

THE VOLUNTARY ACT REQUIREMENT IN PRISON CONTRABAND CASES

INTRODUCTION

When has one committed the crime of introducing prison contraband? This is an important question when one is visiting a prison, voluntarily or otherwise, and a question which can be surprisingly difficult to answer. Most state statutes punishing the introduction of prison contraband look much like California's statute:

Except when otherwise authorized by law . . . any person, who knowingly brings or sends into, or knowingly assists in bringing into, or sending into, any state prison . . . or within the grounds belonging to the institution, any controlled substance, . . . any device, contrivance, instrument, or paraphernalia intended to be used for unlawfully injecting or consuming a controlled substance, is guilty of a felony¹

These statutes are straightforward, containing a *mens rea*, usually “knowingly,”² an *actus reus*, usually introducing, possessing, conveying, etc.,³ and then a list of prohibited objects. Moreover, the prototypical prison-contraband cases, such as baking a gun into a cake and mailing it to prison,⁴ or mailing a friend drugs in a package designated as legal mail,⁵ are equally straightforward violations of introducing-contraband statutes. However, in a subset of prison-contraband cases, where the defendant is arrested with the contraband already on his or her person, loaded into the back of a police car, and taken to the county jail, the violation is not so clear. These cases are complicated by the defendants' simple defense that they did not want to bring their contraband to jail; rather, their arrest “forced” them to bring it into the facility.

Usually, these cases play out like the case of *People v. Gastello*, where the defendant was arrested for being under the influence of a controlled substance

1. CAL. PENAL CODE § 4573(a) (2011).

2. ARIZ. REV. STAT. ANN. § 13-2505(A)(1) (2016); PENAL § 4573(a); COLO. REV. STAT. ANN. § 18-8-203(1)(a) (2012); OHIO REV. CODE ANN. § 2921.36(A) (2013).

3. ARIZ. REV. STAT. § 13-2505(A)(2) (2016); COLO. REV. STAT. ANN. § 18-8-203(1)(a) (2012); MO. REV. STAT. § 221.111 (2017); OHIO REV. CODE ANN. § 2921.36(A) (2013).

4. Jesse Rhodes, *The File Inside the Cake: True Tales of Prison Escapes*, SMITHSONIAN.COM (June 14, 2011), <http://www.smithsonianmag.com/arts-culture/the-file-inside-the-cake-true-tales-of-prison-escapes-15653967/> [<https://perma.cc/WTR3-BLH2>].

5. *Wilson v. Haney*, 430 S.W.3d 254, 256 (Ky. Ct. App. 2014).

and placed in the back of a police car.⁶ The arresting officer informed the defendant that possessing controlled substances at the jail was a felony.⁷ The defendant manifested understanding but did not declare possession of any forbidden items.⁸ Once at the jail, officers conducted an intake search and discovered .32 grams of methamphetamine in the defendant's sweatshirt.⁹ Gastello was charged and found guilty of bringing a controlled substance into prison.¹⁰

Gastello was decided in California, one of the majority of States that punish suspects arrested while in possession of contraband and taken to prison with specific, prison-contraband statutes.¹¹ But in a handful of States, when faced with nearly identical facts, the courts will find the defendant innocent.¹² This discrepancy stems from courts' varying interpretations of their voluntary act requirements.¹³ While some courts find that defendants like Gastello commit a voluntary act somewhere within their possession, arrest, and journey to jail, others do not. Bizarrely enough though, the voluntary act requirements in these jurisdictions are also remarkably similar. So here is the problem, various courts facing effectively identical facts and with practically identical voluntary act requirements reach conflicting results in introducing-prison-contraband cases.¹⁴

Part I of this paper seeks to illustrate the problem by analyzing two conflicting introducing-prison-contraband cases in the context of each State's voluntary act requirement. Part II asks the practical question of "how?": how can two courts with identical facts and identical laws come to two opposing

6. 232 P.3d 650, 652 (Cal. 2010).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 653.

11. Including California, ten States have found a defendant in this situation guilty of introducing prison contraband. North Carolina: *State v. Barnes*, 747 S.E.2d 912, 922 (N.C. Ct. App. 2013); Arizona: *State v. Taylor*, Nos. 1 CA-CR09-0626, 1 CA-CR09-0666, 2010 WL 3597222, at ¶ 20 (Ariz. Ct. App. Sept. 16, 2010); Kentucky: *Taylor v. Commonwealth*, 313 S.W.3d 563, 566 (Ky. 2010); Virginia: *Herron v. Commonwealth*, 688 S.E.2d 901, 907-08 (Va. Ct. App. 2010); Missouri: *State v. Winsor*, 110 S.W.3d 882, 888 (Mo. Ct. App. 2003); Ohio: *State v. Cargile*, 916 N.E.2d 775, 778 (Ohio 2009); Tennessee: *State v. Carr*, No. M2007-01759-CCA-R3-CD, 2008 WL 4368240, at *7 (Tenn. Crim. App. Mar. 23, 2009); Texas: *Brown v. State*, 89 S.W.3d 630, 633 (Tex. Crim. App. 2002); and Iowa: *State v. Canas*, 597 N.W.2d 488, 497 (Iowa 1999).

12. Those states in the minority include: Washington: *State v. Eaton*, 177 P.3d 157, 162 (Wash. Ct. App. 2008); New Mexico: *State v. Cole*, 164 P.3d 1024, 1027 (N.M. Ct. App. 2007); and Oregon: *State v. Tippetts*, 43 P.3d 455, 459-60 (Or. Ct. App. 2002).

13. All states, whether by statute or by common law, require that criminal conduct include a voluntary act. The comments to the Model Penal Code list 27 states that have statutory voluntary act requirements and 11 States with common law requirements. Presumably the remaining 12 States fall into one of the two categories or some mixture thereof. MODEL PENAL CODE § 2.01 n.14 (AM. LAW INST., Proposed Official Draft 1962).

14. See cases cited *supra* notes 11 and 12.

results? I argue that the courts employ two tools, time-framing and disjoining/unifying acts to reach “subjective” rather than “objective” concepts of voluntariness. Part III asks the “why?” question: why do courts manipulate a given arrestee’s conduct to reach their understanding of voluntariness? I argue that in addition to the language of the statutes, “includes a voluntary act,” courts are guided by personal means. Acknowledging that courts, at least in part, are deciding introducing-prison-contraband cases on personal grounds, Part IV offers model statutes to standardize our approach to culpability. And finally, Part V concludes with some parting thoughts on the voluntary act requirement as a whole.

