's, his theories on the distinction between volition and intention provide guidance in this portion of the analysis. According to Austin:

To desire the act is to will it. To expect any of its consequences, is to intend those consequences.

The act itself is intended as well as willed. For every volition is accompanied by an expectation or belief, that the bodily movement wished will immediately follow the wish.

Now the consequence of an act is never willed. For none but acts themselves are the appropriate objects of volitions. Nor is it always intended. For the party who wills the act, may not expect the consequence. If a consequence of the act be desired, it is probably intended. But an intended consequence is not always desired. Intentions, therefore, regard acts; or they regard the consequences of acts.41

Since acts and consequences are separable, they may be accompanied by different mental acts or states. As Austin indicates, consequences may be intended42 or unintended. But, acts may also be either intended or, in the case of a convulsion or reflex, unintended. According to Austin, the difference in the applicable mental element between physical acts and their consequences is that acts may be willed, whereas consequences are never willed.

It is not clear that Austin is correct. Arguably, one can will the death of another. However, absent some extraordinary psychic power, the consequence will not result from the willing of the act. Austin's view, however, is not defeated by the suggested argument. While desiring an act is willing it, and desiring a consequence may be intending it, there is a difference in the closeness of the connections between the desire that is will and the act willed and the desire that is intention and the consequence intended. The only desires immedi-

41. 1 J. AUSTIN, supra note 33, at 293-94.
42. See id. However, Austin's use of the term intended seems broader in scope than the common usage. Under his view, recklessness would be included as intention since, in such cases, the consequence is expected (all that is necessary in Austin's scheme), although it may not be desired.
ately followed by their appropriate or direct objects are volitions.\textsuperscript{43} Bodily movements—acts—may directly follow the desire for those acts. Consequences, absent psychic power, do not immediately follow desire. They require an act and some physical chain of cause and effect.

Intentions are positive mental attitudes regarding foreseen consequences of acts.\textsuperscript{44} Willing or volition seems to enjoy a closer, and perhaps even causal connection, to the act itself. Volition may be defined as “a mental state or process which expresses a propositional attitude and which tends to initiate behavioural episodes corresponding to the content of that propositional attitude”\textsuperscript{45} or as “a conscious or mental act which initiates and guides the physical change that is brought about deliberately in a physical act.”\textsuperscript{46} The nature of that connection or relation between volition and act is the subject of the remainder of this Article.

III. Volitions and Voluntary Acts: Correlation and Causation

The ascription of criminal liability based on the existence of a voluntary act would be on its firmest footing if a causal relation could be shown between volition and act.\textsuperscript{47} However, before turning to an examination of that possibility, it is necessary first to examine a looser connection. The philosopher David Hume argues that causality is nothing more than constant conjunction.\textsuperscript{48} While that conclusion is

\textsuperscript{43} Id. at 295-96. Of course, volitions are not always successful in bringing about the appropriate or direct objects. A paralytic may form volitions without the object muscle contractions coming to pass. Nonetheless, volitions are the only desires that may be immediately followed by their appropriate or direct objects. The desires that are intention cannot be followed so directly by their objects.

\textsuperscript{44} In criminal law, intention may include knowledge rather than desire (positive mental attitude). See W. LaFave & A. Scott, supra note 6, § 3.5(a), at 217.

\textsuperscript{45} Gorr, Willing, Trying and Doing, 57 Australasian J. Phil. 237, 237 (1979). Gorr also argues that volition and intention are not really dissimilar, id. at 248, but he seems more concerned with the explanatory use of the concepts. They are similar in that both concepts are useful in explaining what one may be said to do, but they differ in how closely connected they are to the act of doing. Gorr does not recognize this because he distinguishes willing from trying. See id. at 245-46. By so doing he turns willing into something like an intention to try, that is, he separates willing from the act to the point where it is no longer the volition.


\textsuperscript{47} If volitions cause acts, the mind is the causal agent. If volitions do not cause acts, the mind might be seen as approving the act but not involved and so, perhaps, not culpable. See infra text accompanying note 104.

\textsuperscript{48} See generally D. Hume, An Inquiry Concerning Human Understanding §§ 4-7 (C. Hendel ed. 1955).
open to debate, constant conjunction is at least a necessary aspect of causation. But, Hart's view calls into question even this weaker connection between volition and voluntary acts. Therefore, before turning to the question of strong causation, Hart's challenge must be met.

A. Correlation

Hart characterizes Austin's position on voluntary acts as follows: "Conduct is 'voluntary' or 'the expression of an act of will' if the muscular contraction which, on the physical side, is the initiating element of what are loosely thought of as simple actions, is caused by a desire for those same contractions." Hart attacks Austin's position, arguing that it runs counter to ordinary experience. Hart does not argue absence of any defect in instances of involuntary acts but that we cannot convey the difference between the normal case and these very abnormal ones, by saying that in the normal case there is a desire for the muscular contractions which is absent in the abnormal case. For the desire for muscular contraction as a component of ordinary action is a fiction.

Hart finds the desire to contract muscles to be very rare and that acts are normally performed without any such desire. He admits of instances in which it may be said that what a person did was contract his muscles, for example, in the furtherance of physical training or in the exertion of extraordinary force. But, in normal action, even an awareness of which muscles are contracted results only from performing an action and reflecting on what has occurred. In his view, normal actions are not subsumed under Austin's category of voluntary acts.

Hart offers an alternative theory. He suggests that those cases in which one would concede that an act lacks an element of will are "cases where muscular movements occur which form no part of any

49. It would be inconsistent to state that A is the cause of B, if A occurs, yet B does not, or if B occurs without A. Hence, A and B must be constantly conjoined before a claim of causation is reasonable.

50. See Hart, supra note 19; see generally Hart, supra note 20.

51. Hart, supra note 20, at 126.

52. Id. at 129.

53. Id. at 130-31. Hart is willing to accept a theory that normal action involves a desire to do something involving muscular contraction, but this theory would be unacceptable to Austin. See id. at 132.

54. See Hart, supra note 19, at 44-45.
action which the agent believes himself to be doing,”55 or are “not appropriate”56 to such action. But arguably, Hart’s criterion selects not only involuntary acts, but also some negligent acts.57 An act done without thinking may not be appropriate to an action in which the actor believes himself to be engaged, yet such thoughtless acts may be the basis for a finding of negligence, since they are not involuntary in the sense in which an actus reus may be found lacking. In Hart’s approach, volition or will is noncausal, which is consistent with his view that, even in normal cases, volition is lacking. If he is correct in the latter view, his appropriateness approach might have some value as a fallback position despite the noted shortcoming. However, Hart’s argument against even the constant conjunction variety of causation may be rebutted, thereby saving a role for volition and voluntary act in criminal law.

