

# What it Means to be Responsible for Action: Mind and Movement in Criminal Law

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## *Abstract*

*This paper asks whether law has a persuasive conception of action and considers what it might mean to be responsible for action so conceived. The matter is important. If law's concept of action does not allow us sensibly to claim that we are responsible for it, then law may need a substantially revised concept of what action is. The paper proposes that law lacks a consistent account of either action or responsibility and it suggests a better approach.*

## **1 Introduction**

The decision that a defendant is guilty of an offence involves a decision that he is responsible: responsible as an agent who acted, and for the prohibited action that he did. This paper asks whether law has a good understanding of responsibility for action; does law understand what action is and what it means to be responsible for it?<sup>1</sup> The question is of considerable practical importance: if law's

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<sup>1</sup> The order of priority here is important. Many analyses of responsibility, including of responsibility for action, focus on what it means to be responsible. Naturally, this is a vital consideration. Still, this paper implies that an account of what it means to be responsible must, first, have something to say about the nature of the thing that we are responsible for. That is not some secondary consideration; it is a vital and hugely complex subject for analysis. Law is a useful arena from which to elaborate the point because it has at once a clear defensible composite account of what action is and an equally clear – while flawed – atomistic (physical) account of what action is. It might immediately be objected that any scrutiny of law, in this regard, is disingenuous or at least misplaced. In so far as it is persuaded by its own account of the world, law is an epistemically closed enterprise that has no allegiance to other domains that employ concepts differing in part or in whole from its own. The objection is more appealing than it might appear to be. Law, after all, may reach practically effective and morally

understanding is deficient, it may be that some defendants are deemed responsible when they ought not to be and that others are adjudged responsible for the wrong kind of action or to the wrong degree. It is important philosophically too. If law's concept of action does not allow us sensibly to claim that we are responsible for it, then law may need a substantially revised concept of what action is. The paper begins by probing law's nebulous, shifting and complex commitment to the idea that we are responsible for our physical 'actions'. It presents an alternative, simple view that defendants are responsible for their crimes. The simple view emerges from the philosophical proposition, to be defended, that to be responsible for action is to be responsible for both the physical and mental components that in combination give action (and crime as action) its form.<sup>2</sup>

## 2 Some Distinctions

A number of distinctions clarify what this paper is not about and so bring its subject matter into focus. The first is between responsibility and accountability. The paper is about responsibility in a narrow sense.<sup>3</sup> Accountability (which might

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sound conclusions, in part, by using, even manipulating, concepts of action to those ends. Still, even to conclude this much is to understand, first, whether law's concepts do fit with true or more convincing ones. And, if law owes no fidelity to analytical 'truth', still there is surely merit in determining the extent to which the enterprise coheres with sound philosophical and other conclusions. I am grateful to David Prendergast for making the point, in the context of 'element analysis,' which many deem to be an effective if not true account of how human beings act.

<sup>2</sup> These ideas are defended in a limited sense only. Law, in its *actus reus/mens rea* paradigm, simplifies a problem at the heart of the philosophy of action. It exposes significant flaws in the standard view of action and responsibility for it but it also shows how apparently more sophisticated accounts of action suffer many of the very same flaws. The purpose of the paper is to make this point; not to posit a fully-fledged better account of responsibility for action but to show how such an account surely must proceed.

<sup>3</sup> For two broader concepts of responsibility, considered from the perspective of legal philosophers, see John Gardner, 'The Mark of Responsibility' (2002) 23(2) *Oxford Journal of Legal Studies* 157; Anthony Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart, 2007). Gardner's concept is expansive in allying responsibility with our capacity to explain, to give an account of our actions; Duff's is expansive in connecting responsibility both to what we are responsible for and who we are responsible to. To focus on responsibility rather than answerability, as this paper does, is not to make the case that there are no vital connections between the two. Many conclude that answerability is coextensive with attributability (responsibility in the sense used here). See, eg, TM Scanlon, *What We Owe to Each Other* (Harvard University Press, 1998); TM Scanlon, *Moral Dimensions: Permissibility, Meaning, Blame* (Harvard University Press, 2008); Angela Smith, 'Responsibility for Attitudes: Activity and Passivity in Mental Life' (2005) 115 *Ethics* 236. Others, notably David Shoemaker, take the view that attributability, answerability and responsibility are distinctive and that the conditions for one can be met without conditions for the others being satisfied.

be considered part of a wider concept of responsibility) is akin to answerability. It identifies an important duty that responsible agents owe to others: if I fail to discharge my duties at work, I may be accountable to my employer; if a prime minister breaks his manifesto commitments, he is accountable to the electorate, to citizens, to parliament; if a defendant commits a murder, he is accountable to society, to the court, to the victim's family. But in each case, the agent must already be responsible, at least in some way, for the relevant behaviour or a dimension of it. I ought not to be held to account – I am not accountable – unless I am responsible.

The second distinction is between responsibility and those factors that are commonly considered to render us 'less' (or not) responsible but do not go to its nature.<sup>4</sup> Criminal law does not hold responsible for murder an intoxicated defendant who, by virtue of his intoxication, lacks the specific intent required for that offence. Nor does it blame at all a defendant who uses force in legitimate self-defence.<sup>5</sup> It exculpates agents who are acting under duress and it may partly excuse others who lose their self-control or act as a result of diminished responsibility. Most notably, it withholds guilt from the insane and from those acting, without prior fault, in a state of automatism. It might reasonably be said

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See David Shoemaker, 'Attributability, Answerability, and Accountability: Toward a Wider Theory of Moral Responsibility' (2011) 121(3) *Ethics* 602. The important debates engaged by these distinctions cannot be said to bear no importance for the argument considered here. Still, it is not a centrally important matter for present purposes and it will, in fact, be excluded from the contours of debate. Note that Shoemaker, like Smith and Scanlon, accepts the view that actions for which we are responsible are those that reflect our moral judgments. This paper rejects that view in favour of a far more intimate relationship. Indeed the relevant relation is not one of 'connection' at all. Our moral judgments, together with much else, once we act, represent an important part of what our actions are and so too an important part of what we are responsible for. Once we act, our engaged capacities – to make judgments, to evaluate, to foresee, to set out to, to feel, to move etc – are not apart from but intrinsic to what we do.