I. THE TWO APPROACHES TO INTRODUCING-PRISON-CONTRABAND CASES

It will help to establish a quick understanding of the voluntary act requirement before directly comparing two introducing-prison-contraband cases. A fundamental tenet of criminal law is that “[a] person is not guilty of an offense unless his liability is based on conduct which *includes a voluntary act* or the omission to perform an act of which he is physically capable.”¹⁵ The Model Penal Code (“MPC”) adopts a strict construal of the language “includes a voluntary act.” An explanatory note following section 2.01 of the MPC states that, “[i]t is, however, required only that the actor’s conduct include a voluntary act, and thus unconsciousness preceded by voluntary action may lead to liability based upon the earlier conduct.” This reading of the MPC’s voluntary act requirement has been called “the single voluntary act” view.¹⁶ Many States have adopted this “single voluntary act” requirement, leading to results like the conviction in *State v. White*, where the defendant was “playing soldier” with a shotgun when it accidentally discharged, shooting a fourteen-year-old girl.¹⁷ The court held that although shooting the gun was not voluntary, “playing soldier” was voluntary. Therefore, because the “State need not prove the voluntariness of each and every act,” only that the conduct “includes a voluntary act,” the requirement was satisfied.¹⁸

However, despite nearly unanimous use of the language “includes a voluntary act,” the single voluntary act view has not achieved unanimous application. A poignant portrayal of this fact comes in our introducing-prison-contraband cases. So, armed with an understanding of the voluntary act requirement and the single voluntary act view, we turn to a comparison of two introducing-prison-contraband cases.

15. MODEL PENAL CODE § 2.01(1) (AM. LAW INST., Proposed Official Draft 1962) (emphasis added).

16. Ian P. Farrell & Justin F. Marceau, *Taking Voluntariness Seriously*, 54 B.C. L. REV. 1545, 1565–66 (2013).

17. 138 S.W.3d 783, 784 (Mo. Ct. App. 2004).

18. *Id.* at 785–86.

The first case is *State v. Winsor*.¹⁹ On December 3, 2001, Ian Winsor was pulled over for driving the wrong direction down a one-way street.²⁰ The acting officer, Sergeant K.J. Heather, collected Winsor's information and ran it through a computerized database of law enforcement information.²¹ The search revealed two outstanding warrants for possession of a controlled substance and a probation violation.²² Accordingly, Officer Heather arrested Winsor and placed him in the back of the police car.²³ Officer Heather informed Winsor that he was being taken to the county jail and that, if he had any other drugs on him, he should turn them over now because possessing drugs at the jail would constitute a felony.²⁴ Winsor remained silent.²⁵ As part of the admission process of the county jail, Winsor was searched and found to have a baggie of marijuana in his shorts.²⁶ Instead of charging Winsor with possession of marijuana, the State charged Winsor with possession of a controlled substance on the premises of a county jail under section 221.111 of the Missouri Revised Statutes.²⁷ After a trial, Winsor was found guilty.²⁸ Winsor appealed on the grounds that his action was involuntary but the Missouri Court of Appeals, Western District affirmed.²⁹

The second case is *State v. Tippetts*.³⁰ Farrell Tippetts was arrested in his home and brought to the Washington County Jail.³¹ Before he was admitted, Officer Morey asked Tippetts if he had any drugs or weapons that he would be bringing into the jail.³² Tippetts did not declare any such items.³³ Officer Morey then searched Tippetts and discovered a baggie of marijuana.³⁴ Tippetts was charged under Oregon's statute against supplying contraband to correctional facilities.³⁵ Tippetts was found guilty after a trial.³⁶ Tippetts also appealed, but unlike Winsor, Tippetts was found to be innocent because he had not voluntarily supplied contraband.³⁷

19. 110 S.W.3d 882 (Mo. Ct. App. 2003).

20. *Id.* at 884.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Winsor*, 110 S.W.3d at 884.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Winsor*, 110 S.W.3d at 885, 888.

30. 43 P.3d 455 (Or. Ct. App. 2002).

31. *Id.* at 456.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Tippetts*, 43 P.3d at 456.

36. *Id.*

37. *Id.* at 459–60.

Both *Winsor* and *Tippetts* begin their analyses by laying out the State's voluntary act statute. In *Winsor*, the voluntary act statute is section 562.011 of the Missouri Revised Statutes:

1. A person is not guilty of an offense unless his or her liability is based on conduct which includes a voluntary act.
2. A "voluntary act" is:
 - (1) A bodily movement performed while conscious as a result of effort or determination; or
 - (2) An omission to perform an act of which the actor is physically capable.
3. Possession is a voluntary act if the possessor knowingly procures or receives the thing possessed, or having acquired control of it was aware of his or her control for a sufficient time to have enabled him or her to dispose of it or terminate his or her control.³⁸

In *Tippetts*, the voluntary act statute is section 161.095(1) of the Oregon Revised Statutes, which states: "The minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which the person is capable of performing."³⁹ Oregon explicitly defines some of these terms in section 161.085 of the Oregon Revised Statutes:

- (1) "Act" means a bodily movement.
- (2) "Voluntary act" means a bodily movement performed consciously and includes the conscious possession or control of property.
- (3) "Omission" means a failure to perform an act the performance of which is required by law.
- (4) "Conduct" means an act or omission and its accompanying mental state.
- (5) "To act" means either to perform an act or to omit to perform an act.

In comparing the statutes, we can see that both Missouri and Oregon require that criminal conduct "includes" a voluntary act, that an "act" is a bodily movement performed consciously, and that possession is a voluntary act.⁴⁰

38. *Winsor*, 110 S.W.3d at 885–86. Interestingly, there is another possession statute, MO. REV. STAT. § 195.010(34) (2017), which defines possession specifically for controlled substances. The *Winsor* court never mentions this statute. It is unclear why the court in *Winsor* did not also make use of this statute since the prison contraband statute, MO. REV. STAT. § 221.111 (2017), expressly prohibits possessing "any controlled substance." It is possible the court avoided this statute because it is used for possession charges under MO. REV. STAT. § 579.015 (2017), and the court wished to distinguish MO. REV. STAT. § 221.111 (2017). Or, it is possible the court simply believed using both possession statutes would be redundant.

39. *Tippetts*, 43 P.3d at 456.

40. There is one slight discrepancy between the statutes in the definition of possession. Missouri's statute defines possession as "knowingly procur[ing]" the item or being "aware of his or her control for a sufficient time" to have disposed of it. Oregon on the other hand defines

The courts then apply the voluntary act statute to their prison contraband statutes. In Missouri, the relevant statute is section 221.111.1 of the Missouri Revised Statutes, which states, in pertinent part:

1. A person commits the offense of possession of unlawful items in a prison or jail if such person knowingly delivers, attempts to deliver, possesses, deposits, or conceals in or about the premises of any correctional center as the term "correctional center" is defined under section 217.010, or any city, county, or private jail:

(1) Any controlled substance as that term is defined by law, except upon the written prescription of a licensed physician, dentist, or veterinarian;

Oregon's relevant statute is section 162.185(1)(a) of the Oregon Revised Statutes, which states, in pertinent part:

(1) A person commits the crime of supplying contraband if:

(a) The person knowingly introduces any contraband into a correctional facility, youth correction facility or state hospital;

In comparison, we can see that Missouri's prison contraband statute punishes knowingly delivering, attempting to deliver, possessing, depositing, or concealing contraband in or about a correctional facility, and Oregon's statute punishes knowingly introducing contraband into a correctional facility. While an argument could be made that the preposition "into" contained in Oregon's statute is distinguishable from Missouri's use of "in or about," the common sense reading of these two statutes would indicate that both punish identical actions.