The only adequate response to Hart is to argue that volition does generally accompany acts. This occurs so regularly that the cases in which volition is lacking are described as cases in which no voluntary act exists, even though movement is present.

The philosopher Hugh McCann adopts this approach, arguing the existence of “sound evidence that acts of volition occur typically when bodily movements are performed.”58 McCann finds evidence for his conclusion in an analysis of the attempts of paralytics to contract their muscles. He argues that paralytics try to move, and in fact this is the only way that such a person learns he is paralyzed. Furthermore, he argues that the trying of a paralytic is not significantly different from the trying of nonparalytics.

According to McCann, the only difference in the trying of paralytics and nonparalytics is success. When the trying is unsuccessful, we are left with only the trying to discuss. But when the trying is successful, we are left with an action into which the trying is subsumed. McCann states:

With attempts at overt actions . . . it is generally the case that when a person tries to A and succeeds, his trying to A is not an entirely distinct action from A. Rather, it belongs to A, as part of the process which is the performance of A. To put it another way, when the agent succeeds, the

55. Id. at 46. For a similar approach, see A. MELDEN, FREE ACTION (1961).
56. Hart, supra note 20, at 134.
exercise of agency that is necessary for \( A \) to be an action at all is in the trying.\(^59\)

Further,

"trying" never names a unique species of action, but rather functions always as a general name for the business of going about the intentional performance of action . . . . We speak of trying only when we have occasion to distinguish this business from the actual, complete performance of an act, either intentionally or unintentionally. But it is present wherever action is undertaken: we try to do what, in acting, we are undertaking to do.\(^60\)

While McCann discusses trying, his conclusions apply to volition.\(^61\) After all, the mental activity of trying can be found only in volition.

Charles Ripley, another philosopher, offers an alternative counter to Hart's attack.\(^62\) He argues that, while all actions must be reducible to basic actions,\(^63\) those basic actions may be skilled actions, that is, "the class of basic actions is larger than that of mere bodily movements."\(^64\) His position is that "as skills are acquired, actions that are non-basic at the beginning of the learning process become basic . . . [and] the acquisition of [the] skill is often accompanied by a forgetting of the details of how the skilled action is performed."\(^65\)

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\(^59\) McCann, supra note 58, at 434 (emphasis in original). See also O'Connor, The Voluntary Act, 15 Med. Sci. & L. 31 (1975). O'Connor states:

Ordinary bodily movement is, in one sense, automatic. This means that one has no awareness of the series of events that precede it. It does not mean that the bodily movement is not caused by a series of precedent events and processes, merely that one has no reason to examine the causes of such movements. It is not until there is a breakdown or malfunction that one looks to find causes for abnormal behaviour just as one begins to concern oneself with the working of motor cars only when something goes wrong. Id. at 32.

\(^60\) McCann, supra note 58, at 436 (emphasis in original).

\(^61\) Volition is intentional: it counts as the basic move on the agent's part to execute what he plans to do. It thereby constitutes in itself an instance of what is called trying. And where success in overt action is achieved, volition is the fundamental causal means that leads to it. Id. at 437 (emphasis in original).

\(^62\) See Ripley, supra note 46.

\(^63\) A basic action is "[a] thing that we simply do without having to do anything else to make it happen." A. Flew, A Dictionary of Philosophy 36 (1979) (emphasis in original). A muscle contraction is then a basic action. Flew also includes, as an example, raising one's arm. See id. But, defining basic action to include such a complex of muscular contractions assumes the conclusion argued for in the text.

\(^64\) Ripley, supra note 46, at 141.

\(^65\) Id. at 142. Ripley is influenced by Annette Baier's account of the "gestalt lace-tier" who can tie his shoe laces but cannot describe the motions involved except by actually tying the laces. See Baier, The Search for Basic Actions, 8 Am. Phil. Q. 161, 166 (1971).
Ripley is not referring merely to intentions or to the physical descriptions of acts. Rather, “the object of volition changes as the skill of the agent increases.” If the object of volition changes, the volition itself must also change, since a desire for A and a desire for B differ, even when A is a part of B. Ripley’s position is that basic action is always accompanied by volition, but basic actions and volitions become more complex with increasing skill. If, as Hart suggests, one does not normally refer to volition or willing in contracting one’s muscles, it is only because those contractions are part of a basic action and the volition is aimed at the complex of contractions involved.

Ripley’s position seems superior to Hart’s. There is a certain artificiality to Hart’s assumption that the contraction of a single muscle must be the basic action at which volition is directed. Complex movement may sometimes be accomplished one contraction at a time, but skill is acquired through patterning. The wrestler concentrates on one movement and then on another, repeating them in more and more rapid succession, until the whole sequence flows from the decision to use the particular combination comprising the “move.” Similarly, and more simply, raising one’s arm may require contracting the biceps, the deltoid and the triceps. The combination of contractions results in the intended movement, and the combination is the object of volition. The individual does not concentrate on each muscle separately; rather, once the motion is patterned in early childhood, he concentrates on, or wills, the combination of contractions of which raising the arm consists. The volition that once would have been directed at the single contraction is so subsumed under the volition directed toward the complex series as to no longer be present. Yet there is still volition in each case of normal action.

The best response to Hart lies in a synthesis of McCann’s and Ripley’s positions. If, as McCann argues, one only speaks of trying when one is unsuccessful in the doing, then as skill is acquired, talk of trying decreases with regard to the individual contractions that make up the skilled action. Since there may still be some difficulty with the skilled action, there may still be an emphasis on trying with regard to the combination, but it, too, will decrease as success becomes more regular. Hart has not shown that there is a lack of volition in normal

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66. Ripley, supra note 46, at 145 (emphasis omitted).
67. W. F. R. Hardie argues that Austin’s theory does not commit him to holding that there must be an awareness of the individual muscular contractions involved in each of a person’s acts. See Hardie, Willing and Acting, 21 PHIL. Q. 193, 200-04 (1971).
acts but rather that there is a lack of *talk* of volition.\footnote{68} Because Hart is looking in the wrong place for such talk, and even when looking in the right place, talk may be absent while volition is present, Hart’s position loses its appeal.

Accordingly, Hart’s attack on Austin fails.\footnote{69} The lack of emphasis on volition in ordinary cases of bodily movement does not mean that volition is not present in all normal acts. Indeed, volition accompanies normal acts. And, as even Hart admits, volition is lacking in the abnormal cases. Consequently, there is constant conjunction or correlation.\footnote{70} However, correlation is not causation.

