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# THE ACT REQUIREMENT AS A BASIC CONCEPT OF CRIMINAL LAW

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## INTRODUCTION

In *The Grammar of Criminal: Law American, Comparative, International*, Fletcher elaborated what he called a “communicative concept of action.”<sup>1</sup> According to Fletcher, it is necessary to examine the context in which a movement or non-movement takes place in order to determine whether or not we intersubjectively consider such movement or non-movement to be a socially relevant action that may trigger the imposition of criminal liability. His aim was to develop a theory about how we *understand* actions instead of developing a theory, as criminal law scholars often do, about how we can biologically or psychologically *explain* them.

In light of the fact that, for the most part, we agree with the theory of action that Fletcher defends in *Grammar*, in the first section of this Article we will attempt to show why the communicative concept of action should be preferred over competing concepts of action that have emerged in continental criminal law theory over the past fifty years. In the second and third sections, we will explain why we believe that Fletcher’s theory is also superior to Michael Moore’s mechanistic concept of action and to Douglas Husak’s control principle, which are the most important theories of action developed in the last decades in the Anglo-American criminal law theory.

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<sup>1</sup> GEORGE P. FLETCHER, *THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, INTERNATIONAL* (forthcoming 2007) (manuscript at 408, on file with the Cardozo Law Review) [hereinafter *GRAMMAR MANUSCRIPT*].

I. FROM A CAUSAL AND TELEOLOGICAL THEORY OF ACTION TO A COMMUNICATIVE CONCEPT OF ACTION: COMPARATIVE PERSPECTIVES

A. *The Causal and Teleological Theories*

The act requirement as a basic concept of criminal law poses two problems:

1. On the one hand, if the point of reference and gravitational center on which criminal responsibility should be posited is an act understood as a willed bodily movement, it follows that any other factor extrinsic to the act, such as the dangerousness of the actor, his belonging to a particular ethnic or racial group, his political or religious convictions, etc., should be excluded as a condition for criminal liability.
2. On the other hand, if one accepts, as is generally accepted at this moment in countries that share our same cultural background, that human action is a prerequisite of penal responsibility, then we should ask ourselves which is the concept of action that we need to use as the foundation and backbone of criminal liability.

With regard to the first problem, today there seems to be agreement amongst courts and commentators about the fact that criminal responsibility and criminal law theory should be based on what the actor does, that is, on his actions or willed bodily movements, instead of on the *status* of the actor. It is debatable, however, whether one can establish a unitary concept of action that can serve as a basis for the theoretical and practical elaboration of the processes of attribution that give rise to penal liability. During the last fifty years, the discussion of this problem in German criminal law theory (and in the criminal law theory of other parts of the world such as Spain and Latin America, because of the influence of German criminal law) has been dominated by the controversy between the causal (Mezger)<sup>2</sup> and the teleological (Welzel)<sup>3</sup> theories of action. Both theories are based on the assumption that human action is the cornerstone of criminal law theory, and that its chief feature is the will. The distinction is that for the causal theory, the concept of action does not require knowledge about what, in the first instance, is the content of the human will, what the actor wants, which is something that is examined during a later stage in the analysis

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<sup>2</sup> EDMUND MEZGER, STRAFRECHT (3d ed. 1949). But he started to stress his theory in opposition to the theological theory by Welzel, see *infra* note 3, in EDMUND MEZGER, MODERNE WEGE DER STRAFRECHTSDOGMATIK (1950) (Spanish translation). For more about Mezger and his relationship with the Nazi Criminal Law, see FRANCISCO MUÑOZ-CONDE, EDMUND MEZGER Y EL DERECHO PENAL DE SU TIEMPO (4th ed. 2004).

<sup>3</sup> HANS WELZEL, DAS DEUTSCHE STRAFRECHT (11th ed. 1970) (Spanish translation).

of criminal responsibility (mainly, in the analysis of culpability or guilt). However, for the teleological theory, the content of the action, understood as the aim that the actor wants to achieve with his act, is also an element of the very concept of action which, therefore, should be the object of evaluation from the moment that we define what an act is.

The two theories allow for many fine distinctions and interpretations, but, in the end, despite their apparent differences, both coincide in that they maintain a purely individual concept of action based on bio-psychological and naturalistic considerations, causal and teleological, that make the center of gravity fall upon the perspective of the subject who acts, disregarding the effect of the action or the perception that other people have concerning the act. Only a theory espoused by a small number of commentators in Germany, called the social theory of action (Jescheck),<sup>4</sup> stresses the social relevance of the act as a key component of the concept of action. This excessively generic approach adds little to the other two concepts of action previously mentioned. However, it has the virtue of underscoring the importance that the social dimension of the act has for the concept of action. In this sense, we believe that the communicative concept of action maintained by George Fletcher in his *Grammar of Criminal Law* signifies an important step in the aforementioned direction. It still considers the concept of action as an essential element of criminal law theory, but analyzes it from a much more current point of view that is in accordance with the actual conceptions that modern philosophy of language supplies regarding the theory of action.

### B. *Fletcher's Communicative Theory of Action*

In order to formulate a concept of action that can serve as the foundation of a theory of national and international criminal law, Fletcher highlights a point, in our opinion a fundamental one, which in general, has not been sufficiently accentuated by the defenders of other theories. This may be because they take it for granted, or because they do not believe it to be a fundamental element of the concept. This point is the idea that a concept that has to be assessed in the future by third parties cannot be analyzed like a metaphysical abstraction separated from its context and the social reality in which the subject acts.