Despite the similarities in statutes, the two courts differ drastically in the next step of their analysis. In *Winsor*, defendant's main argument is that he was not "voluntarily" in or about the premises of a correctional facility and accordingly did not meet an essential element of the crime.⁴¹ The court rejects the idea that voluntary presence at the correctional facility was required.⁴² Instead, the court focuses on the voluntary possession preceding Winsor's presence at the county jail:

possession as "conscious possession or control of property." The difference is likely only one of language and not substance as conscious possession roughly encompasses both knowingly procuring and awareness for a sufficient period of time to enable disposal.

41. Winsor's brief and subsequently the court's decision is broken into three arguments: (1) "[T]hat the voluntary presence on the county jail premises of the person charged is a crucial element of the crime for which he stands convicted," (2) "that his voluntary presence on the county jail's premises was required," and (3) "that his possession of a controlled substance on county jail premises was not a voluntary act because he was transported to the county jail against his will." *Winsor*, 110 S.W.3d at 886-87. In reality, these three arguments are one argument: because Winsor was not voluntarily present at the county jail, he did not satisfy the voluntary act requirement.

42. *Id.* at 886.

Appellant was convicted for his voluntary conduct of possessing a controlled substance in or about the county jail. Appellant's willful possession of a controlled substance itself constitutes the requisite voluntary act. His secreting the substance in or about the county jail, *regardless of whether he was present voluntarily*, satisfies evidentiary requirements to support the conviction.⁴³

The court is very clear on its implementation of the "single voluntary act" view, recognizing that Winsor's presence may have been involuntary, but nonetheless finding the requisite voluntary act in his prior possession. The court later does a quick analysis of Winsor's possession:

The arresting officer asked [Winsor] if he had any other controlled substances on his person and informed him that bringing a controlled substance onto the premises of the county jail constituted a felony. Once he was apprised of this fact, [Winsor] had sufficient time to dispose of or terminate his control over the controlled substance.⁴⁴

The court found that Winsor voluntarily possessed the marijuana under Missouri Revised Statute 562.011(3), which requires he "was aware of his . . . control for a sufficient time to have enabled him . . . to dispose of it," and therefore, his voluntary possession was the requisite single voluntary act.⁴⁵

In its argument in *Tippets*, the State offers the same rationale employed by the court in *Winsor* to support a conviction. The court wrote, "[t]he state argues alternatively that, even if defendant did not voluntarily introduce the marijuana into the jail, he voluntarily possessed it before his arrest and that act is sufficient to satisfy O.R.S. 161.095(1)."⁴⁶ Yet, where this rationale was sufficient in *Winsor*, the court rejects it in *Tippets*, choosing instead to focus on the act of "introducing" the contraband and ignoring the prior act of possession.⁴⁷ The court stated: "Defendant, however, did not initiate the introduction of the contraband into the jail or cause it to be introduced in the jail. Rather, the contraband was introduced into the jail only because the police took defendant (and the contraband) there against his will."⁴⁸ This fact is no less true in *Winsor* than it is in *Tippets*. In both instances, the police took the defendant to the county jail against his will. And in both instances the defendant has delivered, possessed, or introduced contraband into the correctional facility, in as much as he brought his marijuana from outside the doors to inside the doors.

43. *Id.* (emphasis added).

44. *Id.* at 888.

45. *Id.* at 887.

46. *State v. Tippets*, 43 P.3d 455, 457 (Or. Ct. App. 2002).

47. *Id.* at 459.

48. *Id.* at 457.

II. HOW THE TWO COURTS REACH OPPOSING CONCLUSIONS

How then, was Ian Winsor convicted and Farrell Tippetts released? The answer lies in two judicial tools Mark Kelman calls “time-framing” and “unifying/disjoining” acts.⁴⁹ Time-framing refers to establishing “the temporal boundaries of the criminal conduct: when that conduct can be said to begin and end.”⁵⁰ Disjoining acts is the method of determining which acts, within a continuum of acts, can be said to “contribute” to or result in the criminalized conduct. Kelman states that unifying/disjoining occurs when:

[W]e feel we must look beyond a single moment in time and account, in some fashion, for some clearly relevant earlier moment. The earlier “moment” may be the time at which a defendant made some judgment about the situation she was in, some judgment that at least contributed to the ultimate decision to act criminally.⁵¹

Armed with these two tools, courts can manipulate a variety of acts to either find or not find a requisite voluntary act.

Like many theories, these two tools are easier to understand in application. For clarity’s sake, I’ll apply time-framing and disjoining/unifying acts to a well-cited voluntariness case, *Martin v. State*,⁵² before applying it to the introducing-prison-contraband cases. In *Martin*, officers arrested the defendant, who was drunk in his home, and brought him outside, onto the highway, where he was in violation of public intoxication.⁵³ In setting the time-frame for *Martin*, one could say the criminalized conduct begins when the defendant started drinking and ends when he is present on the public highway. This time-frame includes a certain spectrum of acts. Within this spectrum, the court can engage in disjoining/unifying the acts to select which acts contribute to public intoxication. If the court finds that the acts of drinking and being present in public are disjoined acts, that is, two distinct moments each contributing to the charged crime, the court can find that the voluntary act of drinking satisfies the voluntary act requirement. Alternatively, the court could limit the time-frame, claiming the conduct begins when the defendant is arrested and ends when he is drunk in public, which would exclude the voluntary act of drinking. Or, the court could keep a time-frame which includes the voluntary act of drinking, but not disjoin the acts of drinking and being present in public, in which case the unified act of public intoxication would be involuntary. Regardless of which route the court

49. Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 593–95 (1981).

50. Larry Alexander, *Reconsidering the Relationship Among Voluntary Acts, Strict Liability, and Negligence in Criminal Law*, 7 SOC. PHIL. & POL’Y 84, 91 (1990).

51. Kelman, *supra* note 49, at 595.

52. 17 So. 2d 427 (Ala. Ct. App. 1944).

53. *Id.* at 427.

takes, these tools will help the court justify the inclusion or exclusion of a voluntary act.⁵⁴

Applying time-framing and disjoining/unifying actions to the introducing-prison-contraband context, we begin to see the process by which these two courts reach opposing conclusions. In *Winsor*, the court explicitly disjoins the actions of possession and presence, when it states, “[t]o accept [Winsor]’s position that his voluntary act of possessing a controlled substance is somehow negated by the fact that he was involuntarily on the county jail’s premises would render section 221.111.1(1) meaningless.”⁵⁵ By disjoining the actions, the court allows itself to create a time-frame that could either include or exclude Winsor’s voluntary act, possession. The court chooses to set boundaries that include the voluntary act, and convict Winsor on the grounds that his prior possession satisfies the voluntary act requirement.