\footnote{68. Cf. Gustafson, *Voluntary and Involuntary*, 24 Phil. \& Phenomenological Res. 493, 498 (1964). Gustafson holds the position that acts are voluntary only when inculpation or exculpation is in order. This position also seems based more on when one *talks* of volition and may help explain Hart’s position that volition is not present in normal acts. Rather, since for most acts inculpation or exculpation is not at issue, there is simply no reason to speak of volition. See Melden, *Action*, in Essays in Philosophical Psychology 58, 74 (D. Gustafson ed. 1964). Melden argues that it is a context of moral rules and principles that leads us to treat bodily movements as acts. His position may also be taken as a conclusion regarding when one *talks* of volition. One does so only when there is a moral factor involved, and since most simple movements are of little or no moral concern, there is no talk of volition in “normal” cases.}

\footnote{69. Hart offers another criticism of Austin’s account. He argues that the account does not address omissions, that is, there is no criterion for saying that an omission is involuntary. See Hart, supra note 19, at 45; see generally Hart, supra note 20. But, as R. F. Stalley points out, “Austin . . . does not suggest that his account of action should be applied in this way . . . . Its purpose is simply to provide a distinction between positive acts and mere bodily movements.” Stalley, *Austin’s Account of Action*, 18 J. Hist. Phil. 448, 449 (1980). Indeed, Austin indicates that the analysis of omissions must be of a different nature. He states, “It follows from the nature of Volitions, that forbearance from acts are not willed, but intended.” 1 J. Austin, supra note 33, at 296.}

\footnote{70. Two types of acts seem troublesome to this claim. In the first, the actor’s motions are, in some sense, the product of coercion. He is threatened with death or some lesser harm unless he acts as directed. In the second, the body of an individual that is so absorbed in thought or preoccupied with concentration on some task as to have no awareness of his bodily motions moves in such a way that, absent that absorbed or preoccupied state, criminal liability would attach. Are these acts voluntary, and is there volition on the part of the actor? The presence of volition in the case of the coerced action does not present much difficulty. The actor does not lack the control missing in the cases of convulsion or movements while unconscious. There is volition; the actor has willed the contractions of the muscles involved. But, for the proposed correlation to hold, the act must also be voluntary. The coercion may seem to make the act involuntary, but the act itself, the contraction or complex of contractions, is best viewed as voluntary. Coerced and noncoerced acts do not differ because of the presence or lack of desire for the movements; rather, they differ because of reason(s) why those movements are desired. This is not even a difference in intent; it is a problem of motive. The analy-
Further analysis is needed to determine whether the close relationship between volition and voluntary acts is causal in more than

sis of the coerced actor's motives may be fraught with difficulty, but the act is voluntary under any of the definitions presented. See generally Thalberg, Hierarchical Analysis of Unfree Action, 8 CAN. J. PHIL. 211 (1978).

The act is voluntary under Austin's analysis because it is volitional, but that provides no insight, and using that fact to demonstrate correlation would involve circular reasoning. More interestingly, the act is voluntary under Hart's approach. The act is related to, or appropriate to, an activity in which the actor believes himself to be engaged. See supra text accompanying notes 53-56. The only difficulty is that the actor, in some sense, does not want to be involved in the activity in question. But this is not a factor for Hart in determining whether the act is voluntary. The act is also voluntary under a Moore-like approach that concentrates on whether the actor could have chosen to do other than what he did. See G. Moore, supra note 69; Gustafson, supra note 68, at 498-501; Sweeney, supra note 69.

The coerced actor may not be considered culpable, see generally W. LAFAVE & A. SCOTT, supra note 6, § 5.3, at 432-41, not because his acts are not voluntary; rather because they are justified or excused. The Model Penal Code's treatment of these areas supports this view. The Code treats coercion in the duress section, § 2.09, while involuntary acts are excluded from criminal liability in § 2.01. If the Code considered acts under duress to be involuntary, § 2.01 would make § 2.09 redundant (except as to the level of duress required). Rather, the listing in § 2.01 of the sorts of acts that are involuntary indicates that acts under duress are voluntary, and § 2.09 is needed to handle such cases. See MODEL PENAL CODE §§ 2.01, 2.09 (1962).

The case of the subconscious act is more difficult. One whose body moves, while the mind is totally engrossed in thought, appears to be lacking volition. The mind, so occupied, does not consciously will the movement, and this lack of volition is not the sort that may be addressed by finding volition in a more skilled basic action. It is not that the movement has been incorporated in a complex of movements and that the complex is willed. Rather, there appears to be no volition that would encompass the movement in question. Yet, the individual is not unconscious in the sense in which a sleep-walker is, nor lacking control in the sense in which one in the midst of a seizure is.

The problem seems to be the result of forcing a continuum of, or at least a natural tripartite division of, states of consciousness into a dichotomy of voluntary-involuntary, willed-unwilled or conscious-unconscious. Analysis of the in-between state or states of consciousness is sparse. One finds statements such as "one is not guilty of murder if he killed the victim while asleep or in the clouded state between sleeping and waking." W. LAFAVE & A. SCOTT, supra note 6, § 3.2(c), at 198. While this in-between state may be recognized, commentators generally place this state of consciousness in one of the two more defined categories. However, when the question to be answered—the existence or nonexistence of actus reus—is black or white, there is no room for shades of gray. The in-between cases must be placed in one of the two categories.

The best approach seems to be a case-by-case analysis of whether the defendant's state of mind was more like the conscious state or more like the unconscious. Suggesting criteria for that decision is beyond the scope of this Article, but an interesting analysis of the relationship between unconscious mental states and criminal liability is provided in Moore, Responsibility and the Unconscious, 53 S. CAL. L. REV. 1563 (1980). What is of importance here is that these subconscious acts do not require the abandonment of the claim of correlation between volition and voluntary act. When the jury finds volition, the act is considered voluntary; when the jury finds no volition, the act is considered involuntary.

While the suggested approach makes no contribution to this analysis of voluntary acts, neither is it question begging. The problem presented by the coerced act—the seeming combination of volition with an involuntary act—is not present here. There is no indication that acts in a "clouded state" might be volitional and involuntary or nonvolitional and voluntary. The correlation is still present and the problem is simply into which category the act should be placed.
the Humean sense. If such a relationship could be established, resting culpability on the existence of a volition would be on firm ground. If the mind, through its volitions, causes the body to act, the mind is culpable for those acts. If the mind is not so directly involved, allowing the mind to play such an active role in the attribution of actus reus is on less firm ground.

B. Causation

The search for a causal connection between volition and act has long been one of the central aspects of the mind-body problem. A volition is a mental event, while the acts considered here are physical events. For a purely mental event to cause a physical event would violate the principle of the conservation of energy. This has led some philosophers to adopt a monistic theory of mind and body with modern approaches arguing that there are only physical phenomena. That is, mental events are identical to a subset of physical events and the expressions that seem to distinguish the two distinguish only significance or connotation, while the references or denotations of the two types of expressions are identical.