For Fletcher, the first thing that needs to be noticed in the concept of action is that human conduct is always a form of expression or of relevant communication between human beings. Consequently, if we

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<sup>4</sup> DR. HANS-HEINRICH JESCHECK, *LEHRBUCH DES STRAFRECHTS, ALLGEMEINER TEIL* (2d ed. 1982) (Spanish translation); DR. HANS-HEINRICH JESCHECK & THOMAS WEIGEND, *LEHRBUCH DES STRAFRECHTS* (5th ed. 2000) (Spanish translation).

consider the concept of action from the point of view of the traditional theories (causal or teleological), we ignore precisely the only thing that really characterizes human action in general, and human criminal action in particular: that, regardless of any external assessment that can be made of it, human action is, above all, a form of intersubjective communication and not a simple causal or teleological process. To buttress his theory, Fletcher offers various examples:

1. If a professor is teaching a class or delivering a lecture in a classroom, and none of the students or participants gets up and slaps him, that does not mean that someone is omitting slapping him; however, if after the lecture, the attendants remain seated without leaving the classroom, it is plausible to interpret this as a form of protest or as something with some socially relevant meaning. It is not necessary at this point to examine the reasons regarding why the omission of the action (getting up from the seat in the classroom) has different significance in each case. The only thing that should be highlighted here is that, from our perspective, the same omissive process can, and in effect does, have different meanings.<sup>5</sup>
2. Another example: Everybody knows that the guard at London's Buckingham Palace has the peculiarity of remaining motionless when he is on guard while children pose at his side and tourists take pictures of him. However, everyone knows that the guard is also performing an action, namely, safekeeping the door to the palace, and that if somebody tries to break in, it is likely that the guard will proceed to detain him or to do something in order to stop him. Does this mean that that he only acts at that moment, or is he already acting, even if it does not look like it, when he remains motionless in the guardhouse? If he is acting, what makes his purely omissive conduct an action? Is it his purpose, or a particular causal process, or the interpretation and meaning that everyone attributes to the simple fact of standing motionless?<sup>6</sup>
3. Finally, Fletcher posits another example of similar characteristics: When the psychoanalyst listens, without making a gesture, to what his patient has to say during a session, how should one interpret his merely passive attitude? As a causal process, as the exercise of a purposeful activity, or as meaningful conduct for the patient or for any impartial observer contemplating the scene?<sup>7</sup>

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<sup>5</sup> GRAMMAR MANUSCRIPT, *supra* note 1, at 410.

<sup>6</sup> *Id.* at 410-11.

<sup>7</sup> *Id.* at 410.

With these examples, Fletcher wants to stress that acts, whether they are actions in the strict sense of the term, or omissions, should not be understood as a pure ontological causal or teleological process, but as a form of communication, as meaningful conduct that makes sense both to the person who acts and to the rest of us.

In our opinion, from Fletcher's communicative theory of action one can derive another fundamental fact that needs to be taken into account when formulating a concept of action. This fact is that the concept of action cannot be decomposed, like the causal or teleological theories seem to suggest, into a discrete event, or into a sequence of isolated discrete events. Let us illustrate this by way of our own examples.

1. The person who, with the intention to kill, loses control of his actions while stabbing the victim and blindly and impulsively inflicts more stabs than necessary to kill, acts and kills. His act of killing should be assessed, therefore, as a whole, without having to decompose his action into the many stabs that he inflicted. Similarly, it is irrelevant, in principle, whether a particular murder was produced by one or various gunshots, as long as they are fired in a continuous manner and with a unitary intent to kill.
2. The person who goes for a walk or a stroll performs various bodily movements, such as, moving his legs, taking one step, and then another. However, the act of walking or going for a stroll is a unitary action that includes all of the discrete steps needed in order to perform it, and should not be conceived as a combination of various discrete and separate acts.
3. The person who drives a motor vehicle necessarily performs various separate acts like stepping on the brakes, accelerating, changing gears, and moving the steering wheel. These acts, taken as a whole, make up the single action of driving and each of them would lack relevance outside of this context.

Ultimately, what these examples highlight is that, in these cases, the global significance of killing, walking, or driving a vehicle, and not the number of stabs, gunshots, steps or driving maneuvers performed by the actor, is what is of interest regarding the concept of action. Contrarily, if we only emphasize the partial aspects or the different temporal sequences of a unitary action that give meaning to these fractional moments, the act will stop making sense and we will give importance and meaning to that which in isolation does not make any sense or has significance only in a different way.

This can be clearly grasped when one examines the different defenses that negate the existence of human action. Consider

determining the responsibility of a driver in a car accident. Certainly, somebody that loses control of his car because he used his hand to swat at a bee that had just entered the window of his vehicle acts in an instinctive, involuntary manner, if one only examines the isolated act of swatting at the bee. This is not so, however, if one analyzes the event from the perspective of the unitary action of driving. This is the only way that we can know if the actor could have stopped the car, reduced the speed of the vehicle, etc. These, in turn, will be the relevant factors in order to assess whether he acted correctly from the point of view of what is considered permissible in the context of the rules that regulate motor traffic. The reason for this is that the act of driving a motor vehicle is not solely composed of various interconnected actions. The interrelationship between the different actions is the product of a previous learning experience that, once learned, becomes habitual. Obviously, the acts of stepping on the breaks, accelerating, or changing gears are decisive when we assess the action of driving a vehicle, not because of their isolated voluntariness or involuntariness, but because they are elements of the very action of driving, which is the only one that, taken as a whole, has communicative relevance and meaning. This is why the passive or active nature of the discrete and isolated conduct examined is often irrelevant; not stepping on the breaks or gratuitously accelerating the automobile are things that ultimately pertain to the broader concept of action implicit in driving the vehicle.

