

## Culpable Acts of Risk Creation

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*In our view, an actor deserves punishment when he demonstrates insufficient concern for others, that is, when he engages in a culpable act of risk creation. In this essay, we address how we would rethink the actus reus so as to track the actor's culpability and blameworthiness. Part I sets forth our view that defendants deserve to be punished for culpable acts. Briefly put, an actor is culpable when he risks others' legally protected interests for insufficient reasons. In Part II, we turn to the question of how we would formulate a unit of culpable action. We argue that with respect to criminal acts, the criminal law should focus on the willed bodily movement as the unit of culpable action. We believe, however, that some omissions are also the appropriate targets of the criminal law, and we discuss how our view places significant reliance on omissions. We also add an additional element to our criminal law arsenal—we argue that the duration of the risk (as the actor perceives it) also affects the actor's culpability and thus the punishment he deserves. In Part III, we turn to the question of how to individuate crimes. We begin by defending our view that we should abandon crime types in favor of a general prohibition against risk creation to legally protected interests. We also argue that this approach eliminates bedeviling act-type individuation problems created by complex action descriptions. We then turn to how to individuate tokens of risk creation. Here, we argue that each willed bodily movement is a new action; that multiple criminal acts are not subject to "volume discounts," but the degree of premeditation may affect the actor's ultimate culpability; and that continuous courses of conduct may be but one act of extended duration. We conclude by arguing that our view is more perspicuous because the number of crimes an actor has committed is but a rough proxy for his overall blameworthiness. In contrast, our account which includes risks,*

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*reasons, quality of deliberation, and perceived duration of risk fully captures all the aspects of an actor's blameworthiness.*

In our forthcoming book with Stephen Morse, we radically reconceptualize the criminal law, taking seriously the notion that individuals should be punished based solely on what they deserve.<sup>1</sup> To us, an actor deserves punishment when he demonstrates insufficient concern for others. Actors demonstrate insufficient concern by choosing to unleash a risk of harm to others for insufficient reasons.

Our approach to the criminal law thus has two important elements. First, there must be culpability—a decision to risk harm for insufficient reasons. Second, there must be an act that “unleashes” that risk of harm. As we have previously written, we believe that a liberal criminal law cannot punish an actor for just any step in his plan to harm another.<sup>2</sup> Rather, the act itself must be *culpable*; that is, from the actor's perspective, that act must itself risk harm.

In our view, the criminal law should punish an actor for these culpable “acts.” But, given that we deny that the results of an action—whether the action causes harm, and of what magnitude—affect the actor's blameworthiness, we should explicate exactly what “a culpable act” is. Because we view crimes as culpable risk creations, what is it exactly that creates that risk?

Moreover, we need an account of how to individuate such culpable acts. Having reduced all criminality to “risk creation,” we need to explain when one risk creation stops and another begins. For example, first there are continuous courses of conduct that can be divided—or not—into multiple acts of risk-imposition. Take a kidnapping, where the victim is moved over a period of time from A to B, which, as in Achilles and the tortoise, consists of a number of movements approaching infinity over lesser distances.<sup>3</sup> Second, there are different “acts” that can occur within one course of conduct. For instance, in a rape case, what determines the number of rapes that have been committed when there is a continuous course of different forced sexual acts?<sup>4</sup> Third, there are single bodily movements that result in multiple harms. What of an arson during which the defendant ignites a building with two people inside?<sup>5</sup> How many crimes has the defendant committed?

These crime-counting questions are not just puzzles for us. Rather, because the Double Jeopardy Clause prohibits multiple punishments for the same offense, the criminal law must have an account of when there is but one offense and when

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<sup>1</sup> LARRY ALEXANDER, KIMBERLY KESSLER FERZAN & STEPHEN J. MORSE, *A CULPABILITY-BASED THEORY OF CRIMINAL LAW* (forthcoming 2008).

<sup>2</sup> Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138 (1997).

<sup>3</sup> Cf. *Brown v. State*, 830 N.E.2d 956, 965 (Ind. Ct. App. 2005) (continuous flight from three police officers held to constitute just one act of resisting arrest).

<sup>4</sup> See, e.g., *Sanchez-Rengifo v. United States*, 815 A.2d 351 (D.C. 2002).

<sup>5</sup> See, e.g., *People v. Myers*, 816 N.E.2d 820 (Ill. App. Ct. 2004).

there are more.<sup>6</sup> Even within double jeopardy jurisprudence, there has yet to be a satisfactory resolution of these problems. For instance, although some courts hold that one act that affects multiple people constitutes one crime,<sup>7</sup> still other courts hold that there are as many crimes as there are victims.<sup>8</sup> What is needed is a principled approach to crime counting.

This essay proceeds as follows. Part I sets forth our view that defendants deserve to be punished for culpable acts. Briefly put, an actor is culpable when he risks others' legally protected interests for insufficient reasons. In Part II, we turn to the question of how we would formulate a unit of culpable action. We argue that with respect to criminal *acts*, the criminal law should focus on the willed bodily movement as the unit of culpable action. We believe, however, that some omissions are also the appropriate targets of the criminal law, and we discuss how our view places significant reliance on omissions. We also add an additional element to our criminal law arsenal—we argue that the duration of the risk (as the actor perceives it) also affects the actor's culpability and thus the punishment he deserves. In Part III, we turn to the question of how to individuate crimes. We begin by defending our view that we should abandon crime types in favor of a general prohibition against risk creation to legally protected interests. We also argue that this approach eliminates bedeviling act-type individuation problems created by complex action descriptions. We then turn to how to individuate tokens of risk creation. Here, we argue that each willed bodily movement is a new action; that multiple criminal acts are not subject to "volume discounts," but the degree of premeditation may affect the actor's ultimate culpability; and that continuous courses of conduct may be but one act. We conclude by arguing that our view is more perspicuous because the number of crimes an actor has committed is but a rough proxy for his overall blameworthiness. In contrast, our account, which includes risks, reasons, quality of deliberation, and perceived duration of risk, fully captures all the aspects of an actor's blameworthiness.

## I. CRIME AS CULPABLE ACT

We have some rather strong views about the criminal law. We believe that punishment must be *deserved*. We believe that what people deserve is based upon the risks they choose to take to others' legally protected interests. And we believe

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<sup>6</sup> U.S. CONST. amend. V.

<sup>7</sup> *Ladner v. United States*, 358 U.S. 169 (1958) (holding that the defendant could be convicted of only one count of assaulting a federal officer where a single pull of shotgun trigger resulted in multiple pellets that injured two federal officers); *Smith v. United States*, 295 A.2d 60 (D.C. 1972) (one threat uttered to two people constitutes only one crime of threats to do bodily harm).

<sup>8</sup> *Arizona v. Henley*, 687 P.2d 1220 (Ariz. 1984) (upholding two convictions for aggravated assault where bullet traveled through intended victim into bystander); *Wisconsin v. Rabe*, 291 N.W.2d 809 (Wis. 1980) (holding defendant was properly charged with four counts of homicide by intoxicated use of a motor vehicle when defendant ran stop sign and killed four people).

that a liberal criminal law cannot punish an actor until the point at which he unleashes that risk of harm, but that unleashing that risk—and not the harm that eventually results—is what determines the actor’s blameworthiness. In this section, we briefly elaborate on these views.

In our forthcoming book with Stephen Morse,<sup>9</sup> we analyze what it would mean for the criminal law to take retributive justice seriously. How would we formulate crimes if they were designed to give individuals what they deserve?

In our view, individuals deserve punishment when they act culpably. An actor is culpable when he exhibits insufficient concern for others.<sup>10</sup> Actors demonstrate insufficient concern for others when they (irrevocably) decide to harm or risk harming other people (or their legally protected interests) for insufficient reasons. If Alex decides to drive one hundred miles an hour on the highway, whether we deem Alex culpable and deserving of blame and punishment will depend upon whether he has chosen to impose this risk to impress his friends with how fast his car can drive or, alternatively, to transport a critically injured friend to the hospital.

As criteria for insufficient concern, the criminal law need not employ the Model Penal Code’s four mental states—purpose, knowledge, recklessness, and negligence.<sup>11</sup> Purpose, knowledge, and recklessness are all the same type of assessment—a weighing of the risks the actor imposes and his reasons for doing so. When an actor purposefully aims to injure another, his reasons are presumptively culpable. When an actor knowingly harms another, the degree of risk is presumptively culpable. But, in instances of both purpose and knowledge, these presumptions may be rebutted by showing that the actor was justified in imposing the risk that he did. In contrast, as formulated, recklessness requires the risk to be unjustified, thus building justification into the mental state itself. In all of these cases, however, for a defendant ultimately to be deserving of punishment, the risks he takes must be unjustified. As we have both argued elsewhere,<sup>12</sup> the current approach of separating this single criterion for culpability into three discrete mental states creates doctrinal difficulties as well as the false impression that these three mental states neatly line up in a culpability hierarchy.

Negligence, on the other hand, is not culpable.<sup>13</sup> There is no principled and rationally defensible way to construct the “reasonable person” against whom we judge the actor. Infinite possible constructs exist between full omniscience and the

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<sup>9</sup> ALEXANDER, FERZAN & MORSE, *supra* note 1.

<sup>10</sup> See generally ALEXANDER, FERZAN & MORSE, *supra* note 1, at ch. 2; Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 931, 931 (2000); Kimberly Kessler Ferzan, *Holistic Culpability*, 28 CARDOZO L. REV. 2523, 2532 (2007).

<sup>11</sup> See ALEXANDER, FERZAN & MORSE, *supra* note 1, at ch. 2.

<sup>12</sup> Alexander, *supra* note 10; Ferzan, *supra* note 10.