A theory that places mental events within the realm of the physical has the potential to provide a causal relation between volition and act. But, some philosophers believe that an acceptable theory must be more than philosophical. References to consciousness in the causal

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71. See supra note 48 and accompanying text.
72. See, e.g., R. DESCARTES, MEDITATIONS (1641).
73. The theory of the conservation of energy, to state it simplistically, proposes that energy is not created (or lost) but is merely transformed from other forms of energy or matter. Assume that a purely mental event does not contain any physical matter or energy. For such a purely mental event to cause a physical event, which would involve energy on the physical plane, would be to create that physical energy in violation of the principle.
74. See, e.g.,男, The Mind-Body Problem in the Development of Logical Empiricism, in READINGS IN THE PHILOSOPHY OF SCIENCE 612 (H. Feigl & M. Brodbeck eds. 1953); Smart, Sensations and Brain Processes, 68 PHIL. REV. 141 (1959). For a more radical theory that even the significance or connotation is identical, see R. CARNAP, THE UNITY OF SCIENCE (1934).
process, it is argued, "will be useful only if supplemented by a scientific theory which locates the role of consciousness in the mechanism" and "a detailed delineation of the causal process that is characteristic of intentional actions is a problem mainly for the special science." That position may overstate the case for the problem under consideration. While a physicalist philosopher of mind might not be satisfied with a nonscientific theory, such a theory may be adequate in this context. The subject in this Article is the justification for asserting criminality only when an act is accompanied by volition. The problem is philosophical, that is, one of ethics or some related field, and a philosophical solution may be acceptable. The physicalist philosopher of mind is, in a sense, making a scientific claim that the mind has physical existence, and a scientific basis for that claim would be of great value. The concern here is one of moral justification. The conclusion that criminal sanctions are or are not justified is philosophical, and thus the analysis supporting that conclusion may be philosophical.

While a philosophical theory may be acceptable, no definitive philosophical solution exists, and like most philosophical problems, the issue may defy philosophical resolution. The allusions to a scientific theory, however, point out that, if a theory could be developed, it would be useful in providing a solution to the problem. Scientific evidence that provides a physical existence for consciousness or a causal connection between volitions and acts would make at least that aspect of the assertion of criminality less subject to debate.

Brain scientists generally have been reluctant to discuss such philosophical areas, but the place of consciousness in science has recently found a champion in Dr. Roger Sperry. In Sperry's view, brain science not only can, but must, include a place for consciousness. "Any model or description that leaves out conscious forces... is bound to be sadly incomplete and unsatisfactory." According to Sperry, consciousness and conscious phenomena are "built of neural and perhaps glial and other physiochemical

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75. Murphy, supra note 57, at 339.
78. R. Sperry, supra note 77, at 31.
events,"79 so they are clearly physical. They are found in the overall structure of the brain.

[T]he flow and the timing of impulse traffic through any brain cell, or even a nucleus of cells in the brain, are governed largely by the overall encompassing properties of the whole cerebral circuit system, within which the given cells and fibers are incorporated, and also by the relationship of this circuit system to other circuit systems. . . . [I]f one keeps climbing upward in the chain of command within the brain, one finds at the very top those overall organizational forces and dynamic properties of the large patterns of cerebral excitation that are correlated with mental states or psychic activity.80

Sperry theorizes there are many forces present in the brain, ranging from the simple to the complex, and the most complex are the forces of consciousness:

When trying to visualize mental properties . . . it is important to keep in mind the fact that all of the simpler, more primitive, electric, atomic, molecular, cellular, and physiological forces remain present . . . , but these lower level forces and properties have been superseded, encompassed, as it were, by those forces of successively higher organizational entities.81

Before turning to Sperry’s explanation of how consciousness relates to other brain processes, and how volitions could cause voluntary acts, the compellingness of his theory of consciousness will be explored. First, it is important to note that Sperry admits that he is taking “a stand that . . . goes well beyond the facts”82 and for which “[n]o direct empirical proof is available.”83 He also notes, however, that the opposing position, the behaviorist-materialist denial of a role for consciousness, has no proof either. “It comes down to a balance in credibility, all things considered, and . . . many of us have come increasingly . . . to regard this modified . . . concept of conscious mind as being more credible on several counts than the behaviorist view.”84

The lack of available proof might cause one to question whether Sperry’s view can be regarded as a scientific position, but lack of direct proof does not in itself prevent a theory from being scientific.

79. Id. at 65. Glial cells are the “non-neuronal cellular elements of the central and peripheral nervous system.” Stedman's Medical Dictionary 493 (4th unabridged Lawyers’ ed. 1976) (defining neuroglia).
80. R. SPERRY, supra note 77, at 33.
81. Id. at 35-36.
82. Id. at 31.
83. Id. at 66. See Sperry, supra note 77, at 532 (“the evidence at hand still falls far short of providing any full or final answer”).
84. R. SPERRY, supra note 77, at 66.
The explanatory entities behind a scientific theory are not directly observed, but their existence is accepted as the most credible explanation for those phenomena that are observed.\footnote{See, e.g., T. Kuhn, The Structure of Scientific Revolutions 16-18 (2d ed. 1970).} Seemingly then, Sperry's theory is as credible as any other scientific paradigm, perhaps enjoying less support than the more generally accepted ones. There is, however, a more serious problem.

Despite the protests of some philosophers,\footnote{See supra notes 75-76 and accompanying text.} the mind-body problem may be philosophical and not subject to scientific analysis. The situation differs from that of the ordinary explanatory entity. While there is no direct impression of those entities, for example, subatomic particles, there is evidence of their effects, for example, cloud chamber tracks. In contrast, in the mind-body problem, the most direct awareness is of one's own consciousness. How can consciousness then serve as an explanatory entity for less directly accessible phenomena?

When considering the consciousness of others, as Sperry does, the parallel to other explanatory entities seems reasonable. But the examination yields electric, atomic, molecular, cellular and physiological forces, cells, and organizational and dynamic properties.\footnote{See supra text accompanying notes 80-81.} This outsider's view seems to enjoy little correspondence to the insider's view of one's own consciousness. The centuries long history of the mind-body problem\footnote{See generally Shaffer, supra note 73.} indicates just how strained any asserted correspondence must be. The continued viability of the opposing schools of thought demonstrates that the competing positions may not be subject to the falsifiability that is an essential characteristic of a scientific theory.\footnote{See K. Popper, The Logic of Scientific Discovery (1959).}

Even if it should be concluded that Sperry's theory is not scientific, his views should not be dismissed. They are consistent with certain philosophical physicalist theories of mind\footnote{See generally Shaffer, supra note 73.} and transcend those theories only in suggesting the particular locus for consciousness. It would be worthwhile, for the moment, to accept those views and examine his theory of the causal power of consciousness.