In *Tippetts*, the court similarly disjoins the actions but imposes a more limited time-frame that excludes the prior act of possession. The court neatly lays out the two approaches of disjoined or unified acts, by recording the parties’ arguments:

The state reasons that, even if defendant did not voluntarily introduce the marijuana into the jail after the police arrested him, he voluntarily possessed it before he was arrested. The earlier voluntary act of possession, the state concludes, is sufficient to hold defendant criminally liable for the later involuntary act of introducing the marijuana into the jail. Defendant responds that ORS 162.185(1)(a) punishes the act of introducing the contraband into a correctional facility; it does not punish the act of possessing drugs.⁵⁶

The court accepts parts of both parties’ arguments. Regarding the State’s argument, the court acknowledges that Tippetts voluntarily possessed the drugs and that his possession served in some fashion as a predicate to the later introduction of the drugs into a correctional facility.⁵⁷ However, it is the weakness of that predicate which persuades the court to adopt a narrow time-frame and exclude the act of possession: “the involuntary act must, at a minimum, be a reasonably foreseeable or likely consequence of the voluntary act on which the state seeks to base criminal liability.”⁵⁸ Because introducing marijuana into a correctional facility is not a reasonably foreseeable consequence of possessing marijuana, the court chooses to ignore the act for the

54. To be fair, Kelman labels these “tools” unconscious interpretive constructs. It might be an overstatement to claim that judges are actively using time-framing and disjoining/unifying to cherry-pick results. Rather, as Kelman puts it, unconscious constructs “are often used to avoid issues inherent in [conscious constructs], issues that the legal analysts are most prone to be aware are controversial, perhaps insoluble, and highly politicized.” Kelman, *supra* note 49, at 593.

55. *State v. Winsor*, 110 S.W.3d 882, 888 (Mo. Ct. App. 2003).

56. *State v. Tippetts*, 3 P.3d 455, 459 (Or. Ct. App. 2002).

57. *Id.* at 459–60.

58. *Id.*

purpose of satisfying the voluntary act requirement. Thus, despite having a voluntary act statute requiring conduct that only “includes a voluntary act,” the court did not find the voluntary act of possession satisfied the statute.

As perhaps has already been shown, the process of time-framing and disjoining/unifying actions can be arbitrary, and it can be abused. Regarding time-framing, Larry Alexander notes that, “if we time-frame too broadly we make the voluntary act principle vacuous.”⁵⁹ And as far back as Aristotle, people have suggested that acts dating from childhood can in some sense be said to contribute to the crimes of adulthood, even involuntary crimes.⁶⁰ If time-framing and disjoining/unifying acts are the tools allowing courts to determine whether a crime is voluntary, the remaining question is why do some courts seek a voluntary act where others do not.

III. WHY THE TWO COURTS REACH OPPOSING CONCLUSIONS

That the courts in Missouri and Oregon reached different conclusions and how they did exhibits the arbitrary process of selecting a voluntary act, but it does little to reveal the guidelines the two courts followed in making their determination. The basic issue is why one court was willing to accept the voluntary act of possession but not the other court. I argue that the reason some States have convicted defendants in Winsor’s situation while other States have not rests on notions of culpability.

The necessity of a voluntary act requirement is so apparent that it can be difficult to say exactly why it must exist, but most scholars agree that criminal conduct must include a voluntary act to ensure that punishment is appropriate for the actor. That is, a voluntary act is necessary to evaluate culpability.⁶¹

59. Alexander, *supra* note 50, at 91.

60. ARISTOTLE, NICOMACHEAN ETHICS 1113b–1114a (H. Rackham trans., 1934).

Well, but men are themselves responsible for having become careless through living carelessly, as they are for being unjust or profligate if they do wrong or pass their time in drinking and dissipation. They acquire a particular quality by constantly acting in a particular way. This is shown by the way in which men train themselves for some contest or pursuit: they practice continually. Therefore, only an utterly senseless person can fail to know that our characters are the result of our conduct; but if a man knowingly acts in a way that will result in his becoming unjust, he must be said to be voluntarily unjust.

Aristotle uses this rationale to justify punishing the drunken criminal who, although he committed the crime involuntarily, was drunk by voluntary habit.

61. A.P. Simester, *On the So-Called Requirement for Voluntary Action*, 1 BUFF. CRIM. L. REV. 403, 404–05 (1998) (“Criminal lawyers have often said there must at least be proof of a ‘voluntary act’ by the defendant if she is to be convicted of any offense. This reflects the insight that one is liable to be praised or blamed for the occurrence of an outcome only when one is morally responsible for that outcome—and that one cannot be morally responsible for bringing anything about unless it is brought about voluntarily.”); Luis E. Chiesa, *Punishing Without Free Will*, 2011 UTAH L. REV. 1403, 1404 (2011) (“Under the standard view, the offender deserves punishment only if he could have abstained from committing the crime.”). Not all scholars believe that the

Holmes writes, “[t]he reason for requiring an act [as a precondition for the existence of an offense] is, that [it] implies a choice, and that it is [considered unfair] to make a [person] answerable for harm, unless he might have chosen otherwise.”⁶² In fact, regardless of one’s theory of punishment (utilitarian prevention, retribution, incapacitation, rehabilitation, etc.), that punishment becomes unhinged from its purpose without a voluntary act.⁶³ There is nothing to prevent, no conduct to be condemned and avoided, and no one to be rehabilitated where the punished action is involuntary. The courts have imposed an act requirement because of an implicit understanding that punishment loses its punch without a voluntary act.

When viewed in light of its purpose, the voluntary act requirement begins to acquire new boundaries not present in a strict construal of its language. We might now ask not only, “does the conduct include a voluntary act?” but further, “can that voluntary act fairly predicate the derivative punishment?” When we ask both questions, as opposed to just the first, we get a more precise and just implementation of the voluntary act requirement. I believe that courts in introducing-prison-contraband cases have unconsciously been asking themselves these questions, and then using time-framing and disjoined/unified actions to reach their preferred result.

voluntary act requirement stands as a necessary predicate to culpability. Doug Husak argues that “[i]f the act requirement should be construed to hold that only acts are and ought to be the objects of liability, it unquestionably is false” because the State regularly punishes non-acts, like possession. Douglas Husak, *Rethinking the Act Requirement*, 28 CARDOZO L. REV. 2437, 2439 (2007).

62. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 54 (Little, Brown & Co. 1949) (1881).

63. In his book *The Limits of the Criminal Sanction*, Herbert Packer compiles a list of common theories of punishment in Chapter Three. Packer places every theory of punishment under the umbrella of two ultimate purposes: (1) “[T]he . . . infliction of suffering on evildoers” and (2) “the prevention of crime.” HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 36 (1968). Julian Hermida notes that these different theories all rely in some way on a voluntary act to justify their purpose:

Utilitarians would see little social benefit in punishing a person who does not carry out a voluntary act. This argument is not based on an idea of intrinsic justice, but on the belief that punishing an involuntary offender would not effectively deter the offender or other members of society who many commit similar involuntary acts. Retributivism’s major tenet is that the offender deserves punishment when he ‘freely chooses to violate society’s rules.’ An offender who does not act voluntarily—even if he produced social harm—does not deserve to be punished.

Julian Hermida, *Convergence of Civil Law and Common Law in the Criminal Theory Realm*, 13 U. MIAMI INT’L & COMP. L. REV. 163, 197–98 (2005) (footnotes omitted).

And regarding incapacitation and rehabilitation, Packer notes, “A man who is shown to have committed a homicide through an accident for which he was not at fault does not present a case for social protection through measures of incapacitation or reform.” PACKER, *supra*, at 64.