A different problem regarding the concept of action has to do with the perspective from which we should analyze the meaning of the act. Fletcher's theory on this matter dovetails with the one espoused by the Spanish criminal law scholar, Tomás Vives Antón.<sup>8</sup> Vives Antón defends an "expressive" concept of action in which an "action is the assessment of an underlying fact and not the fact underlying an assessment."<sup>9</sup> The question that now emerges is the following: Is it necessary to appeal to considerations that lie outside the very concept of action in order to give meaning to an act? If so, this would make the concept of action lose its fundamental nature and would introduce to the analysis elements that are typically not associated with the act requirement, namely: purely normative elements that vary according to the context in which the action takes place. If the act that we make reference to is, for example, the concrete "action of killing," the possibility of an abstract concept of action is lost. Consequently, it

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<sup>8</sup> TOMÁS VIVES ANTÓN, FUNDAMENTOS DEL SISTEMA PENAL 203-79 (1996). Spanish criminal law theory follows this conception as well. See, e.g., Carlos Martínez Buján Pérez, *La Concepción Significativa de la Acción de T.S: Vives*, in HOMENAJE A BARBERO, CUENCIA (2001); PAULO CESAR BUSATO, DERECHO PENAL Y ACCIÓN SIGNIFICATIVA (2007); FRANCISCO MUÑOZ-CONDE & MERCEDES GARCÍA ARÁN, DERECHO PENAL, PARTE GENERAL 215-220 (6th ed. 2004).

<sup>9</sup> ANTÓN, *supra* note 8, at 205 (translated by authors).

would not be plausible to talk about the general requirements that should underlie every criminal or non-criminal action, be it the action of stealing, of committing a homicide, or of forging a document. In any case, even if we recognize that the concept of action that is of interest to the criminal law is that of a "homicidal action," or an action constitutive of theft, robbery, or rape, it is clear that this is the product of a choice that the legislator makes in which he selects certain events as legally relevant. However, this choice presupposes that the legislator had previously determined what qualities or attributes the selected event should have in order to later supply considerations specifically relevant to the criminal law (definition of the offense, absence of justification, and absence of excuse).

In deciding which considerations give meaning to the act, it is necessary to study the considerations that underpin the other categories of the theory of criminal responsibility (definition of the offense, wrongdoing, and culpability). As a precautionary measure, we should clarify that even though many of the problems that are analyzed within the categories of wrongdoing and culpability are already present in the analysis of the very concept of action, the basic elements of the act requirement can be established without examining these considerations. Therefore, there can be an action even when elements that are essential to the establishment of the other categories of criminal responsibility are absent. The following distinction illustrates this point: capacity for *action* versus capacity for *culpability*.

Even though sometimes these two concepts are not easily differentiated, one can theoretically distinguish between them. This distinction has important practical implications. The capacity for action has to do with the purely experiential ability to choose between various possible courses of action at a given moment. On the other hand, the capacity for culpability is the ability to choose between good and evil and to act in accordance with the choice made. An action is not culpable in and of itself. However, it is a necessary prerequisite for culpability. Therefore, we should not include within the concept of action that which is to be assessed specifically during the determination of culpability.

### C. *Importance of Social Context*

Finally, a few things should be said regarding the importance of interpreting an action within the particular social context in which it is performed.

From the positions maintained by Fletcher and Vives Antón it can be deduced that no socially relevant action exists in and of itself. Acts



acquire their relevance and significance depending on how they are perceived and assessed by persons other than the one who performed the conduct. This leads us to establish as significant criteria in the theory of action certain societal considerations that should be taken into account before one assesses the legal considerations inherent in the different categories of criminal responsibility. Therefore, we should take into account the social importance of the action performed, the reasonability of the course of action selected, and the reasons for engaging in the action. Naturally, these criteria can lead us to demarcate a concept of action that is relevant for the criminal law. However, what is of importance here is to establish that we already use these criteria in our daily life in order to determine the social relevance of an action. Typically, almost every act that remains within what is socially important, or reasonable, or normal according to current societal standards, negates the legal relevance of the conduct in light of extra-legal considerations. These extra-legal considerations are later transformed into legal considerations when one employs them to determine the content of the different categories of criminal responsibility. Let us illustrate this with some examples:

1. First of all, we can ascertain whether an agent acted intentionally or with a mental element (intent to deprive someone of his property, with knowledge of the criminality of his conduct, etc.) by examining indicators that are socially deemed to be revealing of those states of mind. For example, the use of a firearm or a big knife for the infliction of physical harm is generally considered sufficient to establish that the actor's purpose was to kill and not merely to batter. A financially troubled banker's misrepresentation of the money owed by a corporation to his company is probably the product of a fraudulent scheme and not of an accounting mistake. The decision of a judge to wantonly disregard his professional obligations is probably done with knowledge of the fact that what he does is illegal and not out of the fact that he did not know the extent of his legal obligations. A tragic example taken out of the recent history of this city can better illustrate what we have just said: After September 11, 2001, what previously could have been understood as the hijacking of an airplane in which the hijackers would liberate the hostages if they were given something in exchange (this was very common in the 70's and 80's), today would probably be interpreted as the initial stage of an imminent terrorist attack. This, in turn, would trigger a different response than the one that we would expect in the 70's or 80's (for example, shooting down the plane before it is used as a missile against a target, which presents a distinct legal problem).