According to Sperry, "conscious phenomena . . . interact on the brain process exerting an active causal influence,"\footnote{Sperry, supra note 77, at 533.} a causal influence that is possible in a physical theory of mind.
Mind moves matter in the brain in much the same way that an organism moves its component organs and cells, or a molecule governs the travel course of its own atoms, electrons, and subnuclear elements in a chemical reaction. In the case of conscious experience, it is the dynamic system properties of high-order cerebral processes that control their component neural and chemical elements.92

Sperry finds consciousness in the organization of the brain:

[This] is not meant to imply that the properties of consciousness intervene, interfere, or in any way disrupt the physiology of brain cell activation. . . .

. . . [T]hey do supervene. . . .

. . . [T]he individual nerve impulses and associated elemental excitatory events are obliged to operate within larger circuit-system configurations of which they as individuals are only a part.93

The causal power that Sperry finds in consciousness is Professor Edward Pols' "supervening, or governing, ontic power,"94 although, as Pols notes, Sperry has not really worked out the causal theory.95 Pols' theory, like Sperry's, attempts to explain situations in which events occur on several levels. Sperry and Pols propose that the higher levels influence the lower levels, but it is difficult to understand how there could be a causal influence. Even if events at one level cannot progress without progress at the other levels, that does not prove causation. Indeed, there is no principled way to decide whether level A is causing level C or vice versa. While Sperry is willing to allow interaction to work both ways,96 in any given interaction, one level event should be identifiable as the cause and the other level event as the effect. A theory in which it is as reasonable to declare that the voluntary act caused the volition as it is to declare that the volition caused the voluntary act does not provide the brand of causation sought here and may not be an advance beyond constant conjunction.97

92. R. SPERRY, supra note 77, at 66.

93. Sperry, supra note 77, at 533-34 (emphasis in original).


95. Id. Pols' view of Sperry's theory is based on his reading of Sperry, supra note 77, but Sperry's later work does not present any further development of a theory of causation. Sperry cites Pols in R. SPERRY, supra note 77, at 67, but he does not attempt to incorporate Pols' theory.

96. See R. SPERRY, supra note 77, at 92.

97. That is not to say that a causal theory in which it is impossible to identify which of two events is the cause and which is the effect cannot have any import. Constant conjunction may serve as a form of explanation of either event, given the occurrence of the other event. However, given the role causation would seem to play in the analysis of voluntary acts, see infra notes 104-05 and accompanying text, this nondirectional causation is inadequate.
The Sperry-Pols theory has problems even more basic than the lack of direction in causality. The theory fails to establish interaction between levels. Pols resorts to simply asserting his conclusion, stating, "If we are to take seriously the act of the total agent we must simply conclude that there is an 'influence' operating between levels that are simultaneous . . . ."98 The obvious and telling objection that the different levels are merely alternative methods of analyzing the same process is not adequately addressed. Pols' response is that "[p]robably anyone who made an objection of that kind would not be especially interested in talking about levels . . . ."99 Irrespective of the interests of the objector, the objection is valid and must be countered before Sperry's and Pols' causation may be regarded as established.

Consequently, at least two objections to Sperry's theory exist. First, his conclusion that consciousness has physical existence is not a scientific conclusion. This does not mean that consciousness is not physical, but that the conclusion is philosophical. Second, even accepting the physical existence of consciousness, causal connection has not been established scientifically or philosophically. Again, this does not mean that there is a lack of causation, but merely that, as Hume argues, when one looks for causation, all that may be found is constant conjunction.100

Accordingly, the search for causation continues. Centuries of philosophical effort have failed to establish that a mental act or volition may cause the physical event represented by a bodily movement. Even the recent work of the eminent brain theorist, Dr. Sperry,101 fails to establish the existence of such causation. Indeed, the problem seems to be purely philosophical and completely irresolvable. Yet, allowing criminal liability to turn on the existence of volition and a voluntary act would appear to assume such mind-body causation.102 The task of the next Section will be to establish a justification for the role of voluntary acts in criminal liability without any reliance on mind-body causation.

IV. VOLITION AND THE CRIMINAL LAW

The analysis thus far has demonstrated that there is a difference

98. Pols, supra note 94, at 302 (emphasis in original).
99. Id. at 303.
100. See D. HUME, supra note 48.
101. Roger Sperry won the 1981 Nobel Prize for Medicine for his work in brain science.
102. See infra notes 104-05 and accompanying text.
between voluntary and involuntary acts. Contrary to the position espoused by Hart, a volition accompanies every act that would be considered voluntary and capable of serving as the physical basis for a criminal act. On the other hand, as even Hart would acknowledge, involuntary acts are not accompanied by volitions. What remains to be demonstrated is that this difference should be relevant in criminal law.

A. The Causation Dilemma

The difficulty in establishing the relevance of volition lies in the inability to show that volition plays a causal role in the voluntary act. If a cause and effect relationship does not exist, then only the body may be shown to have been directly involved in even a voluntary act. Yet, some of the reluctance to bring the weight of the criminal law to bear against the involuntary actor is the reluctance to ascribe responsibility to a person whose body alone was involved in the act. As Michael Moore explains:

In law, no less than in morals, the idea of human action lies at the heart of ascriptions of responsibility. One is responsible only for those consequences that are caused by his actions, and not for those things in which his body, but not his acting self, is causally implicated.104

While this passage might be read to presume a causal relationship between volition and physical acts in the normal cases of voluntary action, it identifies an important reason—the lack of involvement of the mind, the acting self—for not punishing involuntary acts.105 Tellingly, if no mind-body causation exists, this reason should extend to voluntary acts.

Certainly, when there is no volition there is no causation by the

103. See supra text accompanying note 50.
104. Moore, supra note 70, at 1567.
105. Other reasons have also been offered:
The deterrent function of the criminal law would not be served by imposing sanctions for involuntary action, as such action cannot be deterred. Likewise, assuming revenge or retribution to be a legitimate purpose of punishment, there would appear to be no basis to impose punishment on this basis as to those whose actions were not voluntary. Restraint or rehabilitation might be deemed appropriate, however, where individuals are likely to constitute a continuing threat to others because of their involuntary movements, but it is probably best to deal with this problem outside the criminal law.
W. LAFAVE & A. SCOTT, supra note 6, § 3.2(c), at 197-98. The question of responsibility, which Professor Moore considers, and the problems of distinguishing voluntary and involuntary acts in terms of justification, when causation is not assumed, are also important to these suggested rationales.
mental aspects of the person—the "acting self." In this case, responsibility can be attributed only to the body and not to the mind. Under these circumstances, punishment of the actor, which includes effects on the mental aspects of the actor, seems unjustified. How this position may have relevance if causation between mind and body is not assumed remains to be established. If there is never such causation, it is still reasonable not to punish the involuntary act, since there was no mental involvement. However, if there is also no causation when there is volition, how can punishment of the voluntary actor be distinguished? His or her mind also would appear to have been uninvolved.