That the courts rely not only on a strict reading of the voluntary act requirement, but on notions of guilt is evident in the language employed in these cases. The cases that find no voluntary act focus on the defendant's lack of choice or autonomy. In *State v. Cole*, the New Mexico Court of Appeals stated that "a voluntary act requires something more than awareness. It requires an ability to choose which course to take-*i.e.*, an ability to choose whether to commit the act that gives rise to criminal liability."⁶⁴ And *Tippetts* emphasized that "the involuntary act must, at a minimum, be a reasonably foreseeable or likely consequence of the voluntary act on which the state seeks to base criminal liability."⁶⁵ These cases both involve conduct that "includes a voluntary act," but, because the courts were not convinced that the defendants' actions merited punishment, they used time-framing and disjoining to claim no voluntary act had been committed.

Those cases that do find a voluntary act also include language assessing whether the defendant's voluntary conduct can fairly support punishment. Many of these cases focus on the decision to retain the drugs once the arresting officer warned the defendant that possessing drugs at the county jail will constitute a felony. For instance, in *State v. Alvarado*, the court noted:

Finally, the circumstance here that both the arresting officer and the detention officer informed defendant of the consequences of bringing contraband into the jail and gave him an opportunity to surrender any contraband beforehand highlight that defendant was performing a bodily movement "consciously and as a result of effort and determination" when he carried the contraband into the jail.⁶⁶

And in *Herron v. Commonwealth*, the court noted:

Further, after appellant was arrested, Thomas asked appellant if he had any drugs on his person, to which appellant responded that he did not. Before entering the jail, Thomas again asked appellant if he had any drugs on his person and advised appellant that there were additional charges for bringing contraband into the jail. However, appellant chose to conceal drugs on his person and then failed to disclose the drugs after being advised of the consequences of bringing drugs into the jail. Under these circumstances, we hold appellant's act of taking drugs into the jail was voluntary.⁶⁷

The courts rely upon the officers' warnings because the warnings impart knowledge of the crime onto defendants; and this knowledge is a threshold

64. 164 P.3d 1024, 1027 (N.M. Ct. App. 2007) (quoting *State v. Tippetts*, 43 P.3d 455, 458 (Or. Ct. App. 2002)).

65. *Tippetts*, 43 P.3d at 459–60.

66. 200 P.3d 1037, 1042 (Ariz. Ct. App. 2008).

67. 688 S.E.2d 901, 906 (Va. Ct. App. 2010).

consideration of culpability, what some authors have called an “epistemic precondition” of blameworthiness.⁶⁸

Interestingly though, despite their bearing on culpability, the officers’ warnings have little to no effect on the completion of a voluntary act. By the rationale set out in *Winsor*, the only relevant inquiry is whether the defendant voluntarily possessed the marijuana at the time of the arrest. Remember there the court stated, “Appellant’s willful possession of a controlled substance itself constitutes the requisite voluntary act.”⁶⁹ Admittedly in *Winsor*, the court did refer to the officer’s warning in deciding that Winsor had voluntarily possessed the marijuana, but that was not a necessary route. The court could have determined that Winsor voluntarily possessed the marijuana “for a sufficient time to have enabled him . . . to dispose of it” because the car ride to the county jail was lengthy. Or, like it did in *Herron*, the court could find appellant had ample opportunity to dispose of the drugs because “[t]he evidence at trial showed that appellant was inside an apartment for ten to fifteen seconds before Officer Thomas entered.”⁷⁰ These alternative methods of proving voluntary possession highlight the possibility that a court could meet the single voluntary act requirement without reference to the officers’ warnings, even though it is precisely those warnings which ensure culpability.

Arguably, the officers’ warnings create a duty for the defendants to dispose of their drugs and the failure to do so becomes an omission, which satisfies liability to the same extent as a voluntary act.⁷¹ “An omission is either (a) a deliberate failure to perform a certain positive action or (b) a failure, whether deliberate or not, to fulfill a moral or legal duty or reasonable expectation.”⁷² Under this definition, retaining possession of a controlled substance after a

68. Scholar Ken Levy writes that there are four conditions for the blameworthiness of an action: 1) knowledge, or a threshold capacity to know, that the action is morally wrong; 2) threshold capacity to refrain from the action; 3) control over the action; and 4) an absence of circumstances that excuse this performance. Ken Levy, *Dangerous Psychopaths: Criminally Responsible but Not Morally Responsible, Subject to Criminal Punishment and to Preventive Detention*, 48 SAN DIEGO L. REV. 1299, 1328–29 (2011). Levy refers to the knowledge that an action is morally wrong as the “epistemic precondition,” borrowing the term from Carla L. Harenski, Robert D. Hare & Kent A. Kiehl, *Neuroimaging, Genetics, and Psychopathy: Implications for the Legal System*, in RESPONSIBILITY AND PSYCHOPATHY: INTERFACING LAW, PSYCHIATRY, AND PHILOSOPHY 125, 139–40 (Luca Malatesti & John McMillan eds., 2010).

69. *State v. Winsor*, 110 S.W.3d 882, 886 (Mo. Ct. App. 2003).

70. *Herron*, 688 S.E.2d at 906.

71. MODEL PENAL CODE § 2.01(1) (AM. LAW INST., 1962) (“A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the *omission* to perform an act of which he is physically capable.” (emphasis added)).

72. Ken Levy, *Killing, Letting Die, and the Case for Mildly Punishing Bad Samaritanism*, 44 GA. L. REV. 607, 632 (2010).

warning could conceivably fit under either category.⁷³ However, the law generally requires an omission be a failure to perform while under a *legal duty* not a *moral duty* or *reasonable expectation* and certainly not the mere failure to perform any positive action. For example:

[W]here a married man, during his wife's temporary absence from home, engaged in a drunken debauch with an adult woman of experience, he owed her no *legal duty* of care and protection which would render him legally responsible for her death from an overdose of morphine, taken with suicidal intent, though he neglected to obtain medical assistance for her. On the other hand, where the mother of a young child absented herself from the family home while the child was locked in a bedroom and the child was killed in a fire of undetermined origin, she was guilty of manslaughter because of her statutory duty not to permit the child to become neglected.⁷⁴

Here, the duty incumbent on the defendants after they have been warned is not a new *legal duty*. The legal duty to rid themselves of the controlled substance is no more real or pressing after the warning than it was before the warning; with or without the warning, the possessor of a controlled substance stands under duty of possession laws to rid him or herself of that substance. Therefore, because no further duty has been violated, it cannot fairly be claimed that the omission predicating simple possession, can serve equally well as a predicate for introducing prison contraband.

Yet, while there is no further *legal duty*, there certainly is an additional *moral duty* or *reasonable expectation* which accompanies these officers' warnings. Once an officer has warned a defendant that possessing drugs at the jail will be a felony, his omission to relinquish those drugs has a heightened intention. Importantly, intention does not have the same legal consequences as voluntariness. The law frequently punishes unintentional acts, i.e., negligent acts, as long as the conduct includes a voluntary act.⁷⁵ And the law does not

73. Levy defines a positive action as "any agent-caused event that does not essentially involve a failure or not-doing in its description. Running, walking, talking, and hitting are paradigmatic examples. They can all be described entirely in positive terms." *Id.* at 633. Here, the positive action would be discarding. The failure to discard contraband is a positive action under category (a) and, under (b), a failure to fulfill a legal duty (possession laws), moral duty (controlled substances have a stigma attached to possession), and a reasonable expectation.