2. Whether we would recognize as reasonable a belief that someone is acting in self-defense when the alleged aggressor put his hand in his pockets and at the same time said "I am going to kill you" depends on the context and the knowledge that the threatened person has regarding the reputation and personality of the alleged aggressor (maybe the threatened person knows that the aggressor is a killer for hire that always has a gun in his pocket, or maybe he knows that the supposed aggressor is mentally ill and that he threatens people with killing them all the time without meaning any real harm).
3. Pulling the trigger of an unloaded gun may be an irrelevant act or a joke, but pulling the trigger believing the gun to be loaded acquires social significance and, consequently, legal significance as well. By the same token, it also has social and legal significance for a person to encourage someone to get on a plane when that person has put a bomb inside the aircraft so that it will explode. However, no legal or social significance would attach if this person was solely encouraging another onto the plane so that he arrives sooner at a given destination, and then during the flight the aircraft crashes.

All of these examples highlight that the concept of action only acquires meaning in relation with a concrete society and as part of a particular social system or subsystem. Of course, this model is never value-neutral. In consequence, it is necessary to continuously interpret the model and to keep in mind its relationship with a concrete mode of discourse, that is, with the particular way in which people settle agreements in order to regulate coexistence in society and the conflicts that arise within the social order.<sup>10</sup>

From what has been said one can conclude that the concept of action should include all of the processes that have meaning in a concrete social context. From there one can take into account many successive considerations that could determine the existence of criminal responsibility. This is, in our opinion, the most important contribution that Fletcher makes to the theory of action as a basic prerequisite of the grammar of national and international criminal law. George Fletcher is conscious that a theory of action relevant for the criminal law should be elaborated from an "expressive" or "communicative" perspective. In other words, an action should be perceived as an event that is a part of reality, which only has meaning within said reality, and that helps to explain and understand that reality by taking into account the context

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<sup>10</sup> About the theory of imputation in Criminal Law as a "Discourse," see WINFRIED HASSEMER, *PERSONA, MUNDO Y RESPONSABILIDAD* 160 (María del Mar Díaz Pita & Francisco Muñoz-Conde trans., 1999).

surrounding the event. Thus, the theory of action should not be centered on *a priori* ontological abstractions that have nothing to do with the eminently social nature of human beings.

## II. MICHAEL MOORE'S MECHANISTIC CONCEPT OF ACTION AND THE PROBLEM OF PUNISHING OMISSIONS

### A. *Objections to Michael Moore's Mechanistic Theory*

Several years ago, Michael Moore espoused a mechanistic theory of action that is squarely at odds with George Fletcher's communicative concept of action. Because of this opposition, and in light of the fact that Moore's theory has garnered much support amongst Anglo-American criminal law theorists,<sup>11</sup> we believe that it is necessary for us to discuss some objections that can be leveled against Moore's concept of action.

In *Act and Crime*, Moore suggested that all the act requirement means is that "before one can be punished for any crime whatsoever, one must have performed some simple bodily movement caused by one's volition[.]"<sup>12</sup> As a consequence of Moore's theory of actions as "willed bodily movements," punishing omissions violates the act requirement.<sup>13</sup> However, exceptionally punishing certain omissions, even if doing so runs afoul of the act requirement, is legitimate when the injustice of not punishing them overshadows the reduction of liberty that criminalizing omissions entails.<sup>14</sup>

From a normative point of view, Moore believes that his concept of actions as "movements of the body caused by volitions" and of omissions as "non-movements" captures the important fact that our obligations to omit the performance of a bad act have more moral force than our obligations to perform good acts.<sup>15</sup> Hence, the mechanistic distinction between acts and omissions mirrors the moral distinction between positive and negative duties. In much the same manner as it is and should be true that we have a stronger negative duty to avoid engaging in wrongful actions than we have a positive duty to engage in righteous actions, it is and should be true that criminal responsibility

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<sup>11</sup> See, e.g., Samuel H. Pillsbury, *Crimes of Indifference*, 49 RUTGERS L. REV. 105, 112 (1996) (stating that the criminal law is generally concerned with "willed bodily movements that cause harm to others"); see also Heidi M. Hurd, *What in the World is Wrong?*, 5 J. CONTEMP. LEGAL ISSUES 157, 184 (1994) (equating actions with "willed bodily movements").

<sup>12</sup> MICHAEL S. MOORE, *ACT AND CRIME* 46 (Tony Honoré & Joseph Raz eds., 1993).

<sup>13</sup> *Id.* at 54.

<sup>14</sup> *Id.* at 59.

<sup>15</sup> *Id.* at 58.

should, as a general rule, be triggered by actions and, only in rare cases, by omissions.

