intentionally omits to follow through on the rescue. In the last case supposed, if we were truly punishing for the earlier act, there should be no liability because there was no *mens rea* at the earlier time; yet the undertaking exception generates liability, which must therefore be for the subsequent, culpable omission.

A like analysis applies to the causing-of-the-condition-of-peril doctrine. The doctrine is that those who innocently or culpably cause the condition of peril—as by intentionally, negligently, or innocently bumping someone into the water—are liable if they omit to rescue when they can do so at minimal risk to themselves. It is sometimes thought that in such cases liability is actually imposed for the earlier act of bumping, not the later omission to rescue.[45] Yet again, often there will be a difference in the *mens rea* of the bumper versus the *mens rea* of the non-rescuer: the bump could be non-culpable, yet the omission a knowing failure to help an old enemy. Given that there is liability in such cases, it can only be for the subsequent omission, not for the earlier, innocent act.

I conclude that the Hughes–Gross kind of reconciliation project cannot save the act requirement from the existence of some counter-examples of true omission liability without action. The most one can say of the Anglo-American criminal law's act requirement is that either an act or an omission is required for liability, with the proviso that true omission liability is exceptional rather than customary.

This raises the possibility that perhaps Anglo-American criminal law is mistaken in those rare instances where it genuinely imposes omission liability. Perhaps there ought not to be such crimes, recognizing that presently they do exist. Because such a query is part of the larger normative question of whether there should be an act requirement at all, I shall defer consideration of it until we have further clarified just what the act requirement is.

[45] Suggested in Kadish and Schulhofer (eds.), *Criminal Law and Its Processes*, 210. The position is argued for explicitly in Epstein, 'A Theory of Strict Liability', *Journal of Legal Studies*, 2 (1973), 151–204: 192; E. Mack, 'Bad Samaritanism and the Causation of Harm', *Philosophy and Public Affairs*, 9 (1980), 230–59: 240–1, 242–3.

1.2. Some Critical Legal Silliness about the Act Requirement

The other scepticism about the existence of any act requirement that I shall consider is that of Mark Kelman.[46] Kelman urges that the act requirement is vacuous in the sense that the requirement can be manipulated to yield whichever result one wants. To see the argument, consider one of Kelman's examples, *People* v. *Decina*.[47] Decina was an epileptic who had killed someone while driving his automobile during an epileptic seizure. Although the seizure and the movements of Decina's body that it caused were not voluntary acts, none the less the court held Decina liable for manslaughter because of his earlier voluntary act of getting into the car and driving while he was not in the grip of a seizure. Kelman's point: whether there is a voluntary act depends on how broadly a court is willing to look for one; a narrow time frame (e.g. at the time of the accident) results in no voluntary act; a broad time frame (e.g. during the entire drive) results in there being a voluntary act; and there is no principled way for a court to choose a broad or a narrow time frame. This is why Kelman condemns criminal law's act requirement with his 'winking dismissal': 'You know what? There's not much to it.'[48]

The truth is that there is not much to Kelman's point, although we can use its obvious falseness to make (an equally obvious) clarification of the criminal law's act requirement. If there were a 'time-framing' choice to be made in criminal cases, Kelman is right in his observation that there would be no principled way to make it. But where did Kelman get his assumption that there is such a choice to be made? Every competent teacher of elementary criminal law that I know teaches the act requirement in the following way: if, from the big bang that apparently began this show to the heat death of the universe that will end it, the court can find a voluntary act by the defendant, accompanied

[46] See Kelman, 'Interpretive Construction in the Substantive Criminal Law', 600–5, 618–20, 637–40; id., *A Guide to Critical Legal Studies*, 92–3. Kelman's form of scepticism about the act requirement continues to have unwarranted influence even beyond the cosy confines of critical legal studies, and so is worth dispatching. See e.g. J. M. Balkin, 'The Rhetoric of Responsibility', *Virginia Law Review*, 76 (1990), 197–263: 228–30; Larry Alexander, 'Reconsidering the Relationship among Voluntary Acts, Strict Liability, and Negligence in Criminal Law', *Social Philosophy and Policy*, 7 (1990), 84–104.