<sup>13</sup> See generally ALEXANDER, FERZAN & MORSE, *supra* note 1, at ch. 3; Larry Alexander, *Reconsidering the Relationship Among Voluntary Acts, Strict Liability, and Negligence in Criminal Law*, 7 SOC. PHIL. & POL’Y 84 (1990).

actor's own subjective beliefs, but there is no reason to privilege any of these constructs as the appropriate normative standard against which to judge the actor. Moreover, even if we could construct such a perspective, the negligent actor lacks the requisite control over this "risk." Risk is a matter of epistemic perspective. And a "negligent" actor who assesses a risk as lower than others would is not culpable for his epistemic shortcomings. It is the risk that the actor estimates—not the risk he should have estimated—that determines culpability.

For purposes of this essay, it may suffice to say that we view recklessness as the sole criterion for culpability. We note, however, that our view of culpability is far more nuanced. We reject substantiality of risk as an independent criterion for recklessness; we have an account of when risks are and are not justified; and we believe that in evaluating the risks the actor imposes given "his reasons," "his reasons" include not just the reasons that motivate him but all other justifying reasons of which he is aware.<sup>14</sup> Still, for purposes of focusing on our view of the culpable *act*, the reader may simply wish to use "recklessness" as a proxy for our views about culpability generally.

With respect to a particular act requirement, we (separately and together) have sought to refine our understanding of what types of acts are blameworthy. Notably, we would jettison incomplete attempts from the criminal law.<sup>15</sup> When we punish an actor for taking a step toward his goal, we are punishing him for intending harm and perhaps for a prediction that he will try to commit the crime if we do not intercede. But until the actor unleashes a risk of harm over which he no longer has complete control, he may revoke his intention and decide not to commit the crime at all. The actor who is lying in wait may suddenly change his mind and decide to go home. To punish him for lying in wait, then, is not to punish him for any risk he is presently imposing, but for some perceived future risk, a risk that may actually turn out to be zero, and a risk that the actor correctly perceives to be entirely within his control until the very moment when he either unleashes the risk of harm or changes his mind and decides not to harm his potential victim.

On the other hand, once an actor has unleashed this risk of harm, we believe that whether he causes the harm is irrelevant to his culpability.<sup>16</sup> The actor has decided to risk harming others, and the unleashing of the risk itself manifests the actor's insufficient concern: The result does not tell us anymore about the choice the actor has made or how little he values the victim, and thus, the result does not increase his desert.

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<sup>14</sup> See generally ALEXANDER, FERZAN & MORSE, *supra* note 1, at chs. 2, 4.

<sup>15</sup> See generally *id.* at ch. 6; Alexander & Kessler, *supra* note 2, at 1173–74.

<sup>16</sup> ALEXANDER, FERZAN & MORSE, *supra* note 1, at ch. 5; Larry Alexander, *Crime and Culpability*, 5 J. CONTEMP. LEGAL ISSUES 1 (1994); Kimberly D. Kessler, Comment, *The Role of Luck in the Criminal Law*, 142 U. PA. L. REV. 2183, 2237 (1994).

## II. THE LOCUS OF CULPABILITY

Our theory of the criminal law thus places all of its emphasis on the actor's choice to release an unjustifiable risk of harm. When we are looking at the risk the actor creates, risks and reasons are assessed holistically. That is, to determine if an actor is culpable, we must weigh all of the reasons for imposing the risk of which the actor is aware against *all of the risks* that the actor believes that her action imposes. We assess *one* act by reference to the myriad of risks it imposes. But if we are to compare risks to reasons for a discrete action, then we need to know what counts as a discrete action.

In this section, we discuss how we understand "culpable action." First, we argue that theoretically, the unit of "culpable action" is a volition to move one's body in a way that would increase the risk of harm to others. Second, we argue that for pragmatic reasons, the criminal law should focus on willed bodily movements instead of volitions. Third, we turn to omissions. Although we will not put forth a full normative account of when one should have a duty to act, we will discuss how omissions, too, can count as culpable acts on our account. We also demonstrate how omissions play a more significant role in our theory of the criminal law than they do within current doctrine. Finally, we add one additional element to our culpability arsenal. We argue that the expected duration of the risk imposed affects the actor's culpability.

### A. Rethinking Culpable Action

How does an actor increase the risk of harm to others? Typically, it is by *doing something*. Current statutes embody complex action descriptions.<sup>17</sup> That is, it is not a crime to "move your finger." Rather, the crime occurs when moving your finger *results* in the killing of another person. Nor is it a crime to move your arms and legs; and yet, if those movings amount to taking the property of another, you may be committing theft. That is, your willed bodily movement may be qualified by circumstances and results so that your conduct can be redescribed in any number of ways; and some redescriptions render your conduct criminal.

Now, one question within philosophy of action is whether these redescriptions amount to additional actions. That is, if moving your finger is pulling the trigger, which results in the firing of the bullet, which results in the killing of the victim, how many actions have you performed? Donald Davidson famously argues that after the movement of your finger, "[t]here are no further actions, only further descriptions."<sup>18</sup> In contrast, Alvin Goldman claims that "moving your finger" and

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<sup>17</sup> See MICHAEL S. MOORE, *ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW* ch. 8 (1993).

<sup>18</sup> DONALD DAVIDSON, *ESSAYS ON ACTIONS AND EVENTS* 61 (2d ed. 2001).

“killing the victim” are two different actions because the relationship between the two is asymmetric and irreflexive.<sup>19</sup>

Even if there are more actions, not just more descriptions, as we explain below, we believe that only the first action will be a culpable action of concern to the criminal law. Therefore, for our purposes we need not resolve this philosophical debate. Still, we (tentatively) endorse Davidson’s account. First, recognizing that the only action that one performs is the willed bodily movement, and that other “actions” are simply redescrptions, prevents bizarre metaphysical results. For example, if Alice shoots Betty, placing Betty in a coma, and Alice dies three days before Betty does, when did Alice kill Betty?<sup>20</sup> Before Alice died? But Betty was alive. After Alice died? But how can one *act* after one’s death? To us, the answer to the puzzle lies in seeing that Alice acts when she moves her finger and pulls the trigger. After that willed bodily movement, that one action may be redescrbed in a multitude of ways to include its results and circumstances. Second, the Goldman view leads to a rather large ontology of actions.<sup>21</sup> Even when we are sitting still, or sleeping, we are still *acting* so long as the results of former willed bodily movements lead to new consequences. Even thinking that we are always acting is itself exhausting!

For us, however, it is not the results of actions that matter, but only the risks that the actor is willing to impose. So, if the actor chooses to pull the trigger in order to kill, she is imposing a risk for a terrible reason. She manifests insufficient concern for others, and she should be punished. Redescrptions are thus of little import to us. To us, it is irrelevant whether the pulling of the trigger *results* in the death. The actor’s blameworthiness is fixed at the point that she pulls the trigger.<sup>22</sup>

Because an actor chooses to take an action that risks harming others, we believe that the volition, wherein the defendant wills the movement of her body, is the appropriate unit of culpable action. It is at this point that the actor unleashes a risk of harm to others. What follows are simply redescrptions (or additional “actions” that the defendant last exercised complete control over when she willed her bodily movement).

Of course, because our account relies on the notion of a volition, it presupposes that there is some such thing to which the term “volition” refers.<sup>23</sup> In our view, the most likely account of a volition is that it is a mental state of bare

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<sup>19</sup> That is, we cannot switch the order—you do not move your finger by killing (indicating an asymmetric causal relationship), and you do not kill the victim by killing the victim (thus irreflexive). Hence, to Goldman, these items cannot be identical and are therefore different actions. ALVIN GOLDMAN, *A THEORY OF HUMAN ACTION* 5 (1970).

<sup>20</sup> See *A COMPANION TO PHILOSOPHY OF MIND* 69–75 (Samuel Guttenplan ed., 1994).

<sup>21</sup> See also MOORE, *supra* note 17, at 118.

<sup>22</sup> She may also be blameworthy for culpably failing to rescue. See *infra* Part II.D.1.

<sup>23</sup> For the best theoretical defense of the view of volitions that we presuppose here, see MOORE, *supra* note 17, at ch. 6.

intention that takes a bodily movement as its intentional object.<sup>24</sup> We cannot argue for the existence of volitions here, but we do not doubt that science will ultimately give us a more complete account of volitions and other mental states. As Stephen Morse notes, “[w]e do not know how the brain enables the mind and we do not know how action is possible.”<sup>25</sup> When we want to move our fingers, we somehow do it. We all experience this exercise of will, but science has yet to explain just how it is that we do it. However, criminal law cannot wait for scientific conclusions about the brain anymore than we can await the final word (will there be one?) on a myriad of other physical phenomena. We must plug along with the information we have.<sup>26</sup> (Moreover, we make some concessions to current epistemic inadequacies in the next section.)

In summary, agents are culpable because they choose to impose risks on others for insufficient reasons. When an agent chooses to engage in risky conduct, she does so by willing the movement of her body. The point at which she opts to unleash a risk of harm to others is the point at which she exercises her will. It is her volition that moves her finger, that pulls the trigger, that fires the bullet, that wounds the victim. And thus, it is her volition that is the appropriate locus of culpability.

#### B. *From Volitions to Willed Bodily Movements*

Now, despite the fact that we believe the appropriate theoretical target of the criminal law to be the volition, for pragmatic reasons we believe it best for the criminal law to focus on what volitions cause—the willed bodily movement. Let us begin with a focus on volitions and other “mental acts.” Then, we will explain why we shift our focus from volitions to willed bodily movements.