- <sup>4</sup> Both Duff (n 3) and Gardner (n 3), like the present author, focus not on when we are merely responsible but on when we are culpably responsible; in criminal law, it is blameworthy actions that interest us. Still, that focus is liable to distort what responsibility is like even if only in encouraging an explanatory focus on those factors that make us culpable or mitigate culpability in some way.
- <sup>5</sup> It should be emphasised, as Duff does (albeit for different reasons), that responsibility is a necessary but not sufficient condition for liability and that blame is only one species of responsibility: see Duff (n 3) 19. In the approach to be proposed here, liability becomes the relevant species of responsibility only when the thing that we are responsible for takes a criminally defined form; liability goes to the character of that thing. So, in criminal law we are not responsible merely for doing, or for doing good, or for doing properly, or effectively, or for doing in order to protect oneself, but for criminal wrongdoing. See Fischer and Ravizza who, in a very different approach to the subject, offer reasons to associate moral responsibility with both blameworthy and praiseworthy actions: John Martin Fischer and Mark Ravizza, *Responsibility and Control: A Theory of Moral Responsibility* (Cambridge University Press, 2000) 1.

that in these ways, the practice of criminal law recognises entirely appropriately that the thing done where a defence exists is not the same as the thing done in its absence.<sup>6</sup> So, it is descriptively, morally and legally inaccurate to say that a defendant who acts in self-defence is responsible for an act of murder. It is equally improper to say that a defendant who acts under duress is responsible for some criminal action. This is not to assert that these defendants are not responsible; both have acted and so both are responsible for what they have done. The crucial matter now is to specify, in relevant terms, what this is. It might, relevantly, be said that the first is responsible for [killing another in order to save his own life], and the second for [committing what otherwise would be an offence, knowing that failing to do so will seriously harm her own physical integrity]. By the account of action and responsibility here proposed, these descriptions are (the relevant) descriptions of the defendants' actions, and descriptions so too of what they are (relevantly) responsible for.<sup>7</sup>

This brief suggestion hardly touches on the complexity that attends the relationship between responsibility and defences and it is beyond the scope of this paper to further scrutinise the matter. Instead, the analysis will address the conceptual question of what it means to be responsible for action in the first place: what are these actions that we are responsible for and what does being responsible for them entail?<sup>8</sup> Naturally, answers to the questions posed will tend to influence how we view the responsibility of defendants who are insane, threatened, or disturbed. The point to note is merely that, here, this is indeed the explanatory direction; no conclusions are derived from the mental condition of those whose status no doubt might, in a project dedicated to that end, tell us a great deal about responsibility itself.

The final distinction is between responsibility for action and responsibility for failing to act. In the eyes of the law, we are sometimes responsible for omissions. This paper is tangentially concerned with omissions by virtue of the often-mooted possibility that law places in that category behaviour that comfortably

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<sup>6</sup> The more commonly held view is that defences go to the degree of responsibility we have for an action that is the same as the one done where the defendant has no defence.

<sup>7</sup> Duff's approach is different. He indicates, for example, that we are responsible for wounding, although we are not liable, when we have a justification: see Duff (n 3). By the account here proposed, the thing that makes the defendant's action justified is part of what he does: wounding the defendant in self-defence, say. To describe the action as 'wounding' where a defence arises is to deprive it of its descriptively most relevant dimension.

<sup>8</sup> In this respect, the task set by the author is not the task that Gardner sets himself. Gardner is concerned with why, as human beings, responsibility is vital for us. So, he notes, for example, that only those who are responsible can offer excuses. He usefully associates responsibility with rationality, noting that 'response' 'ability' is indeed an ability to give a response. The, at least arguably, prior question is about what precisely it is that we are responsible for in the first place, and so what it is that our response pertains to: see Gardner (n 3).

might be described as ‘action’. An account of action that does not associate action with physical movement exclusively, such as the one accepted here, is at least capable of defending that possibility.<sup>9</sup> It follows that if law’s ‘omissions’ are actions, we can be responsible for these. A defence of this idea can only be dealt with in perfunctory terms, since the outstanding question of what precisely ‘these’ are – what form their nature as actions take – turns out to be vast.<sup>10</sup>

### 3 How (We Might Think) Law Understands Responsibility

#### 3.1 The Simple View Described: Defendants are Responsible for their Crimes

When a court decides that a defendant is responsible for a prohibited action, what action does it refer to? The practice of criminal law admits a surprisingly large number of potential solutions to the question posed. Among these, there is a simple view offering a quick and attractive answer: to say that a defendant is responsible for his action is to say that he is responsible for rape, for murder, for criminal damage. In short, defendants are responsible for their crimes. Perhaps unsurprisingly, the compelling nature of this view is a symptom of the fact that it is true. A two-stage process helps demonstrate as much. The first consists of a critique of those features of criminal law that seem to undermine it. The second comprises of an, independent, account of its validity.

#### 3.2 Bodily Movement in Law’s Account of Action

However attracted we are to the view that defendants are responsible for their crimes, we are liable to become easily distracted. The alternative possibilities are complex, well-evidenced in legal practice, reflective of dogmatic philosophical positions, and not easily rebutted by anything simple. Consider what criminal law means by action. Reflection on the point will quickly bring to mind the *mens rea/actus reus* paradigm. We have states of mind (*mens rea*) and in (or from)

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<sup>9</sup> Of course we can also sometimes be responsible for possession and for the actions of others, according to the practice. By an extension of the account here proposed, we are responsible only for our actions, but the view is taken that the line between being and doing is often close to vanishing point. To say that we are responsible for possession or for the actions of others is to associate these with actions of ours and it is these that, really, we are responsible for.

<sup>10</sup> A further line might be drawn between the discussion advanced here and those arguments that explore whether we can be responsible at all if determinism is true: am I really responsible for what I do given that I could not have done otherwise? The present author finds no reason to accept determinism and so does not engage with the question. For one notable exploration of the relationship between responsibility and determinism, see PF Strawson in his landmark paper, PF Strawson, ‘Freedom and Resentment’ (1962) 48 *Proceedings of the British Academy* 187. See also Harry Frankfurt, ‘Alternate Possibilities and Moral Responsibility’ (1969) 66 *Journal of Philosophy* 829.

having them, we act (*actus reus*). The two are apart; mind and act. It will be clear too, from the paradigm, what law means by action. Paradigmatically, action is physical action;<sup>11</sup> to act is to move and then to produce effects in the world through movement.<sup>12</sup> Responsibility for criminal action can only then amount to responsibility for the movements we make or, depending on one's concept of action, for these alongside their effects.

Before exploring the implications of that proposition, it might be considered that criminal law also has a more expansive concept of action that is committed to the view that our physical processes are actions without dismissing the existence of other ways of acting. This seems unlikely. The commitment to the physical as the sole category of action is evident in at least in two ways. First, there is the practice's concept of omissions. To take a notable example, Gibbins and Proctor were found liable for the death of the child in their care even though, in law's terms, it was not their actions that caused the child to die.<sup>13</sup> Their liability arose from their failure to act, which is to say that the prohibited outcome (a) was not attributable to anything that the defendants did and (b) was attributable to the absence of something that they ought to have done.<sup>14</sup> In attaching their liability to omissions, the practice rejects the view that defendants such as these are criminally culpable for complete or contributory actions like 'abuse' or 'starvation' or 'malicious neglect', or even, by perfectly sensible descriptions, killing or murder. The rejection is hard to grasp. If 'caring' is the action that the defendants failed to do and if, as appears likely, caring does not just consist of a set of physical processes (it is minimally about responding morally,

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<sup>11</sup> The approach to action is broadly equivalent to a Davidsonian one, where our reasons are taken to be causal (probably in an efficient sense). See Donald Davidson, *Essays on Actions and Events* (Oxford University Press, 2<sup>nd</sup> ed, 2001). It should be noted that Davidson's account of intention, on the other hand, arguably is not compatible with that of law's. It seems that for Davidson, intention is not a discrete mental state; it coincides with our out all-out evaluative reasons.