Recognition of the difficulty of establishing culpability in both mind and body is of at least Talmudic vintage:

Antoninus said to Rabbi: "The body and soul can both free themselves from judgment. Thus, the body can plead: The soul has sinned, [the proof being] that from the day it left me I lie like a dumb stone in the grave [powerless to do aught]. Whilst the soul can say: The body has sinned, [the proof being] that from the day I departed from it I fly about in the air like a bird [and commit no sin]." He replied, "I will tell thee a parable. To what may this be compared? To a human king who owned a beautiful orchard which contained splendid figs. Now, he appointed two watchmen therein, one lame and the other blind. [One day] the lame man said to the blind, 'I see beautiful figs in the orchard. Come take me upon thy shoulder, that we may procure and eat them.' So the lame bestrode the blind, procured and ate them. Some time after, the owner of the orchard came and inquired of them, 'Where are those beautiful figs?' The lame man replied, 'Have I then feet to walk with?' The blind man replied, 'Have I then eyes to see with?' What did he do? He placed the lame upon the blind and judged them together. So will the Holy One, blessed be He, bring the soul, [re]place it in the body, and judge them together . . . ."106

This passage from the Talmud not only expresses the problem; it also provides the seeds of the solution. A way must be found, without assuming causation, to set the mind atop the body and judge them together. The lame man and the blind man might be brought together, in criminal terms, as accessories to each other’s acts. If such accessory liability could be established between mind and body, then mind and body too could be brought together for judgment.

A relationship between mind and body sufficient to establish culpability in the mind may be found through an examination of the insider’s view one has of one’s own consciousness. Michael Gorr in

considering actions, or voluntary acts, suggests that an action should be analyzed as "an episode of behavior experienced by the agent as flowing uninterruptedly from physiological activity which is felt (or at least is capable of being felt) as effort to produce such behavior, where the latter is in turn experienced as flowing uninterruptedly from an appropriate volition."\textsuperscript{107} From the insider's view, one's volitions are experienced as having causal power;\textsuperscript{108} acts seem to follow directly from volitions. At the very least, the mind experiences its volitions, if not as causing bodily events, as commands to the body which are, in the case of ordinary action, heeded by the body.

\textbf{B. Solicitation: Resolving the Dilemma}

This view of the mind, as issuing orders to the body, is adequate to establish culpability in the mind without assuming causation and regardless of whether or not the body actually receives the orders. The culpability involved is that found in solicitation or attempted solicitation.\textsuperscript{109} Under the Model Penal Code,

\begin{quote}
[a] person is guilty of solicitation to commit a crime if with the purpose of promoting or facilitating its commission he commands, encourages or requests another person to engage in specific conduct which would constitute such crime or an attempt to commit such crime or which would establish his complicity in its commission or attempted commission.\textsuperscript{110}
\end{quote}

\textsuperscript{107} Gorr, \textit{supra} note 76, at 11.

\textsuperscript{108} While it may be argued that there can be no direct experience of causation but only of events from which causation is inferred, the problem is not unique to the experience of mind-body causation. If there were mind-body causation, it would, in fact, seem to be the species of causation that would be most accessible to experience.

\textsuperscript{109} The argument presented will not establish culpability in any absolute sense, but it establishes a sort of relative culpability. Just as mathematicians and logicians establish relative consistency of logical systems by showing that if set theory is consistent then so is the system in question, \textit{see}, e.g., A. \textsc{Hamilton}, \textsc{Logic for Mathematicians} 121-23 (1978), culpability on the part of the mind is established if culpability attaches to the normal case of solicitation. For absolute consistency the logician must show that set theory is consistent. Here, an absolute showing of culpability requires a showing that culpability properly attaches to the normal cases of solicitation. The easy argument may be made that what is made criminal is culpable, but that will not serve the role required here. In seeking philosophical justification, a moral argument establishing culpability for solicitation is required.

The drafters of the Model Penal Code provide an argument for culpability in solicitation: Purposeful solicitation presents dangers calling for preventive intervention and is sufficiently indicative of a disposition towards criminal activity to call for liability. Moreover, the fortuity that the person solicited does not agree to commit or attempt to commit the incited crime plainly should not relieve the solicitor of liability, when otherwise he would be a conspirator or an accomplice.

\textsc{Model Penal Code} § 5.02 comment 1 (Tent. Draft No. 10, 1960).

\textsuperscript{110} \textsc{Model Penal Code} § 5.02(1) (1962) (emphasis added).
In addition to solicitation itself being criminal, the Model Penal Code provides that the solicitor is an accomplice of the actor, is legally accountable for his actions, and is guilty of the offense committed by the actor.\footnote{Id. § 2.06.}

Even assuming that the mind's orders are actually transmitted to and received by the body, there are difficulties in applying the Model Penal Code definition of solicitation, which envisions two persons interacting, to this situation in which the two entities involved are the mental and physical aspects of the same person. Obviously, the definition cannot be applied literally. The statement that a "person" is guilty if he commands "another person" to engage in criminal conduct puts the mind-body situation beyond the scope of the subsection. However, the present situation need not fit the definition with any literal precision. A basis on which to establish culpability in the mind of an actor for his or her body's voluntary acts is sought, without assuming that the mind's volition caused the acts. That basis may be established by analogy to the normal forms of solicitation. Just as one person is culpable for soliciting the criminal behavior of another person, so the mind may be viewed as culpable for soliciting the criminal behavior of the body, even if that solicitation—the volition—does not cause the behavior.

A somewhat more serious problem is raised by the fact that, in the case of solicitation by one person of another, an act of solicitation is required. As with any crime, evil intent alone will not suffice. There must be an act of communication, most often a speaking of words, but frequently a writing.\footnote{W. LAFAVE & A. SCOTT, supra note 6, § 6.1(c), at 491.} In the case of solicitation of the body by the mind, there is no such spoken word nor written communication. However, neither is there merely evil intent. The volition that accompanies a voluntary act is more than a positive disposition toward a particular result or a hope that something will occur. It is the doing of all that the mind is capable of doing toward bringing about that end. The forming of a volition goes beyond ruminating with approval on a future state of affairs and should suffice to establish culpability in the mind as well as in the body of the actor.