There can be volitions without actions. Consider David who, due to a car accident, has lost the ability to move his legs. Now, assume that David’s mother-in-law comes to visit him, and finding her to be unsympathetic to his plight, David decides to kick her. Indeed, he does everything that he would have done before the car accident so as to move his leg. Nothing happens. Under our analysis, has David committed a culpable act? It seems to us that the answer is clearly yes. David willed the movement of his body to cause harm to his mother-in-law for no sufficient reason.

There also can be culpable actions without bodily movements. Whether we cast “mental acts” within our ontology of actions or not, we certainly *do* things in

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<sup>24</sup> *Id.*

<sup>25</sup> Stephen J. Morse, *Criminal Responsibility and the Disappearing Person*, 28 CARDOZO L. REV. 2545, 2555 (2006).

<sup>26</sup> As Stephen Morse reasons, “[a]t present and for the foreseeable future, we have no convincing conceptual reason from the philosophy of mind, even when it is completely informed by the most recent neuroscience, to abandon our view of ourselves as creatures with causally efficacious mental states.” *Id.* at 2571.

our heads. Certain mental acts under the control of the will, were they capable of imposing risks on others, would count as culpable on our account although they would not be willed *bodily* movements. If doing the multiplication tables in your head would somehow detonate a bomb, you could be culpable for doing them, even if your body does not move. Notably, these are not mere *choosings* to impose a risk at a future time; they are mental acts that would themselves unleash a risk over which the actor no longer had complete control.

So, assuming that volition precedes action, there will be a small class of cases—in addition to deliberate omissions—in which there will be a volition but no bodily movement. And we see no problem with admitting that ultimately, the appropriate basis of criminal liability is the volition itself and not the bodily movement it produces. It is simply the case that, in almost all of our everyday experiences, bodily movements follow from our mysterious ability to exercise our will—our volitions. In other words, we believe that David has committed a culpable act, an act that is ultimately on par with actually kicking his mother-in-law.

But if we place crime completely within the mind, the citizenry may fear “being punished for thoughts.” In some respects, the concern is unwarranted. One of the primary worries about being punished for thoughts is that one cannot control what one thinks.<sup>27</sup> If thoughts can simply pop into one’s head, then thoughts hardly seem like a fair basis for culpability. Just as we want acts to be voluntary so as to ensure that the actor may fairly be said to have had the requisite degree of control, we do not want to punish an actor simply for her thoughts.

But a volition is not merely a thought. One does not suddenly find oneself exercising one’s will. Rather, volitions are the outcome of practical reasoning, and we exercise control over our willings by deciding if and when to move our bodies.

There is also another reason to reject the complaint about punishing for thoughts. Our criminal justice system functions quite well by inferring the existence of underlying subjective states from an actor’s behavior (including things the actor himself says). Reliance on volitions is no more objectionable than our reliance on other subjective states. And it is these subjective states that are determinative of the actor’s culpability. Our reliance on folk psychology is fundamental to our understanding and blaming each other.<sup>28</sup>

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<sup>27</sup> Douglas Husak, *Rethinking the Act Requirement*, 28 CARDOZO L. REV. 2437, 2438 (2007) (arguing that the normative work done by the act requirement could be done more effectively through a notion of control).

<sup>28</sup> See Morse, *supra* note 25, at 2556. Indeed, Morse cites Jerry Fodor for the centrality of folk psychology to our understanding of human behavior:

[I]f commonsense intentional psychology were really to collapse, that would be, beyond comparison, the greatest intellectual catastrophe in the history of our species; if we’re that wrong about the mind, then that’s the wrongest we’ve ever been about anything. The collapse of the supernatural, for example, didn’t compare . . . . Nothing except, perhaps, our commonsense physics . . . comes as near our cognitive core as intentional explanation does. We’ll be in deep, deep trouble if we have to give it up . . . . But be of good cheer; everything is going to be all right.

On the other hand, we do acknowledge that there is at least one legitimate concern about punishment for volitions. If the target of the criminal law lies within the mind, then the criminal law suddenly becomes extremely invasive. The entire object of the criminal law would then be mental states and not actions, and there may be legitimate worries about how searches might evolve and how powerful the state might become in monitoring our most intimate of thoughts. Hence, even if crime does occur “within the mind,” it is a significant worry that we would give up more in terms of security than we would benefit in implementing such a system of crime prevention and retributive justice.

Hence, despite our views that one can control one’s volitions in a way that one cannot control one’s thoughts, and that a reliance on volitions is as defensible as a reliance on other aspects of folk psychology, we are somewhat inclined to give in on this point. We believe that a willed bodily movement, not a volition, is the more manageable unit of action for the criminal law. In comparison to beliefs, desires, and intentions, volitions themselves are less a part of our ordinary folk psychology, and thus, it may be too much to ask that an ordinary citizen apply the concept of a volition. Bodily movements are “public”; thus, punishment for such movements does not give rise to the same concerns about a police state. Moreover, given that almost all of the time, actions do follow from volitions, we think that the set of unpunishable-but-criminally-culpable acts will be quite small. No one has the ability to prevent an action from flowing from a volition. Rather, it is in the miniscule group of cases where body parts are paralyzed and the like that the body “misfires” and departs from the actor’s will.<sup>29</sup> Given that individuals may fear being punished “for thoughts” if volitions are the unit of measurement, that we have no way to track volitions themselves, and that action follows from volition in almost every case, we are willing to allow a tiny group of culpable offenders to go unpunished.

In summary, given that we care about the actor’s choice to unleash a risk of harm that he no longer controls, volitions are the locus of culpable action. This is the point when the culpable choice is executed into action. However, for pragmatic reasons, we endorse the willed bodily movements as the criminal law’s unit of culpable action.

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*Id.* (quoting JERRY FODOR, *PSYCHOSEMANTICS: THE PROBLEM OF MEANING IN THE PHILOSOPHY OF MIND* xii (1987)).

<sup>29</sup> We acknowledge that a reliance on the bodily movements that are caused by volitions imports causation into our account. Given that we reject that causing a harm has any independent moral significance, it may seem inconsistent for us to be willing to rely on the volition’s causing of a bodily movement. Admittedly, we are swallowing a bit of moral luck here. But we do so out of practical necessity. If we had the ability (epistemically and practically) to punish for volitions irrespective of whether or not they cause actions, that is what we would do. But just as some criminals are lucky enough never to be caught, some of the culpably deserving may be lucky enough for their volitions to fail to result in actions.

### C. Adding Omissions

There is a second potential target for the criminal law—an agent’s failure to act. Omissions may seem puzzling for us in two respects. First, it seems that omissions do not unleash a new risk of harm to others—omissions do not and cannot *cause* anything. From this perspective, omissions should never be culpable acts. On the other hand, the choice not to rescue others demonstrates that the actor has insufficient concern for others. By failing to act in a particular manner, an actor can fail to reduce the risk of harm that another faces when, by acting, that risk could be reduced—or so the actor may believe. From this point of view, all omissions have the potential to be culpable.

Anglo-American criminal law generally has not criminalized omissions. Perhaps because of the deontological constraint against appropriating the bodies and labor of some to reduce the risks faced by others, and perhaps as well because of the difficulties in administrability, affirmative acts are rarely mandated by the criminal law.<sup>30</sup> Though we will not argue for the status quo here, we are sympathetic to both of these concerns. Requiring an individual to act is appropriating his labor and talents to reduce harm to others. On our account, then, the actor’s omission does not reveal insufficient concern for a victim’s *legally protected interests* because the victim has no right that the actor act in the first instance. Moreover, because omissions are failures to act, they raise the same practical and epistemic concerns as does punishment for volitions alone.

There are, of course, standard exceptions to the “no affirmative duties” regime. They fall into three categories. The first category consists of instances where the actor has caused the victim’s peril. The second category consists of affirmative duties to aid predicated on a status relation between actor and victim, such as parent and child or husband and wife. And the third category consists of affirmative duties that are attached to defined roles that are voluntarily undertaken or that are the subject of contractual undertakings. One who becomes a policeman or fireman takes on affirmative duties to aid as part of the voluntarily assumed position. And one may contract to act as a bodyguard or lifeguard and thereby become legally obligated to aid others.<sup>31</sup> (There may be some affirmative duties backed by criminal sanctions that do not fall into these three categories. The

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<sup>30</sup> And perhaps they need not be. For a fascinating study detailing that individuals do rescue, even in risky situations in which the criminal law would not mandate it, see David A. Hyman, *Rescue Without Law: An Empirical Perspective on the Duty to Rescue*, 84 TEX. L. REV. 653 (2006).

<sup>31</sup> Affirmative duties to aid do not cancel duties not to impose risks where the consequentialist balance favors the latter; nor do they override deontological constraints. Thus if a trolley is heading towards one worker, someone who has an affirmative duty to aid that person—her husband, for example, or someone who induced her to work on that track—may not rescue her by redirecting the trolley to the track with five workers, or by pushing a fat man into the trolley’s path. See also Gerhard Øverland, *The Right to Do Wrong*, 26 LAW & PHIL. 377, 395–401 (2007).

military draft places those subject to it involuntarily in roles requiring affirmative acts.)<sup>32</sup>

We shall not examine further the contours and underlying rationales for the exceptions to the “no affirmative duties” regime. We shall take it as a given that there are exceptions, and that these exceptions are triggered by some conduct or relationship—conduct or relationship that we shall from here on refer to as “the trigger.”