In our opinion, the parallelism that Moore wants to highlight between acts and omissions on the one hand and negative and positive duties on the other hand is illusory. What is needed in order to adequately explain why obligations to abstain from performing wrongful acts usually carry more moral freight than obligations to realize good acts is a robust theory of duties and not, as Moore suggests, a theory of action. Consequently, Moore's normative defense of the mechanistic concept of action fails to satisfactorily account for the following three deeply held intuitions: (1) that some results that are the product of omissions are as wrongful as similar results that are the product of actions; (2) that the reason why we believe that some failures to act that cause a result should be punished as harshly as actions provoking the same result has more to do with communitarian ideals of solidarity than with libertarian notions of liberty; and (3) that classifying certain types of conduct as either acts or omissions does more to obscure the normative considerations surrounding the event than to illuminate them. Let us discuss each of these intuitions and the inability of a mechanistic theory of action to account for them separately.

### B. *Equally Culpable Acts and Omissions*

According to Moore, "[w]rongful as it is to let [someone die], it is much more wrongful to [kill them]."<sup>16</sup> This is premised on the assumption that making the world a worse place is morally more reprehensible than failing to improve the world.<sup>17</sup> Hence, the person who acts and kills is more blameworthy than the person who omits and lets die because the omitter who lets someone die fails to make the world better, whereas the actor who kills makes the world a worse place. This is not always true. The mother who contributes to her newborn child's death by intentionally refusing to feed her is as deserving of blame as the mother who contributes to her baby's death by feeding her food that makes her sick. In this particular instance, whether the result was caused by an act (feeding the baby food that made her sick) or an omission (failing to feed the baby) strikes us as totally irrelevant to the question of whether or not the mother should be held responsible for the death of her child.<sup>18</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 58-59.

<sup>18</sup> Whether the death was brought about by an act or an omission also strikes us as irrelevant to determining the amount of punishment that she deserves.

The following example can also be afforded in favor of the proposition that certain omissions are as wrongful as certain actions. The sole emergency room doctor who contributes to his patient's death by intentionally refusing to perform a surgery that would save his life acts more culpably than a doctor who contributes to the patient's death by recklessly performing the surgery. Intentionally omitting to perform a surgery that the doctor had a duty to perform and that would save the patient's life is more culpable (or, at the very least, as culpable) than negligently performing the operation. In this example, the morally decisive criterion seems to be the mental state of the doctor and not whether he produced the result by way of an act or an omission.

What these cases illustrate is that what really makes a difference in our evaluation of the blameworthiness of actors who contribute to the production of a result by omitting to perform an action is whether or not they had a duty to perform the omitted action. When it is deemed that the actor did in fact have an obligation to realize the omitted action, we will, in many cases, conclude that bringing about the result by an omission is as culpable as positively causing the result by way of an action.

Somewhat surprisingly, Moore seems to believe that the "straightforward and intuitive" response in the case of the mother who fails to feed her child would be to conclude that the parent who produces the death of his child by abstaining from feeding him is clearly less deserving of punishment than the parent who provokes the death of his baby by making him eat food that makes him sick. The problem is that, besides this bare assertion, Moore does not provide much more support for his thesis. His response is much less "intuitive" than what he believes it to be. As far as we know, all legal systems, civil and common law, punish killings produced by certain omissions in the same manner that they punish killings caused by actions.<sup>19</sup> Furthermore, as Moore himself acknowledged, there is support in the philosophical literature for the proposition that some omissions can be as wrongful as actions.<sup>20</sup> Criminal law theorists on both sides of the Atlantic share this view as well.<sup>21</sup> In light of the overwhelming support in favor of this proposition, it seems fair to place the burden of proof on those who, like Moore, believe that there is something suspect in thinking that results

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<sup>19</sup> See, e.g., P.R. LAWS ANN. tit. 33 § 3092 (1996); Australia Criminal Code Act, 1995 § 4.3(b); FINISH PENAL CODE chap. 3, § 3(2); SPANISH PENAL CODE art. II (1995); MODEL PENAL CODE § 2.01(3)(b) (1962).

<sup>20</sup> See, e.g., James Rachels, *Active and Passive Euthanasia*, 292 NEW ENG. J. MED. 78 (1975). Moore admits in *Act and Crime* that there is support in favor of the contention that some omissions should be regarded as wrongful as similar actions. MOORE, *supra* note 12, at 58.

<sup>21</sup> In Anglo-America see, for example, ROLLIN N. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 659-62 (3d ed. 1983). In Germany see, for example, GÜNTHER JAKOBS, *STRAFRECHT, ALLGEMEINER TEIL* 645-709 (1983).

provoked by failures to act can be as blameworthy as those caused by positive actions.

C. *The Libertarian Concerns for Criminalizing Omissions*

In our opinion, the reason why Moore is led to support the infelicitous conclusion—that results caused by acts are always more wrongful than those caused by omissions—lies in the political theory underpinning his mechanistic concept of action. For Moore, punishing omissions is problematic because doing so diminishes our liberty to act much more than criminalizing actions. Imposing a duty to perform an act, such as saving someone's life, restricts a person's liberty to engage in myriad activities that can be carried out at that time and place, such as swimming, sleeping, working or going to the movies. However, imposing a duty not to engage in a particular act, such as killing, leaves the person with considerable freedom to engage in whatever act he wishes to perform with the exception of the prohibited action.