74. 3A GLENN C. GILLESPIE, MICHIGAN CRIMINAL LAW AND PROCEDURE § 91:36 (2d ed. 1989) (first citing *People v. Beardsley*, 113 N.W. 1128 (Mich. 1907); then citing *Wayne Cty. Prosecutor v. Recorder's Court Judge*, 324 N.W.2d 43 (Mich. Ct. App. 1982); then citing *People v. Ogg*, 182 N.W.2d 570 (Mich. Ct. App. 1970)), Westlaw, Michigan Texts & Treatises (database updated April 2017).

75. A classic example is a car accident. Few people who get into car accidents intend them, and if they do they are likely to get charged with assault. Yet, we punish car accidents if there exists the requisite voluntary act. Some scholars, like Jerome Hall, have argued against criminalizing negligence because of a belief that culpability is necessarily tied to intention not voluntariness.

punish pure intention without an act.⁷⁶ But intention does have culpability consequences comparable to those of voluntariness. As one scholar puts it, “it is never less blameworthy to bring about an evil outcome when the agent has the intention of bringing it about than it is to bring it about when the agent does not have the intention of bringing it about.”⁷⁷ Therefore, while the officers’ warnings may not qualify the defendants’ retention of drugs as a *legal* omission satisfying the language of the voluntary act requirement, it does give an added level of moral reprehensibility in as much as it creates a heightened intention.

The officers’ warnings do not help the court answer the question “does the conduct include a voluntary act or omission?” Rather, the officers’ warnings help the court determine the guilt question: “Can that voluntary act fairly predicate the derivative punishment?” Therefore, whether the courts choose to focus on the defendants’ autonomy or the officers’ warnings, in either case the courts are relying on both the explicit rule language of its voluntary act statute (“includes a voluntary act”) and on notions of culpability. Once we admit that culpability is shaping the parameters for determining a voluntary act, we are faced with the new challenge of deciding what effect should culpability play in adjudicating introducing-prison-contraband cases.

IV. EFFECT ON INTRODUCING-PRISON-CONTRABAND CASES

I think the first and most obvious effect of admitting that we select our voluntary acts, in part, on notions of culpability is that introducing-prison-contraband cases will be decided on personal, or at best normative, grounds.⁷⁸ At first, this result might not seem too dire; all crimes are created by normative grounds in as much as our legislature reflects the people’s moral stance. As Henry Hart puts it, crime “is conduct which, if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community.”⁷⁹ At some level then, the ultimate culpability of one introducing prison contraband will always be tied to the community’s moral

Jerome Hall, *Negligent Behavior Should Be Excluded from Penal Liability*, 63 COLUM. L. REV. 632, 639 (1963).

76. MODEL PENAL CODE § 2.01 explanatory note on subsection (1) (“Under the Code, liability cannot be based upon mere thoughts . . .”).

77. L.A. Zaibert, *Intentionality, Voluntariness, and Culpability: A Historical-Philosophical Analysis*, 1 BUFF. CRIM. L. REV. 459, 493 (1998).

78. Robert Leikind, *Regulating the Criminal Conduct of Morally Innocent Persons: The Problem of the Indigenous Defendant*, 6 B.C. THIRD WORLD L.J. 161, 161–62 (1986) (“Moral culpability refers to a voluntary breach of known norms which guide the conduct of a community. All members of a community live with the expectation that they have knowledge of the community’s norms and standards. When members of a community breach established norms, their actions are perceived to involve some quantum of moral turpitude, precisely because they were expected to know their conduct was offensive.” (footnotes omitted)).

79. Henry M. Hart Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958).

stance. The issue only arises when the court's notion of culpability is opposed to that of the community.

Fortunately, the law does not have to conclusively answer the most difficult questions, like, what exactly comprises voluntariness and what is the best standard of culpability. The law need only meet these problems head-on with statutes effectuating if not the best, at least a consistent, level of culpability.

Unfortunately, it is difficult to draft accurate statutes for introducing-prison-contraband cases because the added moral reprehensibility which distinguishes simple drug possessors from drug smugglers lies primarily in their intention, and not their actions. Take for example two criminals: Criminal A possesses two grams of marijuana, which he hopes and intends to smuggle into a local correctional facility by getting arrested. Criminal B possesses two grams of marijuana and has no intention or hope of ever introducing it into a correctional facility. In fact, just the opposite, criminal B would prefer to not have the marijuana at a correctional facility, for fear of committing a more serious crime. One would hope that when criminal A is arrested and searched at the county jail, he is charged under the introducing-prison-contraband statute. However, when criminal B, who has committed identical acts to criminal A, is arrested and searched, one would hope that he receives a lighter sentence than criminal A.

How then are the statutes to distinguish the two criminals? Statutes can criminalize intention in the form of *mens rea* requirements, but not without creating significant evidentiary hurdles, as evidence of *mens rea* relies generally on circumstantial evidence.⁸⁰ Additionally, the *mens rea* of "knowingly" used in many introducing-prison-contraband cases is subsumed by the act of possession. Possession, as one scholar points out, is not really an act, but more of a status.⁸¹ The MPC defines possession as (1) having "knowingly procured or received the thing possessed" or (2) when one is "aware of his control thereof for a sufficient period to have been able to terminate his possession."⁸² And "[a]n act is 'voluntary' when the bodily movement is the product of conscious effort or determination."⁸³ Putting these two together, as Gideon Yaffe notes, (1) knowingly procuring an object is a conscious bodily movement, but (2) simply being aware of one's control is not.⁸⁴ Because possession is frequently number (2), and not an act, it is difficult to employ a *mens rea* requirement. Instead, what usually ends up happening is courts read an unwritten requirement of knowledge into the object of possession. That is, courts require that the defendant "know"

80. State v. Germain, 79 A.3d 1025, 1032 (N.H. 2013) ("We note that although most cases will include direct evidence as to at least one element, proof of *mens rea* will usually depend entirely upon circumstantial evidence.").

81. Gideon Yaffe, *In Defense of Criminal Possession*, 10 CRIM. L. & PHIL. 441, 442-43 (2016).

82. MODEL PENAL CODE § 2.01(4) (AM. LAW INST., 1962)

83. 1 Charles E. Torcia, WHARTON'S CRIMINAL LAW § 25 (14th ed. 1978).

84. Yaffe, *supra* note 81, at 443.

he or she currently possesses the object, not that he or she “knowingly” procured it.⁸⁵ When the standard is mere knowledge of an items’ presence, both criminal A and criminal B will always satisfy the *mens rea* requirement. The challenge then is to create statutes which ferret out an intent to violate the statute, without creating meaningless *mens rea* requirements.

I propose three changes that could be made to states’ introducing-prison-contraband statutes which would accurately satisfy the culpability concerns surrounding intent and a single voluntary act requirement, without the collateral effect of criminalizing those who are guilty of mere possession.