Once the trigger exists, the actor may be culpable for not acting. Omissions should be treated as on par with volitions, not as equivalent to mere choosings (or future intentions) to risk. In instances of omission, the risk (as the actor perceives it) already exists, and the actor chooses not to abate it. Omissions, therefore, are not akin to decisions to harm because, from the agent’s perspective, decisions to harm do not themselves create risks of harm over which the agent no longer has complete control, whereas omissions do involve perceived present risks. (In other

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<sup>32</sup> It is worth mentioning some of the difficult issues connected with these three grounds for affirmative duties under the criminal law. With respect to the “causing the peril” ground, one issue is whether the actor’s causing of the peril must be culpable in order to ground the duty. The scant case law on the subject seems to deny this. For example, actors have been held criminally liable for failing to put out fires that they nonculpably started. Such a result seems intuitively correct. We might say that one’s permission to undertake some risky acts, such as lighting a fire, is conditional on undertaking the obligation to take affirmative action if necessary to reduce risks caused thereby. Yet, on the other hand, causal implication potentially casts a very wide net. If, unable to swim, we venture out on a boat only because we believe that other boaters will rescue us if we fall in, then surely in a “but for” sense their boating has caused our peril, as has the host of the beach party to which we were invited, the Olympic swimmer whom we saw standing by the shore and who we were confident could and would rescue us, and so on, approaching a general Good Samaritan duty to rescue enforced by the criminal law. And limiting the affirmative duties to those who not only were “but for” causes of the peril, but who were, in addition, “proximate” causes, throws us into the indeterminacy of “proximate causation.”

The status-relationship ground of an affirmative duty to aid appears more manageable—but only if the statuses are defined quite formally. The status of legally married husband and wife fits that description, but “common law spouse” does not. Registered domestic partner does so, but not live-in companion. Mother and child, husband-of-mother and child, certified-biological-father and child, and adoptive parents and child do; but mother’s boyfriend and child does not. And given the variety of adult relationships, and now the variety of procreative methods, the desirability of formality if a status is to trigger an affirmative duty to aid is even more obvious.

With respect to contractual and other voluntary undertakings of affirmative duties, the deep theoretical question is whether they are distinct as grounds from that of causing the peril. That question is presented most starkly when A contracts with B to come to C’s aid when necessary, but B does not rely in any way on A’s fulfilling his contractual obligation—B would not engage anyone else to do this even if B were aware that A would breach—and C is unaware of the contract’s existence. In such a case, A’s agreeing to aid C and then not doing so has not imperiled C; C is no worse off than had A not agreed to aid C. But A *has* contracted to do so.

Most cases of voluntarily undertaking to aid will also be cases where failing to aid will imperil. If B were relying on A to fulfill his contractual obligation—as, for example, a city would be when it hires policemen or lifeguards—so that it is the case that B would have hired someone more reliable in A’s place if B were aware that A would breach, then A’s breaching will have imperiled those he contracted to aid. But it is still possible for causation of peril and voluntary undertaking to come apart as grounds for the affirmative duties enforced by the criminal law.

words, the victim will not and cannot drown simply because one intends to throw her in the pool, but the victim can and will drown if one decides not to rescue her when she is already in the pool gasping for air.)

Because omissions import additional considerations into the culpability calculus, we should spend a moment on the elements of culpability for omissions. In a case where the actor fails to engage in rescue conduct to reduce the apparent peril that the victim is in, under what conditions is the actor culpable?

Let us, as we do with ordinary risk-impositions, focus on the various relevant probabilities that the actor will estimate:

- (1) The probability that the trigger exists (and thus that the actor does have an affirmative duty to act);
- (2) The probabilities that if the actor does not act, the victim will suffer various harms (a different probability for each different harm);
- (3) The probabilities that the various different rescue acts that the actor might undertake will reduce the various probabilities of harm; and
- (4) The probabilities of various harms or costs to the actor of undertaking the various different acts.

With respect to (1), the actor can never be 100% certain that the trigger is present. The victim drowning may or may not be someone the actor accidentally knocked into the swimming pool. He may or may not be the actor's son. And so on. The trigger may exist, but the actor may believe the chance is small that it does. Or conversely, the actor may believe the chance is high that the trigger exists when it does not. The actor may be culpable for not acting in the latter case despite the trigger's absence and nonculpable in the former despite the trigger's presence.

With respect to (2), the "victim" in the pool may just be joking. Or he may not be, but in no great peril because the side of the pool is near. Or he may suffer physical injury but not die. Or he may die. The actor may attach a different probability to each possible outcome if he does not come to the victim's rescue.

With respect to (3), the actor may consider various acts he can undertake to rescue the victim. He may dive in himself, with a given probability of success. He may alert the more distant lifeguard, with perhaps a lower probability of success. He may urge a guest who is a better swimmer to effect the rescue, with a still different probability of success. And so on.

And finally, with respect to (4), the actor will estimate the risks and costs to himself of the various courses of action considered in (3). What is the chance of his drowning if he goes in? Of ruining his new suit? Of suffering great fatigue or emotional distress? And so on.

The actor may be culpable either for doing nothing or for choosing one method of rescue rather than another of which he was aware. What will *not* be material to the actor's culpability is what actually happens to the victim. Nor will it be material to the actor's culpability whether the trigger actually exists, whether the victim was actually in peril, whether the alternative acts would or would not have been successful, or whether they would or would not have harmed or imposed costs of certain magnitudes on the actor. All that is material to the actor's culpability is what he chooses to do given the various probabilities he estimates in (1) through (4), and what his reasons are for so choosing. Culpability for omissions mirrors culpability for risk-impositions, the only difference being the complexity of the risk analysis. Instead of being concerned merely with the various risks of harm the actor estimates his *specific act* will *impose* on the victim, and the actor's reason for so acting, we now must be concerned with the risks to the victim that *various alternative actions* will *reduce* rather than impose, but also with the actor's reasons for choosing or avoiding the various possible actions, and with the actor's estimate of the probability that he has no duty to act at all.

#### D. Some Further Complications

To this point, we have argued that one "acts" culpably when she wills her body to move in a way that will create what the actor believes is a risk of harm to others that, given its magnitude and the actor's reasons for creating it, is unjustified. We have also argued that some omissions may be appropriate targets of criminal liability, and we have explained when omissions may be culpable. In this section, we seek to show how these two types of culpable "acts" may be related and thus generate more liability under our account than under existing law. We then introduce one additional element that bears on the actor's culpability—the duration of the risk.

##### 1. Risky Acts and Failures to Rescue

After an actor creates a risk of harm, she will sometimes have the ability to prevent the harm's occurrence. The actor may light a fuse that she can extinguish. Or she may wound the victim but can still call an ambulance to prevent further injury or death. In these situations, her culpably risky conduct now gives rise to a duty to try to prevent a harm's occurrence.<sup>33</sup>

We believe that current law fails to pay sufficient attention to an actor's culpable omissions. The actor did not merely light the fuse or wound the victim. Rather, she "performed" a second culpable "act" by omitting to remedy the risk of harm (or further harm) that she created. To illustrate, consider two actors,  $D_1$  and  $D_2$ , who impose similar risks on  $V_1$  and  $V_2$ . (Assume they try to kill their victims.)  $D_1$ 's act kills  $V_1$ , as  $D_1$  hoped it would.  $D_2$  seriously wounds  $V_2$ . Now, however, it

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<sup>33</sup> See Alexander & Kessler, *supra* note 2, at 1183–87.

is possible for  $D_2$  to save  $V_2$ 's life by calling an ambulance. Moreover, under the law regarding criminal omissions,  $D_2$  has a duty to do so. If he fails to do so because he still wants  $V_2$  to die, then whether or not  $V_2$  dies,  $D_2$  has committed *two* culpable acts/omissions of risk-imposition, as opposed to  $D_1$ 's *one* culpable act.<sup>34</sup>  $D_2$ 's circumstantial luck differs from  $D_1$ 's (and also from  $D_3$ 's, who shoots and misses) in that  $D_2$  faces a second opportunity to do wrong based solely on luck.

Many acts of risk-imposition may indeed also be followed by failures to rescue. In these cases, the actor has made more than one culpable choice. Again, in our hypothetical,  $D_2$  has committed *two* culpable acts/omissions of risk-imposition, as opposed to  $D_1$ 's *one* culpable act. After firing the first shot,  $D_2$  has the ability to prevent a further harm from occurring, and a duty to do so; and if he decides not to so act, he has made two culpable choices instead of one. Indeed, imagine that  $D_2$  shot his victim, but as he fled the scene, he accidentally pushed a small child into water. Clearly, even though  $D_2$  had the "bad luck" of creating this unfortunate situation, he now has a duty to remedy it. We see no reason why the situation should change simply because both the act and the omission involve the same victim.

## 2. Culpability and Duration

To this point, we have argued that culpability is about risks and reasons. We have argued that our "act requirement" consists in a willed bodily movement that creates a risk of harm or in an omission to avert a risk of harm where there exists a legal duty to do so. We have also argued that in cases where the actor has created a risk, her conduct also gives rise to a duty to try to prevent the harm from occurring. In viewing culpable acts through the prism of risk creation, we must now introduce one additional factor for this calculation—duration.

In our view, the anticipated duration of risk of harm also affects the actor's culpability. An actor who sets fire to a building that he expects to burn for three hours unleashes a greater risk than the actor who sets a fire that he expects to terminate in twenty minutes. Choosing to rape a victim for three hours is far more culpable than choosing to rape a victim for fifteen minutes. A fireman who fails to put out a fire for fifteen minutes is more culpable (all other things being equal) than one who fails to do so for five minutes. An actor who imposes a risk for a longer period of time imposes more risk than an actor who imposes a risk for a shorter period of time.<sup>35</sup>

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<sup>34</sup> Treating  $D_2$  as having committed two culpable acts/omissions would, of course, give  $D_2$  a nonmoral incentive to rescue  $V_2$ ; but the question here is, incentive aside, is  $D_2$  guilty of two culpable acts in shooting to kill and then failing to rescue?