<sup>12</sup> We may be responsible for either or both, depending on one's account of action. Dworkin refers to responsibility for (undesired) effects as consequentialist responsibility, a phenomenon also addressed by Gardner: see Gardner (n 3); Ronald Dworkin, *Sovereign Virtue: the Theory and Practice of Equality* (Harvard University Press, 2000). The notion is put to sensible use by both but does not stand up to scrutiny (as an account of what we are responsible for) in a more foundational enterprise such as this one.

<sup>13</sup> *R v Gibbins and Proctor* (1919) 13 Cr App R 134.

<sup>14</sup> Note that this normative reliance on duties seems to undermine the notion that the absence of action is the absence of mere physical movement. It would then seem that the presence of action is not just the presence of physical movement either. If the relevant duty is to care for the welfare of a child, then presumably the action that satisfies this duty is caring for the welfare of the child. There is hardly anywhere to go with the idea that this action might consist of a set of willed bodily movements. Now, if there is nowhere to go with this, it might just as well be said that there is no merit in physical accounts of action at all.

empathetically, lovingly, physically, materially to the position of another human being to whom one is inextricably linked, who is dependent on one's care), then so too can abuse, which equally involves a set of (destructive) human responses, be considered an action. The fact that the abuse here did not entail relevantly causal bodily movement is hardly determinative of its ontological status. But the rejection of the idea that abuse, say, might be an action is also inevitable; despite the contradictions that its position manifests, for the generally avowed purposes of criminal law, action is physical action. The absence of (owed) voluntary movement is just, for its purposes, what the absence of action is taken to amount to.

The more obvious piece of strong evidence for the view that law includes only physical movements in its concept of action is the *mens rea/actus reus* paradigm itself. The distinction between *mens rea* and *actus reus* reflects the classical view of action where there is a physical thing caused and directed (act) and a mental thing that does the causing and directing (mind). It is a model of human affairs which entails that there is nothing other than physical movement for action to consist in; those aspects of offending that are not physical, not external, not realised in the world, belong to mind and not to act. Applied to the practice, we can say that states of mind like intention, recklessness, lack of reasonable belief, suspicion, somehow bear upon or cause or direct or accompany the acts we perform, acts that consist purely in physical processes. So, starting from a very simple proposition – if we are responsible for our actions, in criminal law we are responsible for theft, criminal damage, murder – we arrive with very, very little scrutiny somewhere quite remote. If we are responsible for our actions then, in criminal law, this must mean either that we are responsible for the movements we make or that we are responsible for our movements together with their effects in the world. This is what we do; we move and, in moving, we cause.

The view that actions are our movements, when highlighted even in very simple terms, seems strange. As a result, the notion that it is worthwhile devoting any attention to dispelling it might seem philosophically misplaced. Still, however strange, this is, in a vitally important sense, law's view; the *mens rea/actus reus* paradigm is the very essence of criminal law's prohibitions. Now there may be many other reasons for law to focus on the physical, not least the typical requirement that offenders engage with the physical world by actually physically causing harm. Still none of these possibilities undoes the dominance of the physical in law's concept of action and it is a conceptual flaw that this paper seeks to address. But there is another, more surprising reason, to scrutinise the physical account of action further.

Although philosophers would likely reject the 'physical' view if asked whether it is acceptable, in truth variations on it are the essence of its enterprise too, even in its most nuanced forms. So, while it is naturally replete with analyses of how our other capacities and our physical capacities might interact, including to produce action, still philosophy lacks any dedicated consideration of the possibility that action just is, in all its iterations, a composite phenomenon. But perhaps other

capacities just do not fall into the background once we act, somehow taking on a causal, or motivational, or purely agential role in producing but not in 'being' action. Perhaps physical 'action' is just not the thing that stands in need of explanation in its relation to these other capacities; perhaps, indeed, there is no sensible juxtaposition to be made between physical and mental actions.<sup>15</sup> To seek to understand action as a composite of desires, reasons, motivations, knowledge, movement, foresight, evaluations, senses, is to seek to understand something quite different from the physical. It is certainly to cast serious doubt on any enterprise that divorces one, physical, capacity from the others, setting it up as the essence of action, to be understood as such via the role of these others in producing it. Our human capacities are not just the 'how it is that we come to act', they are also 'the actions that we do'. If we do not understand their place in the latter, we certainly cannot grasp their role in the former. So, to set out to dispel the focus on the physical is not to fight a straw man, it is to address something that is central both to law and to philosophy where its dominance is clear, even if it might be denied.<sup>16</sup>

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<sup>15</sup> So, even an excellent study like Matthew Sotirou and Lucy O'Brien (eds), *Mental Actions* (Oxford University Press, 2009) proceeds on the assumption that there are such things as 'mental actions' and 'physical actions'.

<sup>16</sup> To make this case, consider three positions that might seem most compatible with an account of action, like the composite account here proposed. First, Korsgaard. Korsgaard's position is hugely compelling. Her idea, shared by Kant and Plato, that we need self-constitution for action makes a vital, unsurpassed, contribution to our understanding of how it is that we come to act. Still, for Korsgaard, there is no doubt that we act physically: Christine Korsgaard, *Self-Constitution: Agency, Identity and Integrity* (Oxford University Press, 2009). Secondly, a more express account of the point comes from Dretske, although largely as a side-show to his primary analyses. Dretske wants to preserve the causal efficacy of mental content. And although his account of action has been described as 'a component' account, this belies the fact that, for Dretske, it is physical movement that stands as the thing in need of explanation: Fred Dretske, *Explaining Behavior: Reasons in a World of Causes* (MIT Press, 1988). Searle, in 'Intention in Action' acknowledges that the conditions of satisfaction of intentions go beyond bodily movements. Still, for Searle, bodily movements are 'the' action; the remainder amounts to the conditions of satisfaction. Other kinds of actions are dismissed as adding no complexity to the debate and again the notion is preserved that there are such things as physical actions: John Searle *Intentionality: An Essay in the Philosophy of Mind* (Cambridge University Press, 1983). Thirdly, John Hyman in John Hyman, *Action, Knowledge and Will* (Oxford University Press, 2015). Hyman appears to be discussing the constitution of action, or at least he seems to be addressing some very closely related concerns. This appearance is an illusion. Hyman, in first assuming a special and prominent relationship between action and physical processes, proceeds to examine how agents, their attributes, and these physical actions interrelate. While his account of this relation is fresh and insightful, it still assumes that the explanatory burden does indeed take the form of a relation; there are features of agents and (physical) features of actions. The relationship between the two is the thing that matters. Note that neither is a 'full-blown' account of agency a composite account of action. In these accounts, notably Bratman's, it is the aetiology of actions that matter



### 3.3 The Narrow View: Defendants are Responsible for Basic Actions

What might it mean to be responsible for law's physical actions? The brief discussion above suggests two avenues of inquiry: one narrow, the other broad. According to the narrow view, not only is action an exclusively physical phenomenon, it is comprised of voluntary 'basic actions' alone, such that the effects of these are not part of what it means to act.<sup>17</sup> Basic actions are our most fundamental movements, like the one I make when I move my finger.<sup>18</sup> They are considered basic at least in three ways. First, these movements have no prior active cause; there is nothing else that I do in order to bring about the movement of my finger. Secondly, they are, tautologically and essentially, within our control; it is my finger that I move after all. Thirdly, our movements are basic in being the only thing within our control. Everything else that is 'done' after the finger is moved – the pulling of a trigger, the release of a bullet, the killing of a victim – is subject to external factors, conditioned by the world, not by us. These