If, in addition to refusing to assume any mind-body causation, one also refuses to assume that the mind's commands are even received by the body, culpability may still be established. According to the Model Penal Code, "It is immaterial . . . that the actor fails to
communicate with the person he solicits to commit a crime if his conduct was designed to effect such communication.”113 The commentary to the Code supports this position by citing existing law making solicitation criminal, even if the communication fails to reach the intended party. However, when the communication fails, the defendant was generally prosecuted for attempted solicitation.114 The Model Pe-

113. MODEL PENAL CODE § 5.02(2) (1962).


Depending how the comment and the cases are read, the cases may not provide as strong support as the Code comment indicates. For example, in Bloom, the defendant solicited an individual to incite a third party to give false testimony. The defendant was charged with an attempt to incite that third party. The court, citing Krause, stated, “It may be that ... an undelivered letter would not sustain an indictment of inciting, but it would sustain an attempt to incite.” Bloom, 133 N.Y.S. at 711. Since the charge had been an attempt to incite, the information was adequate in that it did “not require that the solicitation should be brought to the person to be finally reached.” Id. While not ruling on a charge of solicitation based on an uncommunicated command or request, the court did not foreclose the possibility.

Krause involved letters written and posted by the defendant proposing to the intended recipient that he murder a third party. The prosecution did not prove that either letter reached the addressee. The prosecutor charged that the defendant “unlawfully [did] solicit, ... persuade, ... endeavor to persuade, ... propose ... murder.” Krause, 18 L.T.R. at 238. Attempt to commit the same misdemeanors was also charged. The court had no difficulty with the attempt charge, but as to the solicitation charges wrote that “there must be some communication to the person in order to constitute the statutory offence.” Id. at 243. While “it is not necessary to show that the mind of a man has been affected ... there must be some evidence of communication.” Id.

In Banks, one of the two defendants wrote and posted a letter to the other suggesting the murder of the child to which the latter was expecting to give birth. The letter was intercepted by the expectant mother’s landlady. Banks, 12 Cox Crim. Cas. at 396. The court held that if the passages of the intercepted letter were serious, deliberate solicitations, they might find the defendant guilty of an attempt to propose the murder of the infant. Id. at 399. So, while the court’s wording indicates that the passages of the undelivered letter could be solicitations, the court’s summation to the jury indicated that the proper verdict, if it found the requisite facts, was guilty to the charge of an attempt to propose.

Fox also involved an unreceived letter. The defendant was charged with soliciting and endeavoring to persuade the intended recipient to murder a third party. Due to poor hand writing, the letter was misdelivered to a police officer with a vaguely similar name. Fox, 19 W.R. at 109. The defendant’s conviction was overturned on appeal with the court in general agreement that solicitation must involve communication. There was disagreement over whether the charge of endeavoring to persuade also required communication, but that disagreement does not support the Model Penal Code position on uncommunicated solicitation. Its discussion would have more bearing on the question of attempted solicitation.

In Crichton, a pregnant woman asked the prospective father to provide a drug that would induce an abortion. He posted the chemical and sent the woman a letter to the effect that he was
nal Code, however, does not treat attempted solicitation as a crime distinct from solicitation. Attempted solicitation is solicitation:

The crucial manifestation of dangerousness lies in the endeavor to communicate the incriminating message to another person, it being wholly fortuitous whether such message was actually received. Liability should attach, therefore, even though the message is not received by the contemplated recipient.

Hence, under the Model Penal Code view, it need not be assumed either that the mind's volition causes the body's physical act or that the volition is even communicated to the body in order to establish culpability in the mind. It is enough that the mind formed the volition. The mind is guilty of solicitation, is the accomplice of the

sending the requested drug. Her father intercepted the letter and then obtained the parcel from the post office. The defendant was charged with “attempting to incite an attempt to commit abortion.” Crichton, [1915] S.A.L.R. at 1. He was convicted and the conviction was upheld. The court appeared unconcerned by any questions arising from the fact that the letter was undelivered, and the only issue on appeal was whether the charge could stand when the inciting letter was in response to an invitation by the woman the defendant was accused of having attempted to incite.

In Ransford, the defendant had written a letter to a school boy suggesting that they engage in an unnatural sexual relationship. The intended recipient received the letter but did not open it, perhaps due to the nature of two earlier letters from the defendant, and turned it over to school authorities. Ransford, 31 L.T.R. at 490. The court was in accord that the defendant could be convicted on those facts, of an attempt to solicit, but some doubt was expressed as to whether a charge of solicitation could have been sustained. Id. at 491.

In Cape, the defendant's letters, which were read as attempting to procure an act of indecency with another male, were intercepted by the addressee's mother, who turned them over to the police. Cape, 16 Crim. App. at 78. The court, based on Ransford and Banks, rejected the appellant's argument that an attempt required that the letters be received and read by the addressee.

Horton may actually provide more support for the Model Penal Code position than is indicated in the comment. Defendant there, while in several lavatories and on the street, “smiled in the faces of gentlemen, pursed his lips, and wriggled his body.” Horton, [1913] 1 K.B. at 155. There was, however, no evidence that anyone other than two police officers watching the defendant even noticed the defendant's alleged solicitations. The court refused to rule that there could not be a conviction without proof that someone had seen the solicitation. Id. at 156. While some attempt was made to distinguish cases in which some physical interference with communication kept the attempted solicitation from being received from this case in which the solicitation was apprehended by the senses of the recipients, though perhaps without conveying the intended message, one judge stated flatly that he did not think it necessary for conviction that a solicitation reach the mind of the person whose solicitation was intended. Id. at 158-59 (Pickford, J.).

Whether or not the case law supports the Model Penal Code position as strongly as the drafters indicate, the strength of the independent argument they offer is unaffected. That argument, see supra note 109, provides adequate support for § 5.02(2).


116. Id.

117. Under the analysis presented, the mind's forming of the volition is analogous to normal criminal solicitation. This raises the interesting question of whether the paralytic who tries (that is, has the volition) unsuccessfully to pull the trigger of a weapon placed in his hand and thereby kill someone is nonetheless guilty of solicitation to murder. Fortunately for the approach espoused here,
body, and shares the body's liability for its physical acts. Even under the weaker, attempted solicitation view, the mind is guilty of attempted solicitation. There is a culpability in the mental aspect of the person that is not present in the case of the volitionless, involuntary act, and it is still a culpability that does not depend on assuming mind-body causation.

This approach presents one last problem. The cases in the Model Penal Code comment on liability for uncommunicated solicitation\textsuperscript{118} were all cases in which the communication might have reached the intended recipient. A situation in which it was impossible for the solicitation to reach the intended recipient might call for a different conclusion.

Furthermore, the argument that the endeavor to communicate is a sufficient manifestation of dangerousness seems to rest on the proposition that liability should not turn on the fortuity of whether or not the communication is actually received.\textsuperscript{119} Again, it appears that the communication could possibly have been received.