<sup>35</sup> Mitch Berman has suggested to us that the duration of the risk is already built into the risk's magnitude. We do not believe this is a widely shared view. For instance, assume an actor sets her cruise control for ninety miles-per-hour and drives this way for twenty minutes. To view the magnitude of the risk as including the duration would entail that the risk because of its duration would need a greater justification than imposing this same risk for only five minutes (unless

In the next section we will discuss how to individuate these acts of risk creation. That is, we must determine when one act of risk creation ends and the next begins. But even single acts can impose risks over a period of time. Some risk-impositions are very short in duration but extremely culpable, as, for example, when an actor fires a gun at her victim's temple to kill her. In other cases, the risk is serious and temporally extended, such as in a typical case of arson. And, still other cases, such as speeding, present low levels of risk-imposition that may persist over an extended period of time.

Critically, in all of these cases, it is the actor's assessment of the duration of the risk, and not the actual duration, that determines the actor's culpability. If Bob sets fire to a building, believing it will burn for fifty minutes, he is culpable for imposing a risk of that duration, irrespective of whether the fire burns for five hours or five minutes, or is snuffed out by a bystander within seconds.

Of course, adding duration as an element increases the complexity of determining the actor's culpability. And, as we just mentioned, the critical determination will be the actor's assessment of the risks, the reasons the actor believes are available (discounted by the probabilities of their actually obtaining), and the actor's belief regarding the durations of the various risks he is imposing. All of these factors combine with the fact that the actor will often not simply *act* in a way that imposes a risk but will then *omit* to stop the harm from occurring.

To illustrate, assume  $D_1$  lights a bomb fuse that he knows will take twenty minutes to detonate.  $D_1$  immediately boards a plane to Paris.  $D_2$ , in contrast, lights a twenty minute fuse but decides to stay there, figuring he can snuff out the fuse at any time.

$D_1$ 's only act is lighting the fuse. His culpability is a product of the risks he believes he is imposing times the duration of that risk in light of his reasons for acting. Holding reasons constant, it seems that  $D_2$ 's initial act will be less culpable because he will assess the risk to be lower (given that he thinks he may later want to snuff out the fuse). However,  $D_2$  has a duty to snuff out the fuse because he, unlike  $D_1$ , retains the ability to do so. Over the course of the twenty minutes, the risk that  $D_2$  realizes he is creating by not snuffing out the fuse increases, so he becomes more culpable over time.

### III. INDIVIDUATING CRIMES

To this point, our view may not appear to be a substantial departure from current law. We endorse some refinements to culpability. But we rely upon the same sort of act and omission analysis as current law does. It is also undoubtedly

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justifications are somehow also understood to include their durations). We think it is far more perspicuous to think of this as an instance in which the risk is unjustified by the reasons, and this degree of unjustifiability extends over the twenty- minute duration. (We add that, even if Berman is correct, our account can be understood as more fully unpacking "risk.")

true that the duration of the harm imposed is likely taken into account in sentencing, even if it is not an element of the crime itself.

Where we most significantly depart in our analysis of a criminal act is that our analysis does not just start with willed bodily movements and omissions; this is also where our analysis ends. We reject the complex act descriptions upon which the current law currently relies.<sup>36</sup> In our view, it is the imposition of the risk that matters, and it is this risk imposition that should be the crime.

Now, having reduced crimes to bodily movements and some failures to act, one might wonder how we identify and count crimes at all. In this section, we turn to puzzles of act individuation. Here, we not only explore how to count crimes on our account, but we also argue that we have a better account of “counting crimes” than does current law.

Currently, questions of crime counting arise under the Double Jeopardy Clause. The Double Jeopardy Clause has multiple aims: it forbids re prosecution for the same offense after conviction, re prosecution for the same offense after acquittal, and multiple punishments for the same offense.<sup>37</sup> But to prevent re prosecution for the same offense or to prohibit multiple punishments for the same offense, one must know when conduct constitutes the same offense as that for which the agent has already been prosecuted or punished.<sup>38</sup> To be precise, the Double Jeopardy Clause currently requires both act-type and act-token individuation. That is, we must ask whether one physical act implicates one or many crimes (act-type), and we must also be able to discern how many times the actor has committed a crime (act-token).<sup>39</sup> Within double jeopardy doctrine, act-

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<sup>36</sup> Sometimes the criminal law seeks to punish acts that do not risk harm in themselves. These sorts of acts are “proxy crimes.” There are two types of proxy crimes—crimes that set forth a rule that is overinclusive (e.g., speed limits, ages of consent), and crimes that punish actions that are not culpable for law enforcement reasons (e.g., possession of burglar’s tools). The former presents a rules/standards problem. In setting forth the rule, the crime is overinclusive, thereby punishing actions that are not themselves culpable. The latter type of proxy crime is even more objectionable because all instances of the conduct are themselves innocent. For a further exploration of proxy crimes, see ALEXANDER, FERZAN & MORSE, *supra* note 1, at ch. 8.

<sup>37</sup> See generally *Double Jeopardy*, 35 GEO. L.J. ANN. REV. CRIM. PROC. 422 (2006).

<sup>38</sup> Multiple criminal charges for the same instance of criminal conduct implicate proportionality concerns. MOORE, *supra* note 17, at 309. Prima facie, one does not expect that the legislature fixes the punishment for each criminal act with regard to other potential criminal acts with which the defendant might also be charged. That is, when the legislature fixes the penalty for possession of narcotics within 1000 feet of a school, likely, it has not considered whether the defendant will also be charged with possession of narcotics (anywhere). But if the defendant were to be punished for both crimes, this might be disproportionate to his desert because the punishment for possession near the school is likely to be sufficient. However, where a legislature specifically authorizes cumulative punishments, there is no Double Jeopardy problem. *Missouri v. Hunter*, 459 U.S. 359 (1983).

<sup>39</sup> MOORE, *supra* note 17, at 320. As Michael Moore explains:

If I practise the violin every morning for a week, there are two very different answers to the question “How many acts did I do?” For there are two very different questions of identity and individuation that could be asked by such a sentence: “How many *kinds* of

type determinations are dubbed “multiple description” problems, whereas act-token determinations are “unit of prosecution” questions.<sup>40</sup>

In this section, we shall address both questions. We begin by exploring how we would account for types of crimes. We defend our risk creation view against the potential objection that we are losing sight of wrongdoing. We also argue that our approach allows us to distinguish more easily among types of offenses, a continuing dilemma within current double jeopardy doctrine. We then turn to how we would count risk impositions and failures to act. Our purpose here is not to argue that our account passes constitutional muster but rather to use the concerns that animate double jeopardy analysis as a way to explicate how our approach resolves the puzzles that bedevil current law.

### A. *Types of Crimes*

#### 1. Brief Normative Defense

We believe that, for purposes of the criminal law, a focus on the willed bodily movement as the unit of action is conceptually and normatively superior. In brief defense of its normative superiority, let us consider the crime of rape.<sup>41</sup> In our view, conceptualizing a criminal act as “rape,” that is, viewing rape as an independent type of wrongdoing, creates more problems than it resolves. Although all rapes involve a violation of sexual autonomy, the degree of physical and emotional injury risked varies from rape to rape. The strategy of considering all rapes to be equal obfuscates the myriad of distinct harms that are done or risked to distinct legally protected interests. In other words, we would do away with the legal category of “rape” and focus on bodily movements and the various harms they risk.

Some may argue that stripping crimes down to willed bodily movements removes their moral importance. Moving one’s finger is the nub of the crime, not the killing that results. Moving one’s foot is speeding. Where, one might ask, is the moral wrongfulness of these supposedly criminal actions?

Of course, crimes such as murder, rape, speeding, and theft are not ultimately about moving one’s foot or one’s finger. These crimes are about being willing to risk injury to others for insufficient reasons. Certainly, agents understand themselves to be performing murders, rapes, speedings, and thefts. But more importantly, they understand themselves to be risking harm to others. (And the implementation of our theory may lead to citizens more often thinking in terms of risks rather than complex act descriptions.) That the basic act is one of moving

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acts did I do?” (Answer: one.) And “How many *particular* acts did I do?” (Answer: seven.)

*Id.* (emphasis in original).

<sup>40</sup> State v. Harris, 162 P.3d 28 (Kan. 2007).

<sup>41</sup> For a fuller normative defense, see ALEXANDER, FERZAN & MORSE, *supra* note 1, at ch. 8.

one's body does not eliminate the ultimate importance of the context of that bodily movement. After all, we are asking what risks the defendant foresaw from his willed bodily movement and what reasons he was aware of for willing that bodily movement. However, the fact that context ultimately figures into culpability does not entail that context should be included in the notion of the criminal act itself.

## 2. Disentangling Legally Protected Interests

Moreover, our approach unravels one crime-counting conundrum—determining how many types of crimes are at issue. Counting crime types is easy for us: we have only one crime—manifesting insufficient concern towards others' legally protected interests. On the other hand, the current law's focus on complex act descriptions creates significant difficulties. Consider *State v. Neal*.<sup>42</sup> The victim drove the defendant home from a bar, and upon arrival at the defendant's apartment building, the defendant pretextually requested a "hug." When the victim got out the car, the defendant carried her to a secluded patch of grass and raped her. In accomplishing this rape, the defendant punched the victim in the face and choked the victim to the point at which she twice lost consciousness. The defendant challenged his convictions for both rape and aggravated assault, claiming that the charges were multiplicitous. According to him, there was just one crime—a rape—accomplished by the use of force.