[47] 2 N.Y. 2d 133, 147 N.Y. S. 2d 558, 138 N.E. 2d 799 (1956).

[48] Kelman, 'Interpretive Construction in the Substantive Criminal Law', 637.

at that time by whatever culpable *mens rea* that is required, which act in fact and proximately causes some legally prohibited state of affairs, then the defendant is prima facie liable for that legal harm.[49] There is no 'time-framing' choice here. If there is *any* point in time where the act and *mens rea* requirements are simultaneously satisfied, and from which the requisite causal relations exist to some legally prohibited state of affairs, then the defendant is prima facie liable. The presupposition of Kelman's entire analysis is simply (and obviously) false.

Consider *Decina* again. The New York court rightly decided that Decina's bodily movements at the time of the accident were not acts, and that Decina's movements beginning to drive were acts. The court did not, however, arbitrarily focus on the earlier time because it had arbitrarily chosen a broad time-frame in which to look for a voluntary act. Rather, the court looked at all possible times and found one where Decina not only acted (in beginning to drive), but did so recklessly (in light of prior seizures he was aware of the risk to others posed by his driving), which reckless act caused the victim's death.

Contrast *Decina* to another case that Kelman discusses, a case where liability was not found, *Martin* v. *State*.[50] Martin was accused of the crime of being drunk in public. Martin got drunk in his own private residence, which is not 'in public' within the meaning of the statute. He was bodily carried out into the street by the police, however, and they arrested him for being drunk in public. Kelman thinks that the Alabama court could justify its decision (of no voluntary act by Martin) only by a 'narrow time-framing'; for a broad time-framing would reveal earlier acts by Martin that were voluntary, namely, the taking of drinks. What Kelman overlooks is that those earlier acts by Martin were not the proximate cause of his being drunk in public. The police officers' intentional placing of Martin in a public place constitutes an intervening cause on anyone's reading of that notion,[51]

[49] See e.g. Dressler, *Understanding Criminal Law*, 171; P. Robinson, 'Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine', *Virginia Law Review*, 71 (1985), 1–63. The reaction to Robinson's paper by the leading Anglo-American and German criminal-law scholars when it was first presented (at the Criminal Theory Conference, Max Planck Institute, Freiburg), was 'Of course—that is what we all teach.'

[50] 31 Ala. App. 334, 17 So. 2d 427 (1944).

[51] See H. L. A. Hart and A. Honoré, *Causation in the Law*, 2nd edn. (Oxford, 1985), for the leading exposition of the idea of an intervening cause.

making Martin not a proximate cause of the legally prohibited state of affairs. In addition, had the Alabama statute required any *mens rea* with respect to the element of public place, as it should have, Martin's earlier acts of drinking in his home were unaccompanied by such *mens rea* and were thus ineligible to be the basis for his conviction for that reason too.

The only intelligible point that Kelman could be making here is the familiar worry about the proximate-cause requirement: it is vague, ambiguous, or in some other way hopelessly mushy, so that such requirement does not meaningfully restrict the time during which a voluntary act by a defendant may be found.[52] To *that* familiar worry there are two answers. One is that, so construed, Kelman's point cannot be that courts can willy-nilly choose whether to find an act or not. Even if the proximate-cause requirement is totally empty of meaning, that only would result in a rather more extensive liability than that the courts currently impose, namely, defendants would be prima facie liable whenever their voluntary act in fact caused a legally prohibited result when that act was accompanied by a culpable *mens rea*. That might make Martin liable under a strict-liability statute, but not otherwise. Secondly, the vagueness/mushiness of the proximate-cause tests is no reason at all to think that any connection can or cannot be said to be one of proximate causation. To think this would be to repeat the medieval fallacy about heaps: since 'heapness' is a vague notion, one can never say that the subtraction (or addition) of one stone unmakes (or makes) a heap; therefore, everything (or nothing) is a heap.

Kelman's form of scepticism is worth rebutting only because it allows us to see clearly how the act requirement works in Anglo-American criminal law. The requirement is only that there be some act of the defendant's, done at any time whatsoever, so long as it is connected in the requisite ways (causation and intentionality) to the state of affairs the law prohibits. There is no requirement that one first isolate some point in time at which one asks, 'Did the defendant do an act *then*?'