If one looks at these cases from a radically libertarian point of view, as Moore does, justifying the substantial diminution of liberty that follows from punishing failures to act is extremely difficult and, almost always, impossible. This leads him to conclude that, as a general rule, criminalizing omissions is illegitimate. Exceptions to this rule should only be made when "the injustice of not punishing [such omissions] outweighs the diminution of liberty such punishment entails."<sup>22</sup>

It seems to us that Moore is barking up the wrong philosophical tree. Trying to justify the criminalization of omissions from a libertarian perspective is a daunting task. Attempting to do so will almost inevitably lead to skepticism with regards to the legitimacy of punishing failures to act. Upon closer inspection, however, one can see that the problem of justifying the imposition of criminal liability for omissions has a lot to do with communitarian notions of solidarity and very little to do with libertarian concerns about the diminution of freedom.

The reason why we find unproblematic the punishment of certain omissions, such as the intentional refusal to feed one's child, is because we believe that the duties of persons cannot be determined without taking into account the fact that they belong to particular institutions whose very existence depends on the acceptance of reciprocal obligations of aiding the rest of the members of the community.<sup>23</sup> This is most obviously true in the case of the family. We have no problem

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<sup>22</sup> MOORE, *supra* note 12, at 59.

<sup>23</sup> See generally DANIEL VARONA GÓMEZ, DERECHO PENAL Y SOLIDARIDAD 109 (2005).

with recognizing that a parent has a duty to keep his baby free from harm and that spouses have the obligation to look out for each other because we understand that bonds of solidarity unite the members of a family. Consequently, there is nothing “hard-to-justify,” as Moore suggests,<sup>24</sup> in the widely held belief that we owe more duty to those that are near and dear to us than to strangers.

Recourse to the communitarian notion of solidarity also helps to explain why it is not inherently suspect to impose on the populace a general duty to rescue those in harms way. Because of the fact that we are “social beings” and “members of a political community,” we depend on a very real sense on our fellow citizens.<sup>25</sup> Hence, subject to certain limitations,<sup>26</sup> punishing failures to aid helps reaffirm the vital link that unites both ommitter and victim as members of a community.<sup>27</sup>

#### D. *Actor's Intent, Not Act or Omission, Relevant*

Another problem with Moore's mechanistic theory of action is that, on some occasions, classifying conduct as either a “willed bodily movement” or an instance of non-movement does little to clarify the normative issues at stake. This is particularly true in the euthanasia cases. Whether the nurse who contributed to her patients death by terminating life support moved her finger in order to turn off the machine that supplied fluids to the catheter or refused to replenish the catheter once it became empty is irrelevant to determining if she should be held criminally responsible for killing the patient. The only pertinent consideration in this case is if the patient consented to having life support terminated and not whether the nurse decided to terminate it by moving the muscles of her finger or by refusing to move them.

The argument against placing too much weight on the movement/non-movement distinction in the context of the euthanasia debate was forcefully advanced by a leading lawyer and bioethicist in the following manner:

The moral distinction between killing and letting die—between actively and passively causing death—has been examined by many bioethicists, philosophers, and lawyers. Most have concluded that the distinction between active and passive, on which opponents so heavily rest, is a distinction without a significant enough moral difference to support the great weight that opponents of physician-

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<sup>24</sup> MOORE, *supra* note 12, at 57.

<sup>25</sup> *Id.*

<sup>26</sup> The most common restriction is to limit the duty to aid to cases in which the rescue can be done without peril or danger to the rescuer. *See, e.g.,* VT. STAT. ANN. tit. 12, § 519 (2005).

<sup>27</sup> VARONA GÓMEZ, *supra* note 23, at 115.

assisted suicide have placed on it. From the perspective of the affected individual, the sought for end—the relief of suffering and demise—is the same regardless of whether the immediate cause of death is described as active or passive, killing or letting die.

...

[Furthermore], [t]he line drawn . . . between active and passive is also vulnerable to a charge of inconsistency or arbitrariness. It is difficult to know in practice why one thing is labeled active . . . and therefore not permitted, and another is labeled passive and permitted. . . . Withdrawing treatment is said to be passive, yet many acts of withdrawal are quite active, for example, “pulling the plug” is literally an act. One cannot easily distinguish [these cases] in all significant respects. . . .<sup>28</sup>

Overstating the significance of the act/omission distinction generates a misunderstanding of a very important fact in the context of the euthanasia debate: a doctor violates his patient’s rights whenever he intends to cause the death of his patient against his wishes. Hence, if the nurse in the aforementioned example were to withdraw life support without the patient’s consent, she should be held criminally responsible for causing the death of the patient. It would be wrong to believe that she would deserve less punishment if she chose to provoke her patient’s death by refusing to refill the catheter instead of by turning off the machine connected to the feeding tubes. In both cases she is equally blameworthy because what really matters is that she intended to cause the death of her patient against his will and not whether she provoked his death by moving her finger (act) or by abstaining from doing so (omission).

#### E. *Support for Fletcher’s Social Approach*

From a scientific or ontological point of view, there is nothing wrong with Moore’s definition of actions as bodily movements caused by the will and omissions as the absence of bodily movements. However, the normative appeal of his theory of action, as we have attempted to demonstrate, is limited. The movement/non-movement distinction does more to obscure the moral principles at stake than to illuminate them. Consequently, we agree with Fletcher’s contention that we need to situate the conduct of the actor within the particular context in which it took place in order to understand its social and legal significance. As a result of this, we should abandon the mechanistic conception of actions as bodily movements and substitute it for a more

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<sup>28</sup> John A. Robertson, *Respect for Life in Bioethical Dilemmas—The Case of Physician Assisted Suicide*, 45 CLEV. ST. L. REV. 329, 333-34 (1997) (citations omitted).



humanistic theory of actions premised on the fact that conduct acquires significance by virtue of being intersubjectively perceived as an instance of meaningful and relevant behavior and not by virtue of being the product of a muscular contraction caused by the volitions of the actor.