Despite the state's claim that the defendant went beyond the force necessary to accomplish a rape, the appellate court reversed. Because no distinction was made in the indictment, in the presentation of evidence, or in the jury instructions, the jury may have relied on the very acts of force that constituted the aggravated assault charge to determine that force was used to accomplish the rape. The court went on to say that:

[A]n additional problem with the State's argument that the battery went "far beyond the force used to accomplish rape" is its imprecision. How much force is necessary to rape someone? By what gauge do we measure violence? Is not each victim unique? This was a horrible crime committed with great continuous violence during its entire course; therefore, the application of single act of violence paradigm is appropriate here.<sup>43</sup>

But why should we assume that all instances of forcible rape are equal? An actor who suffocates his victim risks her life more than an actor who punches his victim and more than an actor who uses force only to hold down his victim. Let us be clear—all of these defendants are exceedingly culpable. But if Neal used excessive amounts of force to accomplish his forcible rape, he should be

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<sup>42</sup> 120 P.3d 366 (Kan. Ct. App. 2005).

<sup>43</sup> *Id.* at 372.

differentiated from an actor who uses lesser force. He is more culpable and deserving of more punishment.

Under our approach, there are no act-types. The question is whether the actor, by way of a willed bodily movement, believed that he risked unjustifiable harm to a legally protected interest.<sup>44</sup> For every willed bodily movement, we must ask about *all* the reasons the actor was aware of in support of so acting (discounted by the probabilities of their being realized), and *all* the risks that the actor believed he was imposing. Indeed, without an evaluation of all the risks and reasons, the jury cannot assess whether the conduct was justified and, accordingly, whether the defendant was culpable for imposing the risks. Our approach allows us to focus on the discrete interests that are risked (sexual autonomy, bodily injury) and the different magnitudes of the risks imposed. Not all rapes are created equal.

We believe our approach better distinguishes crimes than does current law. Under the Supreme Court's *Blockburger* test, the question is whether each crime requires proof of an element that the other does not.<sup>45</sup> In *Neal*, because the rape charge included the assaults, there was just one crime. In our view, however, *Neal* reveals that a focus on the extent to which a defendant risks distinct legally protected interests should matter in our assessment of his total blameworthiness.

But to see the true clarity that a focus on legally protected interests brings, consider the Supreme Court's divided opinion in *United States v. Dixon*.<sup>46</sup> Although *Dixon* involved a pair of appeals, let us focus on the *Dixon* case itself. Dixon was arrested for second-degree murder and released on bond, subject to the condition that he not commit any additional criminal offense. Subsequent to his release, Dixon was arrested for possession of cocaine with intent to distribute. The court held him guilty of contempt and sentenced him to 180 days in jail. Dixon later moved to dismiss his indictment for the drug possession on double jeopardy grounds. The trial court granted the motion, and a majority of the Supreme Court concurred that the drug prosecution would violate the Double Jeopardy Clause.

Though the Court was deeply fractured in reaching this decision, we wish to spend a moment on Justice Scalia's opinion, in which Justice Kennedy joined, because Scalia rejects the very analysis that we advance here. Scalia reasons that because the contempt order incorporated the drug offense, the underlying substantive drug offense was a "species of a lesser-included offense."<sup>47</sup> Scalia explicitly rejects the view that because the interests that the offenses protect are different, the offenses are not the same for double jeopardy purposes.<sup>48</sup> To Scalia,

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<sup>44</sup> There is probably little practical difference between our view that one looks to risks to legally protected interests and Michael Moore's claim that one must search for "morally salient sameness." See MOORE, *supra* note 17, at ch. 13. But our view deconstructs crimes in a way that Moore would not.

<sup>45</sup> *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

<sup>46</sup> 509 U.S. 688 (1993).

<sup>47</sup> *Id.* at 698 (citations omitted).

<sup>48</sup> *Id.* at 699.

the test turns on legislative definitions—the text of the Double Jeopardy Clause speaks to whether the *offenses* are the same, not whether the *interests* they protect are identical.<sup>49</sup>

But to apply the Double Jeopardy Clause in this manner strikes us as very odd. One of the primary purposes of the Double Jeopardy Clause is to prevent double punishment.<sup>50</sup> If the legislature prohibits burglary, the legislature should not have to consider the possible combinations of crimes with which the defendant could be charged in crafting the punishment for burglary. So, if burglary warrants a maximum of five years in jail, we would not think that the defendant should also be punished for criminal trespass and breaking and entering, if both of these crimes are lesser included offenses.

Not only does this make sense with respect to how a rational legislature might behave, but it also makes sense with respect to the legally protected interests at stake. A trespass, a breaking and entering, and a burglary all risk harm to the same sorts of legally protected property rights, but they risk that harm to different extents. Thus, the burglary is a greater risk to a property right than a simple trespass, and if one is being punished for the full extent of the risk to the property right, then it would be double punishment to also punish the defendant for the simple trespass.

But once we begin to think of crimes as risks to legally protected interests, we see why it is that the contempt charge did not fully exhaust the punishment that Dixon deserved for the drug offense. Although we find the underlying drug possession charge potentially problematic,<sup>51</sup> the legally protected interests at stake go beyond the interests at stake in the criminal contempt charge. Dixon's violation of his release condition revealed that he might be either dangerous or a flight risk. Any criminal offense would have shown this to be true. On the other hand, if possession of cocaine with intent to distribute risks harm to life,<sup>52</sup> the offense is deserving of far more punishment than a mere 180 days. It is hard to conceive how this offense constitutes a lesser-included offense within the contempt charge.

In summary, viewing crimes as instances of risk imposition does not obfuscate the underlying blameworthiness of the conduct. To the contrary, a direct focus on risks and reasons allows us to make fine-grained distinctions among criminal defendants who would otherwise be deemed to have committed the same offense. In addition, by tying crime directly to risks to legally protected interests, we avoid the problem of overlapping offenses that present multiple description problems under the Double Jeopardy Clause.

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<sup>49</sup> *Id.*

<sup>50</sup> *See supra* note 38.

<sup>51</sup> *See supra* note 36 (discussing proxy crimes). *See generally* ALEXANDER, FERZAN & MORSE, *supra* note 1, at ch. 8.

<sup>52</sup> For the difficulties of articulating the harms at stake with drug offenses, see DOUGLAS N. HUSAK, *LEGALIZE THIS! THE CASE FOR DECRIMINALIZING DRUGS* ch. 2 (2002).

## B. Tokens of Crimes

A second crime-counting dilemma remains. How do we determine how many acts of risk imposition a defendant has committed? In this section, we begin by arguing that each willed bodily movement is itself a culpable act of risk imposition. We defend this view against the claim that culpable acts could be reduced to smaller units of movement and against the view that our approach greatly expands criminality. We then turn to the puzzle of “volume discounts”—the defendant who attempts a crime several times in rapid succession—and here, we argue that the defendant has still committed as many acts as there are willed bodily movements, *but* that there may be cases in which multiple attempts over longer periods of time are more culpable because the defendant deliberates better and longer. Finally, we turn to continuous courses of conduct. Here, we argue that many continuous crimes are just one crime of long duration.

### 1. Counting Willed Bodily Movements

As we have argued above, a culpable “action” to us is a volition, though, conceding to practicalities, we believe the criminal law should focus on willed bodily movements. The token counting problem, then, is, in some respects, quite simple—there are as many criminal acts as there are willed bodily movements, and there are as few criminal acts as there are willed bodily movements.

So, consider *People v. Myers*,<sup>53</sup> where the defendant, after being picked up while hitchhiking, violently opposed being dropped off prior to his destination. Myers threatened one of the passengers in the car by holding a machete to the passenger’s neck. Myers then sought to prevent the driver from turning on the interior car light by cutting the driver’s hand, after which he returned the machete to the passenger’s neck and severed the passenger’s windpipe. The defendant was charged with two crimes—armed violence for the first attack on the passenger and attempted murder for the second. The Supreme Court of Illinois had to determine whether there was just one criminal act, or whether there were two distinct assaults, ultimately holding that there were two crimes because there were two distinct physical acts.<sup>54</sup>

We believe this case was correctly decided. The defendant chose to impose a risk of death on the victim in the first attack. (We shall address below the question of this act’s duration and its omissive aspect—the failure to remove the knife.) After some time elapsed, the defendant ceased to impose that risk. The defendant then made another culpable choice to risk harm to the victim and acted in a way that imposed a greater risk of harm (moving the machete so as to sever the windpipe). The defendant then had committed two distinct culpable acts.

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<sup>53</sup> 426 N.E.2d 535 (Ill. 1981).

<sup>54</sup> *Id.* at 536.

Even moving from volition to “willed bodily movement” may seem too quick for some. Despite our claim that a bodily movement is a discrete and measurable unit of action, one might wonder whether bodily movements can be reduced further still. Cannot moving one’s finger be reduced into even smaller (perhaps infinite) units of movement? And is that movement the movement of a body, an arm, a finger, or just the surface of the actor’s finger?<sup>55</sup>

This question requires us to join the movement of one’s body (which may be divided into infinite parts) with the volition that causes it. Even if our fingers move over a distance that may be broken into an infinite number of smaller segments, we typically do not will these microparts. Rather, we decide to “move my finger.” So even if the bodily movement may be broken up, the volition is not.

Moreover, recognizing that the object of a volition is likely to be a larger bodily movement serves the function of our act requirement. We are concerned with an actor’s choosing to risk harm to others for insufficient reasons. When an actor chooses to move her body in a way that creates unjustifiable risks, she is culpable. The ultimate unit of action must, therefore, be one by which risks and reasons can be assessed. An actor does not choose to move his body in micro-parts and millimeters, but to “move my finger.”<sup>56</sup> Of course, to the extent that an actor with expertise in throwing a ball, playing the piano, or firing a trigger can will more discrete movements, he has willed more actions. Because this is the unit by which the actor makes his culpable choice, the criminal law, too, can use it as the unit by which to evaluate his choice. Our approach is, after all, an approach that looks to *culpable acts* as the unit of criminality.