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and the expansive complexity of agency therein. There is no consideration of the notion that all of this complexity goes not at all to aetiology but to the constitution of the actions we do: see, eg, Michael Bratman, 'Two Faces of Intention' (1984) 93 *Philosophical Review* 375; Michael Bratman, *Intention, Plans, and Practical Reason* (Harvard University Press, 1987). Hornsby's observation, although it is not addressed to questions put here, is insightful: 'those who speak as if an action were an event one candidate for whose cause is an agent make it seem as if an action might be identified independently of any agent. But an event that merits the title 'action' is a person's intentionally doing something. And such events do not belong in a causal order from which people themselves might be missing. Their effects and results are caused by people situated in the causal world in which they intervene, and knowledge of which they rely on for their doings to lead to outcomes they want. Evidently this world, which we know and inhabit, although it is not a world from which events are absent, is not 'the event causal order' of which Bratman spoke. But nor is it a world into which people intrude.' Ultimately Bratman's is the standard story: 'Like others who tell the standard story, they suppose that citing states and events that cause a bodily movement carries the explanatory force that might have been carried by mentioning the agent': Jennifer Hornsby, 'Agency and Action' in Helen Steward and John Hyman (eds), *Agency and Action* (Cambridge University Press, 2004) 1, 1-23.

<sup>17</sup> For an account of basic actions see, eg, Arthur C Danto, 'Basic Actions and Basic Concepts' (1979) 32 *Review of Metaphysics* 471: 'if there are non-basic actions there must be actions where the agent acts directly; where in order to do a, there is nothing x such that x causes a and the agent does x.'

<sup>18</sup> Wittgenstein famously explored the issues like so, '[w]hat is left over if I subtract the fact that my arm goes up from the fact that I raise my arm?': Ludwig Wittgenstein, *Philosophical Investigations*, tr G E M Anscombe (Basil Blackwell, 1953) 621 [trans of: *Philosophische Untersuchungen* (1953)]. Commenting on the often proposed solutions, McCann is correct that commonly posited theories of reason do not tell us why reasons explain actions: 'No doubt, if a reason causes me to raise my arm it also causes my arm to rise. But this no more helps us understand the difference between raising my arm and the arm going up than it helps us understand the difference between ball games and innings to say that ball games, and hence their innings, are played': Hugh J McCann, 'Volition and Basic Action' (1974) 83 *Philosophical Review* 460.

external events are not really 'mine'; they are not actions of mine.<sup>19</sup> The narrow view can be contrasted with the broader view (to be considered below) that identifies the accused's action, not merely with his voluntary movements but also with the complex effects that these have in the world, effects like the pulling of the trigger, the release of the bullet, the killing of the victim etc.

Again the focus on this narrow view might seem unnecessary. Surely no one, any longer, subscribes to it. Again this is not the whole truth. First, many hold the view. Secondly, it is, fairly obviously, the most plausible construal of what the *mens rea/actus reus* distinction might sensibly entail. Thirdly, if one is to subscribe to any physical account of action, as most do, this basic account, is actually the most plausible. The flaws in it, *a fortiori*, are replicated in the apparently more sensible broad view.

So, what are the implications of the narrow view? Take the offence of murder, committed by a defendant who shoots his victim. Under the narrow view, the defendant's action consists of the movement of his finger. The broad description of events 'killing (or murdering) the victim' might seem better to represent, in simple terms, what the defendant does but these are not, by any sensible construal, basic actions. Indeed, we might say, at most, that the death of the victim is caused, at source, by the defendant's basic action of moving his finger. Nor, even, are interim physical processes, like releasing a bullet or pressing a trigger, voluntary actions of the accused. These events – the trigger moving, the bullet being released – are also caused by the defendant but they are not in themselves movements of his. The defendant's only basic action in this scenario is, indeed, the movement of his finger. Now, if we take seriously the view that we are responsible for actions, and that these consist in voluntary movements, then this defendant, who has murdered, is responsible for the movement of his finger. Of course he may, indeed, be so responsible but if we are to accept the basic action view of behaviour, he must be responsible for this alone.

Of course the idea that a convicted murderer is responsible only for moving his finger is unattractive. This excludes the possibility that the defendant is responsible for his crime or that he is responsible for killing the victim. It further excludes responsibility – beyond the direct concern of criminal prohibitions –

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<sup>19</sup> The view was associated notably with Davidson. It is also accepted by Moore although his explanation for it is complex and subtle. For Moore, basic acts and complex acts are in reality one action; the distinction between the two is just a nominal one: see Davidson (n 11) 59; Michael S Moore, *Act and Crime: The Philosophy of Action and its Implications for Criminal Law* (Oxford University Press, 2010). Hornsby's critique of 'bodily movement' accounts of action (although it still arguably subscribes to a physical paradigm) is devastating: 'Proponents of the standard story identify actions with bodily movements. And the identification gives their game away. Given that agents cause what their actions cause, an agent's place in any causal story must be the place of her actions. But then agents and the events that really are actions are obliterated with a single stroke when bodily movements are identified with actions. In the standard story no-one ever does anything': Hornsby (n 16).

that the defendant is responsible for bringing about great grief on the victim's family, say, or for avenging a perceived wrong. Responsibility for the crime is excluded not least because the crime incorporates both *mens rea* and complex *actus reus* within it; the crime is not just an action in this account. Responsibility for killing the victim is excluded since 'killing' captures many events that are external to the defendant's basic actions. Responsibility for bringing about great grief on the victim's family and for avenging a wrong are excluded, for these are certainly not bodily movements; indeed they admit of no causal physical connection to movements of the accused.

Another extremely important possibility appears to be ruled out by the physical movement account of action. If responsibility for action is responsibility for bodily movements, this appears to exclude the possibility that the defendant is responsible for doing something wrong. Our voluntary bodily movements as such are entirely neutral physical processes, which is to say that the mere movement of a finger, in itself, has no moral import whatsoever. And, naturally, if it is moving my finger that I am responsible for, I am not culpable for anything; moving one's finger is not something that warrants blame, never mind censure. Although law's commitment to the voluntary movement account of action must, by one plausible interpretation, take it here, perhaps no one in the practice would find this notion remotely appealing. It seems unlikely that to be responsible for action is to be responsible for actions so understood. If we are responsible for action, this account of the nature of action must be rejected.