The first change is to include language which mandates a warning from the arresting officer before a defendant can be found guilty of introducing prison contraband. The language could look like this⁸⁶:

X. It shall be the duty of the police officer to inform any person arrested and taken to a correctional facility that:

(i) He or she will be searched upon admission to the correctional facility;

(ii) Knowingly delivering, attempting to deliver, having in his or her possession, depositing, or concealing in or about the premises of any county or private jail or other county correctional facility any item listed in subdivision (1)-(4) of subsection 1 may constitute a felony;

(iii) Announcing possession of any item listed in subdivision (1)-(4) of subsection 1 will not prevent further prosecution.

A mandatory warning helps separate criminal A from criminal B, not by requiring any further voluntary acts or imposing a new *mens rea*, but by revealing intention and therefore culpability. Both criminals, after the warning, have the choice between admission or retention of their drugs. Regardless of what the criminals choose or why, if either criminal is later found to have drugs at the facility, he or she cannot argue that the possession is unintentional because he or she knew the impending consequences.

In most instances the officer provides a warning of his or her own accord, despite there being no requirement.⁸⁷ But so long as the officer need not warn defendants of a potential introducing-prison-contraband charge, the door is open

85. See, e.g., *State v. Ndikum*, 815 N.W.2d 816, 817 (Minn. 2012) (holding that where the court was to assume an unwritten *mens rea* of “knowingly” in the context of possession of a gun in public, that *mens rea* required that defendant know a gun was present in his suitcase, not that he at some point knowingly procured or received the gun).

86. I modify the statutory language of Missouri Revised Statutes section 221.111 (2017) because that is the state in which I write. However, this language could be incorporated into any statutory scheme.

87. Of the thirteen cases cited *supra* notes 11 and 12, ten include a reference to an officer warning defendant that his or her possession of contraband at the county jail could constitute a felony. However, the prevalence of these warnings is attributable to good policing not to good policy. No state’s statute requires this warning.

for courts to satisfy only the letter of the voluntary act requirement, i.e., that it “includes a voluntary act,” and not its purpose of ensuring culpability.

The court does exactly this in *State v. Barnes*, when it held that “the voluntary act necessary for guilt of the offense made punishable by General Statutes of North Carolina section 90–95(e)(9) occurs when the defendant knowingly possesses a controlled substance,” regardless of whether the officer warned the defendant that his retention of contraband could constitute a further felony.⁸⁸ Because voluntary possession alone does not fairly predicate the increased punishment from mere possession (here, a class three misdemeanor) to introducing prison contraband (here, a class H felony), the culpability concerns of the voluntary act requirement are not satisfied.⁸⁹ But, as the court points out, the single voluntary act requirement certainly is satisfied.⁹⁰ In effect, by admitting only the possession was voluntary, North Carolina is imposing an increased punishment for the performance of an involuntary act. That is a problem. A statutory mandate fixes this problem by making the previously optional and arbitrary culpability determination both explicit and certain.

Moreover, a warning like this would not be unique to criminal codes. Most States require that an officer give fair warning to a motorist that refusal to submit to field or chemical sobriety tests may result in penalties.⁹¹ In Pennsylvania for instance, the statute states, in pertinent part:

- (2) It shall be the duty of the police officer to inform the person that:
 - (i) the person’s operating privilege will be suspended upon refusal to submit to chemical testing . . . ; and
 - (ii) if the person refuses to submit to chemical testing, upon conviction or plea for violating section 3802(a)(1), the person will be subject to the penalties provided in section 3804(c) (relating to penalties).⁹²

And, of course, *Miranda v. Arizona* requires that before questioning a defendant in custody, police officers must inform him (1) that he has the right to remain silent; (2) that his statements may be used against him at trial; (3) that he has the right to the presence of an attorney during questioning; and (4) that if he cannot afford an attorney, one will be appointed for him.⁹³

Warnings like those required by *Miranda* and States administering on-the-scene Blood Alcohol Tests exist to assure the courts that the subsequent action

88. 747 S.E.2d 912, 920 (N.C. Ct. App. 2013).

89. *Id.* at 924.

90. *Id.* at 920.

91. DONALD H. NICHOLS & FLEM K. WHITED III, 1 DRINKING/DRIVING LITIGATION: CRIMINAL AND CIVIL § 11:15 (2d ed. 2016).

92. 75 PA. CONS. STAT. ANN. § 1547 (2016).

93. 384 U.S. 436, 471, 473 (1966).

is voluntary.⁹⁴ Admittedly, when the Court in *Miranda* speaks of voluntariness it is not referring to the conscious bodily movements required by voluntary act statutes.⁹⁵ Nevertheless, the admissibility of a confession depends on its voluntariness because only voluntary confessions have the evidentiary power to ground punishment.⁹⁶ Therefore, although *Miranda*'s warnings, and those like it, do not ensure voluntary acts in the physical sense, they nonetheless ensure voluntary acts in a culpability sense, in as much as they ensure the punishment can be fairly administered.

Also, a mandatory warning for arrestees would not affect those already confined in correctional facilities. Another difficulty in drafting introducing-prison-contraband statutes is ensuring that those already within correctional facilities fall within the meaning of the statute, but not those who, although technically on the premises of a correctional facility, are not yet fully admitted. The proposed warning applies only to "any person arrested and taken to a correctional facility," not to any person on the premises of a correctional facility. Therefore, the protections afforded by the statutory warning are narrowly tailored to affect only arrestees being taken to facilities.

The second suggestion is to require the arrestee to sign a disclaimer upon entry of the county jail. This disclaimer would inform the arrestee that if he or she possesses any contraband he must declare so immediately or face potentially higher charges. The county jail in *State v. Cole*, implemented such a warning and its language in relevant part was as follows:

You've indicated that you have no weapons, drugs, [or] anything that will hurt me during this search, etc. [sic] on your person or in your possession (Other than what you've told me). If you tell me now about any such items, if illegal, you may be charged with their possession. If you do not tell me now and I find them

94. The dissent in *Miranda* refers to the mandatory warning as attempting to require "voluntariness with a vengeance." *Id.* at 505 (Harlan, J., dissenting). Congress later attempted to limit *Miranda*'s high burden for voluntariness. Pub. L. No. 90-351, 82 Stat. 210 (1968) (codified as amended at 18 U.S.C. § 3501 (2012)). The opening line of § 3501 reads "[i]n any criminal prosecution . . . a confession . . . shall be admissible in evidence if it is voluntarily given." But in *United States v. Dickerson*, the Supreme Court reaffirmed the need for *Miranda*'s warning to ensure that confessions are voluntary. 530 U.S. 428, 431-32 (2000).

95. In fact, the *Miranda* Court is referring to almost the opposite. It says, "Again we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented." 384 U.S. at 448. The Court wished to ensure that confessions are psychologically voluntary, not physically voluntary, which is the concern of voluntary act statutes.