The opposite objection might also be made against our view—that we seem to be creating too many units of prosecution. In any case of risk creation, the defendant may commit many acts. An act of rape includes many thrusts; an illegal “boxing match” includes lots of bobbing and weaving; speeding may require multiple pressings of the gas pedal.

Admittedly, our view increases the number of units of prosecution. However, each unit may entail smaller risks and risks of lesser duration. More importantly, we are introducing a principled approach to an area full of confusion. Current law is inconsistent in how it breaks up crimes that require multiple actions. Consider the facts *Brown v. Indiana*:<sup>57</sup>

[T]he record shows that Officer Zigler spotted Brown, identified himself as a police officer, and verbally ordered Brown to stop. Notwithstanding these demands, Brown continued to run. After Brown entered the barn that was on the Richardson property, he started the snowmobile, accelerated it out of the building, and struck Officer Simmons in the right

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<sup>55</sup> MOORE, *supra* note 17, at 375.

<sup>56</sup> *Cf. id.* at 380 (discussing the “smallest choosable [sic] bits”).

<sup>57</sup> 830 N.E.2d 956 (Ind. Ct. App. 2005).

leg. During this chase, Deputy Smith grabbed Brown's arm and was dragged a short distance before he lost his grip and fell.<sup>58</sup>

According to the Indiana court, this conduct—running from Zigler, striking Simmons, and dragging Smith—was just one act of resisting arrest.<sup>59</sup> In contrast, an Illinois court found multiple acts of resisting arrest for the following interchange:

When asked to produce his driver's license and proof of insurance by Officer Harrison, the defendant refused and began to walk away from the vehicle. Officer Harrison then grabbed the defendant by the right arm and instructed him to stop. The defendant responded by placing his hands in his pockets and pulling away from Officer Harrison. After Officer Harrison told the defendant he was being placed under arrest for obstructing an officer, the defendant started to pull away to walk away. At this point, Officer Dietz came over from the other side of the vehicle and grabbed the defendant's left arm. Both officers unsuccessfully attempted to pull the defendant's hands out of his pockets. The defendant began to struggle with the officers, culminating in Officer Harrison spraying the defendant with pepper spray and hitting the defendant twice in the face. A further struggle ensued in which the officers wrestled the defendant to the ground and eventually placed the defendant in handcuffs.<sup>60</sup>

Here, conduct that consisted of simply walking away and refusing to pull one's hands out of one's pockets amounted to as many crimes as there were officers. Both Brown and Wicks engaged in multiple actions in their efforts to prevent law enforcement from arresting them. There is no principled reason for one of these defendants to be guilty of one crime and the other to be guilty of multiple crimes. Rather, each action should be evaluated independently for the risk of harm that it created.

Though some courts have attempted to parse crimes into conduct crimes (which are committed once no matter how many victims) and results crimes (where there are as many crimes as there are victims or injuries), this sort of approach leaves too many questions unanswered. Arson is a result crime because it results in the destruction of property, but it also risks other injuries. So, if an actor sets one building on fire, which fire almost ignites a second building and almost kills two people, there is typically but one arson charged; but if the fire actually spreads to the second building, are there two arsons? And if the arson kills the people, should we assume that there cannot be additional arson charges

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<sup>58</sup> *Id.* at 965–66 (citations to trial record omitted).

<sup>59</sup> *Id.* at 966.

<sup>60</sup> *Illinois v. Wicks*, 823 N.E.2d 1153, 1157 (Ill. App. Ct. 2005).

because arson only *indirectly* protects people but does not actually criminalize setting them on fire? Should it be that a defendant is guilty of two counts of carjacking for stealing *one car* because he takes possession from both the driver and the passenger?<sup>61</sup>

Moreover, even when courts know *what* they are counting, it is unclear *how* they are counting. In *Washington v. Soonalole*,<sup>62</sup> the defendant fondled the victim's breasts while he was driving; then, he stopped and parked the car; then, he resumed fondling her. The statute barred sexual contact with a minor, defining sexual contact as "[a]ny touching."<sup>63</sup> The court thus reasoned that there were two acts of third-degree child molestation.

By this reasoning, however, the prosecutor could have charged each contact as a different instance of child molestation. And it strikes us that this would have been the more principled approach. If we look to how many contacts there were and for how long the unconsented to touchings lasted, we know everything we need to know about the actor's culpability (and, for that matter, the extent of harm to the victim).

Our approach is superior to current token identity approaches. It gives us an identifiable unit of action from which to assess risks, reasons, and duration. Moreover, this approach allows us to focus on what matters about crime—how it reflects the actor's culpability.

## 2. Volume Discounts

We should consider a second issue that arises when we join the question of multiple acts with an assessment of culpability. Here is the problem: What should we say about the relative culpability of A, who fires one shot at V with the purpose of killing him every day for six days; B, who fires six shots at V for the same purpose at the rate of one shot per hour; and C, who fires all six shots at V for the same purpose in a thirty-second period?

If each shot is a separate and discrete reckless risk-imposition, then A, B, and C are equally culpable. And yet, one might think that A is more culpable than B, who is more culpable than C. But how can this be so? Each actor has performed the same risky act with the same mental state the same number of times.

Let us first put one solution to the side. We are not subscribers to the theory of "volume discounts." It simply cannot and should not be the case that C is less culpable than A simply because C's actions took place over a shorter period of time. C did not perform one action—he performed six.<sup>64</sup> A condensed time frame

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<sup>61</sup> *People v. Hamilton*, 47 Cal. Rptr. 2d 343 (Cal. Ct. App. 1995).

<sup>62</sup> 992 P.2d 541, 542–44 (Wash. Ct. App. 2000).

<sup>63</sup> *Id.* at 543.

<sup>64</sup> Leo Katz argues that when two actions occur in quick succession, we view them to be one action. See Leo Katz, *Before and After: Temporal Anomalies in Legal Doctrine*, 151 U. PA. L. REV. 863, 878, 883 (2003).

does not change the number of actions that one performs, just how quickly one performs them.

But perhaps there is a hidden criterion that distinguishes these cases from one another. Although the hypothetical case does not specify this fact, we may believe that A's intention to kill V persisted over the course of six days, while C's intention to kill V lasted for only thirty seconds. Thus, the difference between A and C lies in the length of time over which they deliberated whether to kill.

The critical question, then, is whether premeditation aggravates an actor's culpability. There is significant skepticism surrounding premeditation. The first concern is conceptual. Given that, as interpreted, premeditation can occur "an instant before" or "simultaneous with" an act, we may doubt that we understand what it means to premeditate.<sup>65</sup> And even when the actor has time between his decision to act and the act itself, how precisely do we quantify premeditation? If A decides to kill V, fires a shot, misses, decides to wait another week, goes about eating, sleeping, and watching television, and returns to fire a shot a week later, for how long did A premeditate?

Moreover, even if we can surmount the conceptual objection, there remains a normative one. Is the person who deliberates over a period of time more culpable than someone who does not? The argument against premeditation is simply this: premeditation is over and underinclusive. Mercy killings are used to illustrate why it is overinclusive; mercy killers, who may deliberate for significant periods of time, are arguably not nearly as culpable as many killers who do not deliberate at all.<sup>66</sup> The case used to illustrate underinclusiveness is *People v. Anderson*,<sup>67</sup> where the defendant, in an intoxicated state, stabbed his live-in girlfriend's ten-year-old daughter more than sixty times. The California Supreme Court held that Anderson was not guilty of first-degree murder because the killing was not premeditated.

Although both of these cases seem to indicate the failure of premeditation as a normative benchmark, we believe there is much more to be said. First, mercy killings are, quite frankly, red herrings. The problem is that all of the intuitive work is being done by the belief that mercy killings are perhaps justified or nearly so. Thus, the ban on mercy killings, which punishes those whom we do not

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<sup>65</sup> See BENJAMIN N. CARDOZO, WHAT MEDICINE CAN DO FOR LAW, ADDRESS BEFORE THE NEW YORK ACADEMY OF MEDICINE (Nov. 1, 1928), reprinted in BENJAMIN N. CARDOZO, LAW AND LITERATURE: AND OTHER ESSAYS AND ADDRESSES 99–100 (Harcourt, Brace & Company 1931):

I think the distinction is much too vague to be continued in our law. There can be no intent unless there is a choice, yet by the hypothesis, the choice without more is enough to justify the inference that the intent was deliberate and premeditated . . . . [D]ecisions are to the effect that seconds may be enough . . . . If intent is deliberate and premeditated whenever there is choice, then in truth it is always deliberate and premeditated, since choice is involved in the hypothesis of intent.

<sup>66</sup> See, e.g., SAMUEL H. PILLSBURY, JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER 105 (1998).

<sup>67</sup> 447 P.2d 942 (Cal. 1968).

believe to be very culpable or culpable *at all*, does not illustrate the problem with premeditation.

*Anderson*, on the other hand, is a more challenging counterexample, but the importance of *Anderson* has yet to be appreciated. The argument from *Anderson* is that those individuals who are indifferent to others may be just as culpable, if not more culpable, than premeditated killers. Thus, to the extent that premeditation is used as a proxy for the actor's reasons for action,<sup>68</sup> it is being wrongly employed. As we have argued, culpability depends upon one's reason for acting, and premeditation itself does not bear on the actor's reasons.