[52] Larry Alexander so takes Kelman's point, in Alexander, 'Reconsidering the Relationship among Voluntary Acts, Strict Liability, and Negligence in Criminal Law', *Social Philosophy and Policy*, 7 (1990) 92.

2. DOES CRIMINAL LAW HAVE ONE, SEVERAL, OR MANY ACT REQUIREMENTS?

As I noted in the Introduction, sometimes 'the' act requirement is thought to be, in reality, four separate requirements, matching the four things excluded by it: status, mental state, omission, and involuntary bodily movement. If one thinks that these four things have little in common with one another, one might conclude that there is not one (positive) requirement but four (negative) requirements: no one shall be punished for being in a certain status, for mental states alone, or for involuntary bodily movements, and only rarely may one be punished for an omission unaccompanied by any act.

It is the beginning of wisdom here to see that the unconnectedness of status, omission, mental state, and involuntary bodily movements is not much of a reason for thinking that the opposite of each of these four things is not in reality one thing with a unified nature. For the properties by virtue of which an act is opposed to each of these four things could be different, and yet each property be an essential property of 'actness'. Imagine a zoologist told you that there was something: that was not a plant or a mineral; that was not a bird or a reptile; that was not small; that was not a meat-eater; and that could not reproduce with anything but elephants. Suppose she called this thing 'elephant'. Would you have reason to believe that there was no one thing called 'elephant' just because you correctly observed that plants, minerals, birds, reptiles, bigness, meat-eating, and non-elephant reproductive capacity have little to do with one another?

Just as we could tease out a definition of the unitary nature of elephant by thinking of the opposite of the properties elephants don't possess, perhaps we can figure out what concept of action the law employs by thinking of the opposite of the four things acts are not. What is the opposite of status? 'Opposite' here cannot mean 'contradictory', because many things are not statuses. 'Opposite' here means 'contrary', a thing that is not a status. Since many things are contraries of status, we have some choice here. If we take 'status' to be the legal terminology for 'state', a familiar contrary of 'state' in metaphysics is 'event'. A state is a more or less enduring property of an object, whereas an event is

a change in the nature of some object(s), their qualities or relations, over some relatively discrete interval of time. If this is the right opposition, then the act requirement of criminal law requires the existence of some kind of event. What kind of event? Not a mental event, an event that occurs in a person's mind like a sensation, an act of imagination, or a thought. A customary opposite of 'mental event' of a person is 'physical event' of a person. The physical event of persons are the events that take place within or with their bodies—involuntary movements of the peristaltic gut, nerve impulses in the central nervous system, or movements of the fingers, for example. If this is the right opposition, then the act requirement of criminal law requires the existence of some kind of physical event to occur within or otherwise involving a person's body. What kind of human bodily event? Not an involuntary bodily movement. The usual opposite of 'involuntary' is 'voluntary', by which we mean 'willed' or 'of one's own volition'.[53] If this is the right opposition, then the act requirement is a requirement that there be a willed bodily movement.

One may notice that we haven't yet used omissions as we grope our way around the elephant. This is because to grasp what an omission is requires that we already know the nature of the thing omitted, namely, an act. For 'omission' as we earlier analysed it is the contradictory of 'act', not a mere contrary; moreover, of the contradictory pair 'act/omission', it is 'act' that has the primary meaning.[54] That is, an omission is just a not-action; to omit is not to do. Omissions have no nature except that of being the absence of the actions omitted, just as absent elephants have no nature save that of elephants that aren't present.

We end up, then, with the notion of an act as a willed bodily movement that is indeed the opposite (contrary or contradictory)

[53] 'Involuntary' has another accepted sense in both ordinary speech and the law: we idiomatically say that the person who acts under the threats of others 'acted involuntarily'. Still, such a person clearly *acts*, so this cannot be the sense of 'involuntary' relevant to the act requirement. For the two senses of 'involuntary' in ordinary speech, see Gilbert Ryle, *The Concept of Mind* (London, 1949), 69–74; in law, see Fitzgerald, 'Voluntary and Involuntary Acts', 12.