### III. THE PROBLEM OF PUNISHING POSSESSION AND DOUGLAS HUSAK'S CONTROL PRINCIPLE

#### A. *The "Possession Problem"*

Twenty years ago, Douglas Husak decried the Anglo-American obsession with the "act-requirement." His position was based on the fact that "it is not clear that the presence or absence [of an action] is a crucial variable in drawing the distinction between just and unjust instances of penal liability."<sup>29</sup> This skepticism regarding the desirability of maintaining an "act-requirement" as a prerequisite for criminal responsibility led him to recommend that we replace it with an alternative requirement that he dubbed the "control principle."<sup>30</sup>

In his contribution to this issue in celebration of the appearance of Fletcher's *Grammar*, Husak made it clear that he still believes that we "should suspend judgment about the act requirement, and probably reject it altogether."<sup>31</sup> The chief reason that he provided in favor of this assertion is that, contrary to what Fletcher suggests, punishment is often justifiably imposed for something other than actions. A paradigmatic example of an instance where criminal liability is imposed without the existence of an act is that of possession since, according to Husak, possession offenses criminalize states of affair, not acts or omissions.

From a descriptive point of view, Husak's characterization of possession crimes is, in our opinion, misguided. As he seems to concede in his paper, one can conceivably interpret possession offenses as either criminalizing an act or an omission. This, in fact, is all that the drafters of the Model Penal Code (MPC) meant when they defined possession as the "procure[ment]" or "rece[ption]" of the thing whose possession is prohibited or as the refusal to terminate its possession.<sup>32</sup> Thus, in the official comments to § 2.01(4) of the MPC it is stated that:

[T]he concept [of possession] is an application of the principle that conduct that includes a voluntary act or an omission where there is physical capacity to act will suffice. An actor who knowingly

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<sup>29</sup> DOUGLAS N. HUSAK, *PHILOSOPHY OF CRIMINAL LAW* 97 (1987).

<sup>30</sup> *Id.* at 97-99.

<sup>31</sup> Douglas Husak, *Rethinking the Act Requirement*, 28 CARDOZO L. REV. 2437, 2438 (2007).

<sup>32</sup> MODEL PENAL CODE § 2.01(4) (1962).

procures or receives the thing possessed has, of course, engaged in a voluntary act that can serve as the predicate for criminal liability. An actor who is aware of his control of the thing possessed for a period that would enable him to terminate control has failed to act in the face of a legal duty imposed by the law that makes his possession criminal. In both of the instances in which possession can be made criminal, therefore, the principle underlying Subsection (1) [that liability needs to be based on conduct that includes either a voluntary act or omission to perform an act] is satisfied.<sup>33</sup>

This way of thinking of possession is by no means new. More than forty years ago, Professor Glanville Williams had already noted that, properly understood, possession crimes do not pose a problem for criminal liability because what is really being punished is either the act of acquiring the object or the failure to get rid of it.<sup>34</sup> Recently, Professor Joshua Dressler advanced a similar conception of possession offenses:

Possession crimes do not necessarily dispense with the voluntary act requirement. Courts interpret possession statutes to require proof that the defendant knowingly procured or received the property possessed (thus, a voluntary act must be proven), or that she failed to dispossess herself of the object after she became aware of its presence. In the later case, "possession" is equivalent to an omission, in which the defendant has a statutory duty to dispossess herself of the property.<sup>35</sup>

Even though he anticipates that possession could be construed in a way such as to require the occurrence of either an act or an omission, Husak objects to this description of possession offenses in light of the fact that what we are truly punishing in these cases is the possession itself, not the act of receiving the goods or the omission of refusing to dispose of them.<sup>36</sup> Hence, stating that what we prohibit by possession statutes is an act or an omission is just a clever way of avoiding the inevitable conclusion that by criminalizing these offenses we are actually not punishing an act but a state of affairs.

The problem with this argument is that the mere possession of a potentially dangerous object is not noxious *per se*. What we really want to prohibit is the *use* of the object in a harmful way and not its possession as Husak suggests. As a general rule, when one possesses an object it is either because one used it in the past or because one plans to use it in the future. Hence, possession offenses represent an effective way of curtailing the prospective use of the dangerous artifact or of punishing its prior use. When conceived as a method of punishing the

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<sup>33</sup> *Id.* § 2.01(4) cmt. 4.

<sup>34</sup> GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 8 (2d ed. 1961).

<sup>35</sup> JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 104 (3d ed. 2005).