This, however, is not the end of premeditation. That is, even if we believe that reasons for action matter, and that intended harms are not necessarily more culpable than those that are foreseen, that does not resolve the question of whether there is any room for premeditation. In our view, culpability includes the *quality* of the actor's decision making. We contend that when an actor's decision making is degraded, the actor is less culpable.<sup>69</sup> Conversely, in some instances, enhanced decision-making quality can aggravate culpability. We cannot and will not fully sketch out a new version of premeditation here, but preliminarily, a premeditation assessment is best viewed as an assessment of the quality of the actor's deliberation, given the time period in which the decision had to be made.

We believe that a focus on the quality of deliberation best accounts for any differences among A, B, and C. If C fires in rapid succession, he may not have deliberated about the shots after the first one to the same extent as A, who fires one bullet a day at V for six days. (However, it is at least possible that C deliberated *more* than A did.) We believe that quality of deliberation is the only thing that can and should distinguish these actors. The time interval between culpable acts cannot itself change the number (or quality) of the culpable actions.

### 3. Analyzing Continuous Courses of Conduct

Let us consider one final puzzle. Sometimes an actor imposes one risk for a long period of time. An actor may speed for twenty minutes, or steal a car for twenty days, or fail to rescue for three hours. How many crimes has the actor committed?

Many cases involving a continuous course of conduct involve multiple willed bodily movements. In such instances, we should simply count the willed bodily movements (and the duration of each bodily movement expected by the actor). So, if an actor has pummeled a victim with fists for twenty minutes, the actor has committed a number of culpable acts, each of a very short duration.

However, there are other crimes where one willed bodily movement is followed by an omission. An actor pushes down on the accelerator once and then

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<sup>68</sup> See PILLSBURY, *supra* note 66, at 110–20.

<sup>69</sup> See Ferzan, *supra* note 10, at 2534. See generally Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289 (2003).

fails to remove his foot. Or, as in *Myers*, he keeps the machete at his victim's throat. And, of course, because we believe that an omission, following an act of risk creation, is itself a locus of culpability, we can have extended periods of culpably doing nothing.

To ask how long and how many continuous acts the actor has performed is already to answer the question. For a continuous act, the actor has performed one act, which is as long as its duration. Or, as Michael Moore says, we know when a continuous act ends by asking when the conduct stopped.<sup>70</sup> Our account thus has no problem counting continuous courses of conduct and no problem accounting for the defendant's culpability, which turns not on the number of actions but on the perceived duration of the risk imposed.<sup>71</sup>

#### 4. Beyond Counting Crimes: Culpability and Duration Reprised

Though we defend a theory of crime individuation in this section, we should not lose sight of why the criminal law needs to individuate crimes. We count crimes to determine how much punishment the defendant deserves. We assume that a defendant who has committed two thefts deserves more punishment than a defendant who has committed only one.

However, as the previous sections have shown, current approaches to crime individuation fail to capture what is truly at stake in counting crimes—assessing the defendant's blameworthiness. In contrast, a focus on the legally protected interests at stake, and more importantly, the perceived duration of the risk imposed, fully captures the defendant's culpability and therefore his desert.

First, in cases where defendants risk harm to multiple criminal interests, current approaches to act-type individuation fail to distinguish between the different legally protected interests that are risked and the degree to which they are risked. To recapitulate, a man who violently assaults a woman during a rape simply deserves more punishment than a man who uses less force.

Second, the element of duration fully accounts for the actor's culpability in ways that simply counting crimes cannot. The number of crimes does not tell us about the perceived degree of risk imposed, the reasons for which the risk is imposed, the quality of the actor's deliberation, and the length of time the actor thought he was imposing the risks. The arsonist's blameworthiness does not depend upon whether the fire he ignited counts as one arson or two—what matters is the degree of risk imposed and the perceived duration of that risk.

Our view does not just account for the actor's blameworthiness; it fully captures it. For instance, there is the problem of risk impositions that last for some duration—that is, that are not single, instantaneous risk-impositions (such as firing a bullet or swinging a fist). They can be of two sub-types: (1) one long, continuously willed bodily movement, such as pushing down an accelerator

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<sup>70</sup> MOORE, *supra* note 17, at 388.

<sup>71</sup> For purposes of setting punishments, criminal law may have to select a unit of duration.

requiring continuous effort; or (2) a willed bodily movement followed by a willed omission for a long period, such as accelerating to 100 m.p.h., setting the cruise control, and letting the car continue at that speed. In these cases, the culpability of the actor is a product of his reasons (discounted by his estimate of the probability of their obtaining) and the average risk he believes he is imposing over the duration he imposes it times the duration itself. For example, holding reasons constant, if the actor, say, sees the risk imposed as the same during all moments of his speeding, then one multiplies level of risk times the length of time he speeded, the product of which is the actor's blameworthiness.

By contrast, the criminal law currently breaks continuous courses of conduct into multiple actions in its attempt to capture the actor's blameworthiness. As Achille Varzi and Giuliano Torrengo observe, "[i]n practice, when it comes to temporally extended actions, it is contextual and pragmatic considerations that determine what counts as a relevant 'unit' the performance of which deserves to be punished."<sup>72</sup> In other words, when we count one continuous course of conduct, we have just that—one continuous course of conduct. However, for purposes of enforcement and punishment, we may need to break up this continuous course of conduct into smaller units.

To illustrate, consider *Village of Sugar Grove v. Rich*.<sup>73</sup> The defendant, the owner of J.R.'s Retreat, violated a noise ordinance. On one day, he was cited at 8:39 p.m., 9:00 p.m., 10:10 p.m., and 10:16 p.m. The court held that the defendant could not be punished for violating the same noise ordinance four times because the statute specified "each day such violation is committed or permitted to continue constitutes a separate offense."<sup>74</sup>

The ordinance's selection of one day as the unit for determining how many tickets the actor deserves to receive—a decision that will ultimately turn on pragmatics and not morals—will serve only as a rough proxy for the full amount of risk imposed and the actor's culpability for imposing it. By contrast, our approach—which directly takes duration into account—yields the conclusion that the defendant deserves punishment for the exact amount of time that he violated the noise ordinance. He did not commit four crimes; nor did he commit only one merely because all violations occurred during one day. Rather, he committed a continuous offense that lasted as long as the defendant perceived it to last.

Finally, our approach better captures the relationship between acts, omission, and duration. Consider the lit fuse cases. Here, suppose the actor lights the fuse and it is instantly out of his control. His culpability when he lights it is the product of his reasons (again, discounted by his estimate of the probabilities of their obtaining) and the risks of harms of various types he believes he has imposed (including his assessment of the probability that the fuse will go out before

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<sup>72</sup> Achille C. Varzi & Giuliano Torrengo, *Crimes and Punishments*, 34 *PHILOSOPHIA* 395, 403 (2006).

<sup>73</sup> 808 N.E.2d 525, 533 (Ill. App. Ct. 2004).

<sup>74</sup> *Id.* at 533.

igniting, or be snuffed out by someone else, and so forth). Call the risk of harms  $R$  and the resultant level of culpability  $C$ .

Now, compare this case with the actor who lights a fuse for the same reasons and who believes in the same risks of harms, except that this actor retains (he believes) the ability for awhile to snuff out the fuse. At first, he believes his chance of snuffing it out to be very high—not 100%, as he might faint, be hit by a meteorite, and so forth, but close to 100%. At this point, he does not yet believe he has imposed  $R$  or close to  $R$ . His culpability is  $> 0$  but  $< C$ . As time goes by, and he gets nearer the point in time at which the fuse will be beyond recall, his chances of snuffing it out, though still high, are less than they were when he let lit the fuse. (Then, if he were to have a change of heart but slip and fall, he would still have time to recover and snuff out the fuse. But as the point of no return approaches, a slip and fall might prevent snuffing the fuse out were there a change of heart.) Once the actor passes the point of no return, his culpability, like that of the first actor, is  $C$ . If, however, he does have a change of heart, or if he is arrested before the point of no return, his culpability will be assessed as would the culpability of someone engaged in a continuous course of conduct: average risk times duration. In no case will this ever exceed  $C$ , however, as the average risk with a long-burning fuse will be very low (unlikely the actor will not be able to snuff it out if he wants to), even through the duration is great.

Our approach thus allows us to account for the different perceptions of the risk created, how abandonment can factor into culpability, how actors are culpable for failing to terminate the risks they have created, and how the duration of the risk can affect the actor's ultimate culpability. Thus, we do not just have a theory about how to *count* crimes. Rather, we have a theory about how to *account* (fully) for the actor's blameworthiness.

#### IV. CONCLUSION

An actor is blameworthy and deserves punishment when she risks harm to others for insufficient reasons. In this essay, we have attempted to sketch out how a defendant risks harm. In our view, volitions are the appropriate theoretical focus of the criminal law, but willed bodily movements will be more workable in practice. In addition, actors who have duties to act should also be held criminally accountable for their failures to act.

Our view of criminal action begins and ends with these acts of risk imposition. We eschew complex act descriptions in favor of a more straightforward analysis of the risks the defendant is imposing and his reasons for doing so. Analyzing the actor's culpability for these risk impositions also requires taking into account the expected duration of the risk and the quality of the actor's deliberation.

This approach allows us to individuate crime types and crime tokens. Any act of risk imposition is likely to risk different legally protected interests to different degrees. Our approach more closely tracks an actor's blameworthiness than an

approach that requires us to distinguish between overlapping criminal act types. In addition, our focus on the willed bodily movement allows for easy identification of act token. When a defendant commits a continuous act of risk imposition (or more likely a continuous omission), a defendant will have committed one long continuous crime. Finally, though counting crimes serves as a rough proxy for the actor's blameworthiness, our approach, which directly attends to acts, omissions, deliberation, and duration, fully captures an actor's culpability and blameworthiness.