[54] J. L. Austin was perhaps the first to see that often one term in a contradictory pair of terms has primary meaning, the other member of the pair taking its meaning wholly by negating the first member of the pair. Thus, some have argued that 'healthy' only means 'not ill'. See M. Moore, *Law and Psychiatry: Rethinking the Relationship* (Cambridge, 1984), 116.

of status, mental event, omission, and involuntary bodily movement. If the two parts of this definition—bodily movement and willings—themselves have a unitary nature, then so does the criminal law's requirement that there be a willed bodily movement (that is, act). So far I have not attempted such a metaphysical showing, nor have I given any normative justification for why the criminal law should require willed bodily movements for liability. (Although I shall shortly do both.) I haven't even shown that willed bodily movement is the conception of act required by the criminal law's act requirement. All the above discussion is designed to show is that a commonly accepted reason for reaching the conclusion that there cannot be a unitary act requirement in the criminal law—because there are four different opposites of act that are excluded by the requirement—is not a good reason.

There are two similar arguments that merit brief mention here, both because they are similar to, and because they are false in much the same way as, the argument just considered. I refer to the ordinary-language arguments of Herbert Hart and J. L. Austin mentioned in the first chapter. Early in his career Hart advanced the view that the *mens rea* requirement of the criminal law was not a unitary requirement:

> What is meant by the mental element in criminal liability (mens rea) is only to be understood by considering certain defenses or exceptions, such as Mistake of Fact, Accident, Coercion . . . The fact that these are admitted as defenses or exceptions constitutes the cash value of [the mens rea requirement]. But in pursuit of the will-o-the-wisp of a general formula, legal theorists have sought to impose a spurious unity . . . upon these heterogeneous defenses and exceptions, suggesting that they are admitted as merely evidence of the absence of . . . two elements ('foresight' and 'voluntariness') . . . it is easy to succumb to the illusion that an accurate and satisfying 'definition' can be formulated with the aid of notions like 'voluntariness' because the logical character of words like 'voluntary' is anomalous and ill-understood. They are treated in such definitions as words having positive force, yet . . . the word 'voluntary' in fact serves to exclude a heterogeneous range of cases such as physical compulsion, coercion by threats, accidents, mistakes, etc., and not to designate a mental state . . .[55]

[55] Hart, 'Ascription of Responsibility and Rights', 179-80.

Hart's analysis of *mens rea* (or 'voluntariness' in an extended sense) has been extended to 'voluntary' in the sense here relevant, namely, as a synonym for 'willed' or 'volitional'. Thus, Patrick Fitzgerald conducts his analysis of 'voluntary' by considering: physical forces of nature; physical force used by another; epileptic convulsions; unconsciousness; sleep; hypoglycemic episodes; hypnotism; and the like.[56] Similarly, the American Law Institute defines 'voluntary' mostly by instancing situations that are not voluntary: reflexes, convulsions, and bodily movements during sleep, while unconscious, under hypnosis, or under post-hypnotic suggestion.[57] If one were to pursue Hart's analysis here, it would be to conclude that these excluded conditions were all there was to 'willed', or 'voluntary' in its relevant sense.

Such a conclusion would be as unwarranted here as it was with regard to the like claim made about omissions, statuses, mental acts, and involuntary bodily movements. Just because there are opposites of 'voluntary' that do not themselves have much to do with each other is no reason to believe that there is no unitary thing to which each of these conditions is opposite. That remains true even if our legal or ordinary usage of a word like 'voluntary' is as Hart, Fitzgerald, and the American Law Institute describe: we guide our usage by the excluding conditions, not by any nature to the thing excluded by them. 'Voluntary' may still refer to a unitary property, act, or state, even so.[58]

There is another argument from ordinary usage that is different from the argument just surveyed, which emphasizes the supposedly 'excluder' role of words like 'voluntary' or 'will'. As quoted earlier, in Chapter 1, J. L. Austin correctly observed that most of our verbs of action are verbs of quite diverse character: 'killing', 'castling a king', 'telephoning a friend', 'winning a war', etc.[59] On their face they do not seem to share much with each other, nor, as Austin noted, are they easily assimilated 'one and all to the supposedly most obvious and easy cases, such as . . . moving fingers'[60] Herbert Hart supplemented Austin's