### **3.4 The Broader View: Defendants are Responsible for the Complex *Actus Reus* of Offences**

At this point, it might be objected that the author betrays a lack of generosity, that of course in law, we are not deemed responsible for basic actions, consisting in voluntary movements, but for complex voluntary actions, like killing, driving dangerously, theft etc. These, not mere movements, are what the *actus reus* of the practice consists in. Still, the focus on 'basic actions' has brought to light serious difficulties that are simply reproduced in this broader approach to action. Notably, those who take the view that action is 'complex action' want to preserve the idea that there is 'physical' action on the one hand (the appropriation of property belonging to another say) and mind, as something entirely apart from action, on the other (dishonesty and the intention permanently to deprive). So, if I am responsible for theft as an action, this still cannot now mean that I am responsible for the crime writ large; it means rather that I am responsible just for the taking of property belonging to another (something I might do fairly often without committing an offence).

Secondly, notice that the appropriation of property belonging to another, the killing of a victim, the causing of 'damage' to property, as mere physical processes, are just that; neutral processes of cause and effect. If responsibility for action takes this form, then we still lack responsibility for our crimes, and we are

still not responsible for doing anything wrong at all.<sup>20</sup> So, true, it is wrong to cause death intentionally and with no defence, but it is not wrong to 'do' so when the death is the result of an involuntary movement; it is perhaps only slightly 'wrong' when it is 'done' accidentally; partly wrong when done negligently; less wrong when done in mercy; it may be right when done in self-defence; and perhaps it is even praiseworthy in a combat situation; or to be admired where done to save other lives, etc. But in all these cases the mere cause and effect alone tell us nothing beyond the fact that physical event, A, produced result, B. In physical accounts of action, whatever form they take, doing and wrongness (or rightness, or anything else) are apart. We cannot ever be responsible for doing something wrong.

Before abandoning outright the idea that responsibility is somehow tied exclusively to physical movements, basic or complex, the outstanding possibility may briefly be considered that we are responsible for physical actions in virtue of the moral content of those states of mind we have in doing them. This is an important possibility for it might rescue the notion that we are responsible for neutral physical actions from the implication that such an account of action takes wrongness (or rightness indeed) out of the picture entirely. Let us agree, for the purposes of argument, that our actions do consist in physical processes; perhaps it might be said that responsibility is brought to these processes through some sort of inner culpability (or inner benevolence or, more generally, through some kind of purposeful mental state). That seems like a far more convincing idea; a defendant is responsible for killing the victim in virtue of the state of mind he had in doing it; through an intention to kill, say. Moreover, in virtue of the fact that she intended to kill (that her state of mind substantively took this form), she is not merely responsible for causing death, she is culpably responsible.

The problems with this position remain profound. First, it relies on the unlikely notion, to be scrutinised below, that we make bodily movements and have states of mind in respect of these that cause them; that the two are phenomenologically apart. Secondly, and despite appearances to the contrary, we still, here, do not reach the view that we are responsible for doing something wrong. Rather, we are now deemed culpably responsible for doing something neutral. A

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<sup>20</sup> Notice that character theories of responsibility, that rely on physical approaches to action, do nothing to prevent this implication. According to character theories, a defendant is not responsible for her action if that action is not reflective of her as an agent. However, in physical accounts of action, actions never reveal anything about the agent, positive, negative or otherwise. Actions are just physical relations of cause and effect. Although it cannot be explored further in the context of this paper, character is, of course, relevant to an understanding of responsibility; a particularly vulnerable person who overreacts to a minor threat is responsible for her action but she is responsible as the person she is for the thing that she does: as a vulnerable person, for hitting the victim in the genuine belief that he was about to kill her. Now, a relevantly proper description of the action, tautologically, reflects the character of the agent; 'she' acts. For an account of responsibility in its relation to character theories, see Victor Tadros, *Criminal Responsibility* (Oxford University Press, 2007).

contradiction emerges, for it seems impossible that we could be culpably responsible at all for such a thing. The contradiction ought seriously to worry anyone who wants to hold on to these propositions: (a) we are responsible for our actions; (b) we are responsible for wrong actions (or right actions); and (c) action is physical action. This paper commits to (a) and (b) and so it must dismiss (c): we cannot be responsible for doing something wrong if actions cannot in themselves be wrong; the idea that actions cannot in themselves be wrong is entailed in both basic and complex physical accounts of action (whether they acknowledge the same or not), and these must, therefore, be rejected.

### **3.5 We are Responsible for Crimes as a Combination of Mind and Act**

Probably those of us who are even remotely concerned with the operations of criminal law want it to be true that defendants are responsible for their crimes. If we are responsible for our actions and crimes are actions, then the want can, straightforwardly, be satisfied. However, the burden of showing this much has very definitely not been discharged. Before attempting to meet the challenge, a radical alternative might briefly be explored that we are responsible for crimes, that crimes are comprised of both mental and physical processes, but that crimes are not actions at all; that they are a phenomenon that incorporates both states of mind (the mental) and action (the physical) within it. By this account, the *mens rea/actus reus* paradigm survives but now (a) above is rejected; ie the notion is denied that it is action that human beings are responsible for. This idea runs into problems pretty quickly. If states of mind are located within crimes, crimes that we are responsible for, the difficult idea emerges that rather than make us responsible, these states of mind are part of the thing that we are responsible for. And now too, responsibility disappears from sight; we have produced a strange phenomenon that is both states of mind and actions with no account of the ontological character of such a thing or, importantly, of how that phenomenon attaches to us and fixes our responsibility.

## **4 *Tensions within Physical Accounts of Action***

The actions of criminal law are not, it seems, the kinds of 'actions' that are caused in an efficient manner; actions like sneezing, or jumping involuntarily in response to a loud noise, or colliding with another having been pushed by a third party. These movements are akin to the blowing of leaves in the wind and human action, whatever it is like, is certainly not like this. It follows that if action (at least) starts with human physical movement, as both the narrow and broad views would have us believe, it is certainly not all such movement. So those who advocate the human-movement account of action do not really mean to associate action with mere human movement, they want the association, of course, to be with voluntary movement alone.

If this admission appears just to state rather than to affect the credibility of the physical movement account of action, the appearance is deceptive. To say that

action is not (can never be) mere physical movement is to say that there is not a state of mind that causes (or directs, or informs) action, and an entirely separate action that is efficiently caused; I do not, internally, decide to illustrate an argument by gesticulation, say, then wait for the pointing of my finger to follow causally, as though it somehow exists apart from those 'inner' states it implicates.<sup>21</sup> However it comes about, it appears true, incontrovertibly, that voluntary physical movements are phenomenologically unified with the voluntariness of which they are comprised. Put simply, the movement of my finger is purposeful; it is 'done' for a reason, with know-how, in knowledge, and through coordinated physical processes. None of this is apart from the movement itself (indeed my finger has no independent ability to process instructions from the mind for it to move). Crucially, it becomes entirely unclear how anyone who wants to say that action is physical 'action' can at the same time aver that action is constituted by those inner processes that make action voluntary. The tension becomes all the more strained once it is acknowledged that those 'inner' workings involve a vast range of human capacities and an infinite number of objects of those capacities. This is to give up the ghost. Once it is conceded that action is voluntary action, any inner capacity that goes to making it voluntary can stake a claim to belong to that action as such.