For example, if a letter written in English addressed to an English speaking person and commending or encouraging a crime were never received, the Code would still clearly find liability for solicitation. Less clear is how the Code would approach the case of a letter written in Sanskrit and sent to a person who speaks only English or the case of a page full of symbols which were meaningless but which the writer believed would cause the recipient to commit a particular crime. Since it might be argued that the failure of the mind to communicate with the body is more similar to one of the last two examples than the misdelivered letter, the Code's approach to the latter examples must be considered.

The Model Penal Code treats failures to communicate as attempted solicitations, and hence, as solicitations. Section 5.02(2) finds liability for a failed communication, so long as the communicative "conduct was designed to effect such communication."\textsuperscript{120} Furthermore, the cases cited as support for section 5.02(2) are mostly cases in

\textsuperscript{118} See supra note 114.

\textsuperscript{119} See MODEL PENAL CODE § 5.02(2) comment 5 (Tent. Draft No. 10, 1960), quoted supra text accompanying note 116.

\textsuperscript{120} Id. § 5.02(2) (1962). Cf. id. § 5.01(1)(b) (person guilty of attempt, if "when causing a
which the charge had been attempted solicitation. The Code treats these attempted solicitations as actual solicitations for purposes of imposing criminal liability. Consequently, the key to deciding how to handle Sanskrit or jibberish messages lies in the Model Penal Code approach to attempt.

In the section on criminal attempt, the Code states that a person is guilty of attempt if he:

(a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or

(b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or

(c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

The comment to the section explains that the subsection quoted is designed "to eliminate the defense of impossibility." Accordingly, the defense that a Sanskrit letter could not be an attempted solicitation, and hence a solicitation, because it was impossible for the recipient to read the letter, must be rejected if the sender believed that the recipient could read Sanskrit.

The same analysis appears to require the rejection of the impossibility defense for the jibberish letter, so long as the sender believed that the missive would in fact communicate his intended message. However, the Code also allows a court to reduce the grade of an offense or even dismiss a prosecution when the conduct involved is "so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting [an attempt charge]." Hence, the sending of the particular result is an element of the crime, [he] does . . . anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part").

121. See supra note 114.
122. See MODEL PENAL CODE § 5.02(2) (1962).
123. Id. § 5.01(1) (emphasis added).
124. Id. § 5.01 comment 5 (Tent. Draft No. 10, 1960).
125. The same result would obtain under non-Code analysis. The impossibility claim is clearly one of factual, as opposed to legal, impossibility, and factual impossibility is generally not a defense to attempt. See, e.g., W. LAFAVE & A. SCOTT, supra note 6, § 6.3(a)(2), at 512 ("All courts are in agreement that what is usually referred to as 'factual impossibility' is no defense to a charge of attempt.").
126. MODEL PENAL CODE § 5.05(2) (1962).
jibberish letter might not be an attempt.

Returning to the immediate problem, the mind experiences itself as commanding the body, and in fact, even as causing the movements of the body. Thus, under the circumstances as the actor—the mind—believes them to be, the attempt to communicate with the body will result in a communication. That mind-body communication may not be factually possible will not serve as a defense to attempted solicitation. The mind is guilty of the attempt, and hence, of the solicitation. Only if mind-body communication were not only factually impossible, but also inherently impossible, would the Model Penal Code dismiss the attempt charge. The existence of philosophical dispute should not establish that inherent impossibility. In fact, the continued vitality of nondualist theories of mind and body weighs against the claim of inherent impossibility. It cannot be claimed that mind-body communication, while it may be factually impossible, is “so inherently unlikely ... that neither such conduct nor the actor presents a public danger ...”. When volition exists, the mind shares the culpability of the body, even if the mind did not serve to cause those acts and even if the mind is incapable of actually communicating to the body its desires.

The culpability of the mind in a voluntary act justifies the ascription of responsibility to the whole person. Since every voluntary act involves volition, there is participation, at least on the level of an uncommunicated solicitation, of the mental aspects of the person, which is lacking in the case of the volitionless, involuntary act. With the whole person involved, the person may be viewed as criminal in a sense in which the person is not criminal when only the body is involved. Under the theory presented here, that ascription of criminal responsibility does not depend on an assumption of mind-body causation. Hence, even without establishing causation, a role for volition in criminal law may be established.

127. See id.
128. See supra note 74.
129. MODEL PENAL CODE § 5.05(2) (1962).
130. The causation problem discussed in this Article differs from that recently discussed by Michael Moore. See Moore, Causation and the Excuses, 73 CALIF. L. REV. 1091 (1985). While Professor Moore discusses “no action” excuses, his main concern focuses on the problems of causal influences outside the actor’s control. Such influences would normally operate in such a way that a mental act of the actor can be found somewhere in the causal chain. Only in the “no voluntary action” defense is there the claim that the actor’s mind was not a part of the causal chain at all. It is the justification of that defense that has been at issue here.
131. The approach taken may seem to place the cart before the horse in that, while personal
V. CONCLUSION

Contrary to H. L. A. Hart's view, volition plays a role in voluntary acts that is missing in the case of involuntary acts. Furthermore, that role is adequate to justify the finding of criminal liability on the part of the voluntary actor, while not holding the involuntary actor liable. The distinction may be made without assuming a particular solution to the mind-body problem by establishing accessory liability, through solicitation, on the part of the mind for the body's physical acts. In that way, without establishing any direct participation of the mind in bodily events, culpability may be established in the mind, and both mind and body may be seen as criminal, when the act is voluntary. Thus, while the mind-body problem may not be philosophically resolvable, the criminal law's imputation of liability for the acts of another removes the difficulties presented by the mind-body problem.

One may, of course, be opposed to the imputation of criminal liability on the basis of being an accessory, but that is a separate issue. It has been shown that, if criminal accessory liability is accepted, the voluntary act requirement need not rest on an assumed solution to the mind-body problem. Those who object to accessory liability may still argue that volition plays no role in the imputation of criminal liability, but they will do so only if they are troubled by the mind-body problem. However, the voluntary act requirement may now be accepted by all those who are untroubled by the mind-body problem as well as by those who are troubled by the mind-body problem but accept accessory liability. Thus, anyone who wishes to argue that volition plays no role in criminal law must now also argue that accessory liability is unacceptable.

liability of the principal is more basic than accessory liability, accessory liability concepts were used to explain the personal liability of the principal. But, the problem addressed was that presented by the fact that liability on the part of the mind appears to depend on a certain cause and effect relationship. Accessory liability was presented to show that criminal liability may attach even when there is no physical cause and effect relationship between an actor's (accessory's) act and the crime. Thus, the accessory-principal relationship served as an analogy to explain the liability of the mind on an accessory-like theory.