<sup>36</sup> Husak, *supra* note 31, at 2439.

potential future use of the object, possession crimes appear as a type of inchoate offense. On the other hand, when envisaged as a means of punishing previous harmful uses of the artifact, possession offenses serve the purpose of facilitating the prosecution's case by relieving them of proving the actual instances in which the object was used in the past. This view is consistent with the one espoused by Professor Paul Robinson when he states that:

[T]he definition of the offence [of possession] does not truly represent the paradigm—it does not fully and accurately describe the harm or evil the offence seeks to punish. Possession offences seek to prohibit and punish not possession itself, but harmful conduct. . . . The possession of trace amounts of narcotics, for example, suggests their past use or distribution. The possession of burglar's tools suggest [sic] a planned (or past) burglary.<sup>37</sup>

In light of the abovementioned considerations, we can conclude that, contrary to what Husak seems to believe, there is nothing wrong with asserting that possession offenses prohibit either the act of receiving the goods or the omission of failing to terminate possession when faced with a duty to do so. If, as we believe it is, the purpose of these crimes is to prevent future injurious use of the object or to penalize its prior use, it makes sense to affirm that the real prohibition is not the possession itself but rather the voluntary act of acquiring the artifact or the omission of not getting rid of it. As the example of a person who had contraband “planted” on him demonstrates, mere possession does not necessarily entail dangerous prospective or past use of the substance if the person did not have sufficient time to end the possession. Here, as in many cases, the gist of the crime is failing to terminate control over the object even though the defendant had a statutory duty to do so. Consequently, despite Husak's efforts to convince us of the contrary, punishing possession does not violate the act requirement.

### B. *Weakness in the Control Principle*

Besides criticizing criminal theorists who, like Fletcher, defend the act requirement, Husak also advanced arguments in favor of substituting said requirement with his control principle.<sup>38</sup> The essence of the control principle is that “criminal liability is unjust if imposed for a state of

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<sup>37</sup> PAUL H. ROBINSON, *STRUCTURE AND FUNCTION IN CRIMINAL LAW* 63 (1997). Professor Michael Moore also agrees with the proposition that the true purpose motivating the criminalization of possession crimes is not to prohibit the possession itself. MOORE, *supra* note 12, at 21-22.

<sup>38</sup> Husak, *supra* note 31, at 2453.

affairs over which a person lacks control.”<sup>39</sup> The upshot of control is that it provides an alternative scheme in which to base criminal liability that does not have to deal with the complicated problem of defining and distinguishing actions, omissions, and possessions. Thus, the elegance of the proposal lies in its simplicity. If the actor had control over the state of affairs, then a *prima facie* case can be argued in favor of holding him responsible for said state of affairs.

The problem with the control principle is that it proves too much. Myriad examples could be given of actors who should not be held criminally responsible despite the fact that they had control over a given event. Suppose, for example, that a hurricane threatens to approach your area. Your next-door neighbor is out of town and will not be able to make it back home until after the hurricane passes because all flights in and out of the area have been cancelled. Therefore, he calls you in order to ask you to board up his house so that the storm does not damage it. Upon his return, he would pay you a considerable amount of money as a token of appreciation for your help. Even though you had the time and resources to help your neighbor, you decide not to in order to go to the movies. As forecasted, the hurricane ravaged the area and, consequently, your neighbor’s house was destroyed. Should you be held criminally responsible for the damages caused to the house? In our opinion, the answer is clearly “no” because you were not under a statutory duty to board your neighbor’s house. However, under Husak’s control principle, there is no reason not to hold you liable. In view of the fact that you had the time and resources to board up your neighbor’s house, it should be concluded that you had “control” over whether or not it was going to be damaged by the storm. Hence, there would seem to be no impediment to hold you liable for the commission of the offense of criminal mischief. This is surely wrong. The right answer seems to be that your conduct constituted a non-punishable omission because no law existed that required you to engage in the action of helping your neighbor.

Ultimately, the implications of the control principle are either false or trivially and uncontroversially true. The consequences of the principle are false inasmuch as they, as we just explained, prove too much. They are true, however, if we take the control requirement to mean that no liability can be imposed if the defendant did not have the physical capacity to control the state of affairs. Imagine, for example, that rioting prisoners handcuffed all correctional officers to steel beams located throughout a prison. If the prisoners successfully escaped from prison, the correctional officers should not be held liable for violating their duty to prevent the escape. Even though they failed to prevent the

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<sup>39</sup> HUSAK, *supra* note 29, at 98.

escape despite having a duty to do so, they will not be held liable because they were handcuffed to the beams, thus lacking physical control over the situation. Hence, control can and does play an important role in these instances. This, however, is a rather trivial point. No one actually denies that actors who lack the physical ability to prevent the result from ensuing should be held criminally responsible. The fact that someone cannot be held liable for an act that he could not stop is uncontroversial. The problem is that control is a necessary but not a sufficient condition for liability. As the case of the out of town neighbor demonstrates, actors escape punishment in many instances where they had control over the situation. Therefore, the control principle cannot meaningfully limit the number of conducts that may trigger the imposition of punishment. As a result of this, in our opinion, Husak's control principle is not normatively more appealing than the act requirement that Fletcher defends in his *Grammar*.

#### CONCLUSION

Fletcher's communicative theory of action represents an improvement over alternative theories. It compares favorably with the causal and teleological concepts of action that were elaborated in civil-law jurisdictions during the last fifty years because it is premised on the fact that a concept of action can only be normatively appealing once it is divorced from metaphysical and ontological abstractions. The communicative concept of action should also be preferred over Moore's mechanistic concept of action and Husak's control principle. Moore's theory of actions as "willed bodily movements" places too much weight on the movement/non-movement distinction, while Husak's reliance on control unjustifiably broadens the number of cases that could trigger the imposition of criminal liability. Ultimately, moral judgments on criminal responsibility should be based on whether or not the defendant's conduct could be intersubjectively construed as an instance of meaningful behavior and not on whether or not he willed his muscles into movement or had control over the state of affairs that ensued. This is more compatible with Fletcher's concept of action than with Moore's or Husak's.