But perhaps all of this points to a solution rather than a problem. The idea was rejected above that we might be responsible for complex *actus rei* in virtue of the states of mind we bring to it. It was rejected because, in the *actus reus/mens rea* paradigm, states of mind are detached from actions, and actions, as such, must then be just neutral processes of cause and effect. To attach responsibility to this is to make it an irrelevance in human affairs. But, perhaps that rejection too betrayed a lack of charity; after all, in physical accounts of action, actions do consist in [voluntary movements] and not mere movements. Now it seems that we might be responsible for actions taking that composite form. If this seems initially appealing, it is a proposition that is burdened by unlikely implications. First, it offers absolutely no explanation for the fact that an apparently physical account of action, embraces, in its concept of action, the inner human world (a world that, at the same time, is deemed not to belong to action at all). The tensions are just too great for the physical model to accommodate. But let us say that this is not a problem. Let us suppose that action is voluntary bodily movement and that this is compatible with physical accounts of action such that when I voluntarily move my finger, this (or this and its effects) is my action; voluntarily moving my finger. If this seems like a far more plausible account of action –

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<sup>21</sup> A point famously made by Wittgenstein and usefully elaborated by Hacker: 'Suppose I form the decision to pull the bell rope at five o'clock (I want to call the butler and believe that by pulling the rope I shall do so). The clock strikes five. Should I now wait patiently for my arm to go up? If my wants and beliefs can be causes of my behaviour, then I should be able to sit back and let them bring about the movement of my arm': Peter Hacker, *Human Nature: the Categorical Framework* (Wiley-Blackwell, 2010) 272; Wittgenstein (n 18).

indeed it is, although to accept it we must reject, rather than embrace, the physical view – it also seems to problematise the concept of responsibility a great deal. Note the implication. It seems, now, that we are responsible for action as a fusion of physical movement and its voluntariness and in virtue of that dimension of the fusion that consists in it being voluntary. This seems at least a little inelegant, quite far removed from what we might expect responsibility for action to look like. But absolutely crucially, it now, once more, seems that the quality that might make us responsible for action, those inner purposeful states, is part of the thing that we are responsible for.

Two key claims summarise the preceding narrative: (1) if action is physical movement, such that we are responsible just for it, we are never responsible for doing something wrong and defendants are never responsible for their crimes, and (2) if action is voluntary physical movement and we are responsible for action in virtue of its voluntariness, then the ‘inner’ states that make us responsible are now located in the action itself. If there is nowhere to go with (1), it seems pretty obvious that there still must be a grain of truth in (2). Surely, responsibility has something to do with voluntary acting, with the distinctive kind of form that human action takes?<sup>22</sup>

## 5 *A Defence of the Simple View: Defendants are Responsible for their Crimes*

No doubt law treats crime as a bifurcated entity dividing it into discrete categories of mind and act, but it treats it as an integrated entity, too. In truth, the notion would not be controversial that defendants are responsible for acts of theft, murder, criminal damage, that these are things the defendant did. And if this simple view cannot withstand the *mens rea* paradigm, it may just as well follow that the flaw lies with it rather than with the simple view itself. The question that now demands consideration is whether, independently, this simple view is sustainable.

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<sup>22</sup> Like Hornsby, Velleman has a more agent-friendly account of action than the standard view. Yet, his ‘full-blooded account of human action’ is still not full-blooded enough. Velleman, like Frankfurt, indicates that it cannot be true that agents are divorced from their own volition, their will; it really must be the case that agents act. Still, what emerges therefrom is a convincing account of agency that still does not explore the implications for the constitution of action. The better way to bring the agent to the act as Velleman wants to do is not to define his ‘causal powers’ as including that eventuality; it is rather to first address what action itself is, for it might very well turn out to be the case that we straightforwardly find the agent there. We are liable to do so if we abandon – in its entirety and in all its variations – the assumption that there are internal mental states and, typically physical, actions done with or from them; that the two are in any way apart: see, eg, David Velleman, ‘What Happens When Someone Acts?’ (1992) 101(403) *Mind* 461.

When asked, of a defendant, 'what did he do?' we might respond, that Bob murdered Jim, or that he stole the book. We are unlikely to claim, he moved his finger, or his hand, or the movement of his finger on the trigger caused the death of Jim or the movement of the hand on the book caused it to be concealed under a jacket; these were his actions and, by the way, he had a culpable state of mind in doing them. Our linguistic practices that reject these artificial forms of expression are not a matter of semantic convenience; they reflect the kind of thing that action is. Moreover, in the unified form they take, crimes, entailing both physical and mental elements, are excellent representations of behaviour as a composite notion. The action of theft *is* [the dishonest appropriation of property belonging to another with the intention of permanently depriving the other of it]. The analysis of responsibility just undertaken is useful in itself but it is useful too in resurrecting this folk psychological account of behaviour: surely it is true that we are responsible for our actions; surely it is true that defendants are responsible for their crimes; surely it is true that crimes are actions. The suggestion that this might be true must find firm philosophical support. This requires some defence of the composite notion of action and a demonstration of what it might mean to be responsible for action so construed.

Still there is an elephant in the room that may seem to fatally undermine any such composite account; it concerns that connection between agents and their actions that is necessary for responsibility to take hold. If there is no such connection and we just somehow float free from what we do, we are not responsible for anything. So, the suggestion has been dismissed already that we might be responsible for crimes as a combination of both (physical) actions and states of mind because now the thing that might connect agents to their actions (these same states of mind), features in the object of our responsibility. The problem is a persistent one for any claim that crimes are actions appears to alter nothing; it still entails that the thing we are responsible for includes both states of mind and bodily movements within it. The question remains, therefore, what it can possibly mean to be responsible for such a thing. To answer the question it is necessary to show two things: (a) that action might indeed take the composite form here proposed such that crimes are actions and (b) that the necessary connection exists between agents and their actions such that it can be said that we are responsible for what we do.

## 5.1 Crimes are Actions

To show that crimes are actions is to show that actions are constituted by the physical and mental processes that crimes entail – that physical movement is not, alone, the basic building block of human behaviour. Fortunately there is room for scepticism. Consider the phrase 'I move my hand' as a description of a basic voluntary movement. The description is not simple, suggesting, as it does, the presence of an 'I' to do the moving and an 'I' possessed of a hand. Many note that this form of expression splits us apart as agents; I present my hand as something apart from 'I' that 'I' can, independently, act upon whilst persevering



with the notion that it is mine.<sup>23</sup> Moreover the question now arises, what accounts for the action of the 'I' that moves the 'I' that has a hand; some other 'I'? An infinite regress seems inevitable, in terms both of the 'I' that does the doing and the doing itself, and with it the notion of basicness disappears from sight.

This is not of course a novel suggestion; that the basic-action account of human behaviour just fails to reach basicness in human affairs. But a flaw rarely acknowledged is that it also fails to explain why the criterion for basicness would in any case attach to bodily movement alone. Duff is among those who resist the view that the thing that is basic must have a special or unique connection to movement, scepticism that the present author shares.<sup>24</sup> A number of fairly simple observations help make the case for a more expansive account of action: first, it is not necessary to move in order to act. I can solve, or try to solve, a mathematical conundrum without any movement whatsoever. Secondly, it is necessary to exercise other human capacities in order to act. I cannot play a competitive game of football without exercising my capacities for thought, foresight, coordination, planning, without utilising some sense of drive or determination, or without participating in and understanding the rules of the game. Finally, the visibility of physical movement and the felt physical exertion that accompanies it, although liable to suggest otherwise, make no contribution to the question of what human action is. The fact that we see a ball being kicked, tells us very little about what it means to play football.