[56] Fitzgerald, 'Voluntary and Involuntary Acts'.
[57] Model Penal Code, §2.01(2).
[58] For the argument of (realist semantics) that criteria for correct usage of a word do not determine that word's reference, see M. Moore, 'A Natural Law Theory of Interpretation', *Southern California Law Review*, 58 (1985), 277–398.
[59] Austin, 'A Plea for Excuses', 5. [60] Ibid.

observations about ordinary lay usage with his own observation about customary legal usage of action verbs:

> Not only do they [judges] not refer to muscular contractions or 'volitions' or desires for them, but they do not speak as if they were faced with any general doctrine that . . . voluntary movements or omissions are . . . necessary for responsibility. Instead they discuss the meaning of the words in the statutes which they are considering, e.g., words like 'driving' used in [the statute] making driving dangerously an offence.[61]

The inference we are supposed to draw from these facts of ordinary and legal usage is that there is no act requirement running throughout the criminal law; only as many act requirements as there are distinct verbs of action used in the prohibitions of the special part of some jurisdiction's criminal code.

We are not yet in a position to answer this argument of Austin's and Hart's fully, for to do so requires that we work through the metaphysics of complex actions (e.g. killings) and show how such actions are related to basic acts (e.g. moving one's finger). What we can do here is see that the ordinary-language observations that prompted Hart and Austin are an insufficient basis on which to conclude that there can be no univocal act requirement underlying the diverse action prohibitions of the special part of the criminal law.

Ordinary usage of the verbs of action developed for ordinary uses, including the ascription of moral responsibility. Among those ordinary uses was not an attempted systematization of the conditions of either moral responsibility or legal liability. It is thus quite open to the moral or legal theorist to propose such a hidden systematization, even if the concepts and principles employed in doing so are quite alien to ordinary ways of thinking and speaking. No observations about the bountiful diversity of ordinary usage of action verbs can preclude the claim that underneath such diversity there is none the less a hidden unity. It is surely *not* a 'fatal defect in any account of action' that it is 'quite at variance with the ordinary man's experience and the way in which his own actions appear to him', or that it ignores 'the simple but important truth . . . that when we deliberate and think about actions, we do so not in terms of muscular movements but in the [quite different and diverse] ordinary terminology of actions'.[62] To think that this is a fatal defect would be like thinking that the quite diverse things ordinarily said about the planet Venus prior to the discoveries of Babylonian astronomy—things like 'It is the star that appears in the morning', and 'It is the star that appears in the evening'—could preclude someone discovering a hidden unity, namely, that these 'stars' were in reality one and the same thing, namely, the second planet from the sun.

[61] H. L. A. Hart, *Punishment and Responsibility* (Oxford, 1968), 108.

In the context of assessing the divergence between the ordinary, idiomatic usage of complex action verbs and the unitary account of acts in terms of willed bodily movements, Herbert Morris once observed that 'it is obviously one thing to criticize a metaphysical position and quite another to criticize a definition introduced for some limited purpose'.[63] Yet the ordinary-language scepticism about the possibility of there being a unitary act requirement does neither. In particular, it does not, as Morris supposed, criticize the metaphysics presupposed by some unitary definition of act. There are serious metaphysical critiques that we shall examine—about whether the *act* of moving my fingers can be identical to the *bodily movement* of my finger moving, whether my mental state can *cause* an action, whether there are 'volitions', or states of 'willing', that can cause actions, whether basic acts like moving my fingers can be identical to more complex actions like killing. But nothing in ordinary usage of the verbs of action will answer such questions one way or the other. J. L. Austin perhaps understood this when he conceded that ordinary usage 'embodies . . . something better than the metaphysics of the Stone Age' but that 'certainly . . . ordinary language is *not* the last word' about such metaphysics.[64]

[62] Ibid. 101–2.

[63] Herbert Morris (ed.), *Freedom and Responsibility* (Palo Alto, Calif., 1961), 107.

[64] Austin, 'A Plea for Excuses', 11.