What might an alternative view of action look like? A better account of action conceives of our capacity to move as a basic capacity, basic in the same way as our capacities to understand, to feel, to act from reasons, to know, to empathise are basic. When active, these capacities are 'I' in action. They are the tools with which action is done but discretely, atomistically, in their basic form; they are not themselves what action is.<sup>25</sup> This is true of our capacity to move as it is of the

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<sup>23</sup> The kind of event brought to mind by these descriptions might involve a 'dead arm' being lifted by one's other hand to revive it. Here the phrase, 'I raised my arm' might make literal sense.

<sup>24</sup> He has noted, for example, that 'the simple thesis that basic actions are always bodily movements seems to be undermined by the impossibility of providing a criterion of basicness which will identify only such bodily movements as absolutely basic actions': RA Duff, *Criminal Attempts* (Clarendon Press, 1966) 260.

<sup>25</sup> Consider the example of hand-raising 'in itself' and hand-raising to emphasise an argument via gesticulation or to answer a question. Many fail to distinguish these, taking the view that the latter two actions are simply what hand-raising 'in itself' is like. Only a rejection of the flawed physical account of action can show why this is not the case. Raising one hand to answer a question is an action. Now, what is left of 'hand-raising' in itself, is nothing whatsoever. However unlikely it appears, I do not just raise my hand. I might do so to see if I can just raise my hand, or to respond to an instruction, or to exercise, or to stretch, or disprove the idea that I cannot just raise my hand, or even to see if I can raise my hand at all, I can even try to move my hand to see if I can move it (without actually doing so). All of these are central case examples of actions, a conclusion that emerges from an expansive view of what action is, and none is

others. If that sounds a little vague, consider actions that we readily recognise as such: reciting a nursery rhyme, entertaining a guest, getting married, committing a robbery. The idea is somewhat peculiar that we would look, in the case of each such action, for some basic physical movement that started it all off. What action could possibly be deemed basic in the case of getting married? What is the key bodily movement here involved? The question seems nonsensical, for we have no reason to look for an event that somehow might constitute the beginning of getting married. The action has no clear starting-point and if we could point to such a thing, it would seem to tell us nothing at all useful about marriage. If, in particular, we identified some basic bodily movement, the outstretching of a wedding finger, say, as the essence of the action, our explanation would be rejected as meaningless.

From a broader, composite understanding of action, an alternative candidate for basicness in human affairs is found. It is we, as agents, who are basic.<sup>26</sup> 'I' act. In so far as 'I' am an actor, I have a set of capacities, to move, to think, to have reasons, to feel, to know, to believe etc. To say that 'I' act is to say that my capacities are no longer merely 'in' me, they are me in action. Whilst a reconceptualisation of action such as this cannot possibly be defended here, its basic elements can at least be set forth to offer a plausible defence of the view that we are responsible for crimes in their full and natural form. A thief moves but he also perhaps knows and understands that the property he takes belongs to another, he has reason permanently to deprive the other of it, and he is dishonest.<sup>27</sup> From all of this 'he' acts, and through all of it his action is given form. Our thief [dishonestly appropriates property belonging to another with the intention of depriving the other of it]. This is what he does and this is what he is

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anything like 'just raising my arm'. There is no such thing, in or as action, as hand-raising in itself.

<sup>26</sup> The basic-action view of human behaviour is attractive as an account of how our minds and bodies relate; our minds tell our bodies to do something and our body responds. But, notice that our minds can tell our minds to do something and our minds can respond; to solve a mathematical conundrum, or to remember a recipe for making curry, or to think about animals beginning with the letter 'L'. It even seems that our bodies can tell our minds to do something (or at least that our minds can tell our bodies to tell our minds the same) perhaps when we jump up and down to stay alert or lie down in order to mentally relax. Once again, physical movement seems to lose its claim uniquely to represent what action is. But the deeper problem with all of this is the idea that we act by telling ourselves – our bodies or our minds – to act and that a basic action is what happens when the instruction is carried out. This is a problem by virtue of the regressions earlier identified; telling is already acting and so there must be a prior teller and prior telling, and so on ad infinitum. Moreover, the basic action account of behaviour, however expansive, relies on a flawed, usually causal, account of action. There must be two separate things: a thing that causes or tells (our minds) and a thing caused or told (our actions).

<sup>27</sup> For completely different purposes, Melissaris convincingly notes that theft need not involve any movement at all: Emmanuel Melissaris, 'The Concept of Appropriation and the Offence of Theft' (2007) 70 *Modern Law Review* 581.

responsible for. Nothing remains of the unlikely idea that his responsibility must attach either to the movements he makes or, more complexly, just to these along with their results. These ideas can readily be dismissed once the notion is rejected that physical movement is the sole criterion of basicness in human action.

## **5.2 A Non-circular Relationship between Agents and their Actions**

A conundrum that appears throughout this paper must now directly be resolved. If my actions are enabled and constituted by my physical and mental processes, how is it that I can be responsible for them at all? For if my mental association to what I do is actually part of the doing itself then it can no longer provide the connection between me and my act that renders me responsible for it. Some basic observations help to resurrect responsibility from this charge. First, my actions, in this account, are by definition mine. 'I' act; the movements, the reasons, the knowledge, the feeling, the thought, the know-how are all 'me' in action. This almost does the whole job; to say 'I' act is to say that I am responsible for what I do. These are my actions.

If this view is not incorrect, it is yet simple and incomplete. It still must be shown that in that transformation that occurs from states of being to states of doing, a connection persists between the two states – one that anchors our responsibility for action. What might that connection be? In contemplating an action (that I then perform), I might think about it, must have a reason to do it, I may know how to go about it, know what is likely to happen, be able to move in the required way, feel that the act is desirable.<sup>28</sup> But once I act from these capacities, my action, as such, no longer consists, atomistically, in their objects. In an act of theft, a defendant does not somehow do [dishonest appropriation] and separately [appropriation of property belonging to another] and separately [intending permanently to deprive] etc. Nor will the defendant, in acting, recognise that action as separately constituted by these discrete elements, or even as a collection of them melded together.<sup>29</sup> Actions are not like this to us, for although our capacities are the building blocks of action, their pre-existing and even concurrent forms, become, in their relation to action itself, a mere residue once action begins. The observation is an important one for it turns out that the necessary connection between agents and their actions comes into view once we understand what actions really are like to us.

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<sup>28</sup> Fischer and Ravizza associate responsibility with the fact that we do act, autonomously, on reasons that are ours. In the account proposed in this paper, the fact that we act at all is necessary and sufficient to ground and define our responsibility. In acting, we endorse not only the reasons that give action life, but also our emotions, our theoretical knowledge, our movements, and our feelings. From here, all the explanatory burden is shifted to giving an account of what our action is: see John Martin Fischer and Mark Ravizza, *Responsibility and Control: A Theory of Moral Responsibility* (Cambridge University Press, 2000).

<sup>29</sup> Nor even is it necessarily the case that the defendant does theft as some discrete action.

Consider the action of making a cake. It will not occur to me that to know what this action is, I need to compartmentalise it into constituent parts, depending on the capacities involved. This is not what cake-making is like to me (or anyone else). But, more than this, it is liable to strike me as strange that I might need to know my action at all. The requirement appears superfluous for knowing what I do is already part of what action is. Certainly, cake-making requires a reason or reasons, is enabled by know-how, observation, physical movement, taste, reason, reflection, aesthetic appreciation, emotion, theoretical knowledge and more, but I have no need to identify all of this or to observe it to know what I do. Making a cake just is at the same time knowing that I am making a cake; acting is knowing.

The phenomenon that describes this form of 'knowing' is non-observational knowledge.<sup>30</sup> To know by observation is to exercise a capacity to know. To know non-observationally is not to bring to bear on my action some capacity to know; it is not to exercise a capacity at all. It is to know in doing. Consider tennis. If it could seem somehow sensible to find out what I am doing, when I play tennis, I probably would not attend to my consideration, in the same moment, of how many guests are coming to dinner at the weekend. I know the processes to observe when I am playing tennis because I already know, non-observationally, ie without reflection, that this is what I am doing. Intentional actions are known actions, and this (non-observational) knowing is ineliminable in human affairs.

All of this points to a connection between me and what I do that is not at the same time an element of my action. As I act, I know that I so act. More than this, no one else can say, authoritatively, what I do for no one else has the knowledge that my action is. And now it becomes clear why I might be 'response' 'able;' the first-person knowing in which my acting consists cannot ever be held by another. It is this non-observational relationship between agents and their actions that should cause us to alter how we view the notion of practical commitment, and so responsibility, in human affairs. I am practically committed to what I do not in virtue of all the processes of reflection and deliberation that precede, and indeed accompany, my action, nor because of the plans I make, nor in virtue of those capacities (mental and physical) that I take to action, nor through my commitments, however firm or insincere they are. I am responsible because I act from my capacities, and I am responsible for what I do; when states that, alone, are states of being become, in combination with others, states of doing, a transformation that occurs just when I know, non-observationally, that it has. In practical terms, it follows from the position here proposed that when the strategic bomber drops a bomb to comply with an order, knowing that civilians will be killed, he is practically committed through his non-observational knowledge in

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<sup>30</sup> It is a phenomenon described most convincingly by Anscombe, who correctly defines intention as non-observational knowledge of being on the way to intentional action. Nonetheless her interpretation of non-observational knowledge is not quite the one on offer here: see Elizabeth Anscombe, *Intention* (Blackwell, 1957).

acting<sup>31</sup> to what he knows (observationally)<sup>32</sup>, to the reason for which he acts, to his movements, to the other capacities entailed in his doing, and to none of this atomistically but in its mutual connectedness. We should not look for responsibility in inner states and in their connection to the movements we make, for this view misunderstands what responsibility is like as it misunderstands what action is like. Only by looking to a composite view of action can the claim be rescued that defendants are responsible for their crimes.

## 6 Conclusion

Law gets it right in its account of responsibility. Its prohibitions are set out as actions and described using composite terms like theft, murder, criminal damage. Moreover, the clearly defined elements of these actions, mental and physical, carefully delineate the capacities, and their objects that constitute the prohibited action, say, [dishonest appropriation of property belonging to another with the intention to permanently deprive]. If crimes are actions, as law sometimes suggests, a defendant who commits a crime is indeed responsible for it.

But, the practice also gets it wrong in its approach to responsibility. In dividing the crime into its [act] and [mind] parts, law commits to a philosophically attractive account of action, one with a long pedigree, but, as a consequence, it cannot but suggest to us that responsibility for action does not entail responsibility for crimes. To resurrect the idea that defendants are so responsible is to propose that all the elements of the offence (mental and physical) are a constituent part of criminal action. This paper has defended that proposition, indicating that it is legally more viable and philosophically more coherent than the dominant alternatives.

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<sup>31</sup> It should be noted that this is not the 'epistemic condition for responsibility' identified in the literature. See, eg, Joseph Keim Campbell, Michael O'Rourke and Harry Silverstein, *Action, Ethics, and Responsibility* (MIT Press, 2010) 5: 'one is morally responsible for an action (or its consequences) only if one has relevant true beliefs about the nature of that action (or its consequences), or one is negligent in failing to have those beliefs.' In the account of responsibility proposed by this paper, all of this is relevant but it goes to what the agent is responsible for. The agent is practically committed to what he believes in action by virtue of his non-observational knowledge. This approach allows us to see that we can be responsible for what we know, think, believe, and feel, as part of our doing as much as we can be responsible for the reasons that give our actions life and the physical movements we may make in doing them.

<sup>32</sup> In this respect, some communality is shared with Sarah Paul who notes, '[t]he significance of this whole-package view of the conclusion of practical deliberation is that the evidential basis of the agent's non-observational belief is actually his entire practical commitment, and not merely the part he intends ... The Strategic Bomber will infer from his practical commitment not only that he is on his way to bomb the factory, but also that he is on his way to bring about the deaths of some children': Sarah Paul, 'How We Know What We're Doing' (2009) 9 *Philosophers' Imprint* 1.

A residual issue might now be addressed which is the simple charge that we cannot be responsible for our states of mind and this account implies that we can. It must therefore be false. Although many suggest otherwise, it is true that we cannot be responsible for states of mind, but this is not to diminish their importance in understanding responsibility. They are vital in two ways. First, I can be responsible for bringing it about that I am angry, for failing to ameliorate my frustration with life, for pondering too much on the past, for the generally happy disposition that I cultivate.<sup>33</sup> In all these cases we seriously diminish an understanding of responsibility to say (as we very well might) merely that it is states of mind that I am responsible for. At the same time we may very much be responsible for bringing them about, or for cultivating them, or for failing to remedy them. That brand of responsibility is not special; in these examples states of mind are the result or residue of actions, just as a small piece of wood might be the result of an act of chopping. I should not say that I am responsible for my states of mind here, any more than I should say that I am responsible for the small piece of wood. If these statements are not incorrect, they are surely imprecise.

Still, this association between actions and states of mind is not the relevant one for present purposes. What we must seek is an answer to the question of whether we are responsible for states of mind as constitutive of the actions we do. The answer to that question is 'no', an answer that is entirely compatible with actions as so conceived. States of mind are part of the 'I' that acts. Still, once we embark on action, these states, like our physical movements, are brought to action. It is action that we are responsible for; not for having the propensity to move, or for having reasons, or for mere knowledge, but for action, an arena in which our capacities alike are no longer discrete states of being but are constitutive of composite states of doing.

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<sup>33</sup> For a full exploration of the relationship between 'bringing about' and action, see Alfred R Mele, 'Agency and Mental Action' (1997) 31 *Nous* 231. Mele arguably fails to make a required distinction between 'thinking' and other mental processes that can be actions in the ordinary sense when done for a reason and 'states of mind', like sadness, that cannot in themselves be actions.