96. *Brown v. Walker*, 161 U.S. 591, 596-97 (1896) ("While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions . . . made the system so odious as to give rise to a demand for its total abolition.").

during this search, you will not only be charged with their possession, but [you] will also be charged with Introducing Contraband into a Detention Facility[.]⁹⁷

Again, such a warning has no effect on whether the conduct includes a voluntary act. In fact, in *State v. Cole*, the defendant was *not* found to have voluntarily introduced prison contraband, despite signing such a disclaimer, because “the undisputed facts show[ed] that Defendant did not bring contraband into the [county jail]; law enforcement brought him and the contraband in his possession into the facility.”⁹⁸ But, even though the disclaimer does not affect the commission of a voluntary act, it does guarantee that the defendant is culpable, which is the underlying purpose of the voluntary act requirement, and the element most frequently lacking in these cases.

It must be noted that in order for disclaimers such as the one used in *Cole* to work, the case law must change. As it stands, a person is guilty of introducing prison contraband as soon as he or she steps foot in the door of the correctional facility, or possibly, as soon as he or she steps foot in the parking lot.⁹⁹ So, while the disclaimer promises the arrestee that declaring the contraband will insulate him or her from the heightened charge of introducing prison contraband, this is not entirely true. The defendant has already committed the crime of introducing prison contraband by being in the correctional facility. The disclaimer is only an agreement to not press the admittedly committed charge of introducing prison contraband.

Whether such disclaimers are binding on prosecutors is up for debate. The State’s Department of Corrections would write the disclaimer. And, police officers conducting the arrest and search would be issuing the promises within the disclaimer. Although some State and circuit courts are willing to offer relief for agreements made between government officials and arrestees on estoppel

97. 164 P.3d 1024, 1025 (N.M. Ct. App. 2007).

98. *Id.* at 1027.

99. There are no cases in which the defendant is charged with introducing prison contraband for his or her presence in the parking lot, but in such an instance the defendant would be just as guilty of being on the premises of a correctional facility as he or she would be inside. In most introducing-prison-contraband cases, the searches take place inside the facility but before the defendant is admitted to his or her cell. For instance, in *State v. Cargile*, the defendant was found to have marijuana in the cuff of his pants before he is placed in a holding cell. 916 N.E.2d 775, 776 (Ohio 2009). The court’s language in *State v. Eaton* is instructive: “As [the State] rightfully points out, he’s inside the jail. Whether he’s been admitted inside the jail or is walking through the jail, he’s inside the secure facility. He’s under arrest. And he has possession. And if you read the statute, it says, mere possession inside the facility gives rise to the enhancement.” 177 P.3d 157, 158–59 (Wash. Ct. App. 2008). Or for a comparable case outside the contraband context, see *United States v. Coleman*, where the defendant kicked an officer in the shin while being carried through a revolving door to a post office. 475 F. Supp. 422, 423 (E.D. Penn. 1972). Even though defendant was involuntarily carried from a public place into the threshold of a federal building (i.e., the post office) he was charged under 18 U.S.C. § 113(d) (2012), which prohibits “striking, beating, or wounding” another “within the . . . territorial jurisdiction of the United States.” *Id.* at 423.

grounds supported by the Fifth and Fourteenth Amendments,¹⁰⁰ the general rule is that only prosecutors may conduct binding plea agreements.¹⁰¹

A non-binding agreement to not prosecute a crime that has already been committed is not effective. To give the disclaimer any practical protection for an arrestee the case law would need to change to an understanding that the arrestee is not guilty of introducing prison contraband until after formal search and admittance. Only then would the statement of the disclaimer, “[i]f you do not tell me now and I find [contraband] during this search, you will not only be charged with their possession, but [you] will also be charged with Introducing Contraband into a Detention Facility” be true. As it currently stands, regardless of whether the arrestee admits possession of contraband, he or she can be charged with introducing prison contraband.

The third and final suggestion is to statutorily distinguish between introducing prison contraband and possessing prison contraband. Missouri, Kentucky, and Arizona, among other states, currently contain a single introducing-prison-contraband statute which punishes both introducing prison contraband and possessing prison contraband.¹⁰² If these States were to separate introducing contraband from possessing contraband, they could apply useful distinctions in *mens rea* and location to target specific types of offenders. Missouri’s introducing-prison-contraband statute, section 221.111, states:

1. A person commits the offense of possession of unlawful items in a prison or jail if such person knowingly delivers, attempts to deliver, possesses, deposits, or conceals in or about the premises of any correctional center as the term “correctional center” is defined under section 217.010, or any city, county, or private jail.

Consider the following modification to the statute:

X. A person commits the offense of *introducing* unlawful items into a prison or jail if such person knowingly *delivers or attempts to deliver* into the premises of any correctional center as the term “correctional center” is defined under section 217.010, or any city, county, or private jail.

Y. A person commits the offense of *possession* of unlawful items in a prison or jail if such person knowingly *possesses or conceals within* the premises of any correctional center as the term “correctional center” is defined under section 217.010, or any city, county, or private jail.

100. *United States v. Carrillo*, 709 F.2d 35, 37 (9th Cir. 1983); *United States v. Rodman*, 519 F.2d 1058, 1059–60 (1st Cir. 1975); *United States v. Carter*, 454 F.2d 426, 427–28 (4th Cir. 1972); *People v. Fisher*, 657 P.2d 922, 931 (Colo. 1983).

101. *Commonwealth v. Stipetich*, 652 A.2d 1294, 1295 (Pa. 1995) (“Affording police officers authority to enter agreements that [bind the State] . . . would create havoc in the administration of justice . . .”).

102. ARIZ. REV. STAT. ANN. § 13-2505 (2016); KY. REV. STAT. ANN. § 520.050 (2017); MO. REV. STAT. § 221.111 (2017).

Z. For the purposes of subsection Y, no person being searched as part of an initial admittance process shall be found to be within the premises of any correctional center as the term “correctional center” is defined under section 217.010, or any city, county, or private jail.

Under this proposed statute, criminals like A and B could be separated on purely statutory grounds. For instance, if a person is arrested and taken to the county jail, due to subsection Z, he or she is no longer automatically in violation of section 221.111, by reason of his or her mere possession. However, the person could still be in violation of subsection X. Importantly, though, violation of subsection X requires a showing that he or she knowingly delivered or attempted to deliver the contraband into the premises. The added requirement of proving delivery or attempted delivery effectively safeguards those like criminal B, who involuntarily brought contraband to the correctional facility, because mere possession of contraband at the initial search stage will not be sufficient evidence of delivery. Yet, because delivery is still punished, those like criminal A, who voluntarily brought contraband with the intention to smuggle the items inside can still be found guilty. Admittedly, there are new evidentiary hurdles posed by requiring a showing of delivery, but these hurdles are small and surmountable if the arrestee is truly guilty. Evidence of delivery could include an intended or probable recipient, a suspicious quantity of contraband, or a contraband item uniquely useful to the prison context.¹⁰³ These evidentiary hurdles will undoubtedly create some instances where the guilty criminal walks free, but they will also ensure freedom for many more innocent arrestees.

Additionally, separating the acts of delivery and possession by statute helps prevent courts from using disjoining/unifying behavior to selectively find voluntary acts. A court will no longer be able to claim possession at a correctional facility is a contributing action of delivery into a correctional facility when the possession is itself a punishable action.

As a passing note, there is one more significant reason to rework our introducing-prison-contraband statutes: cellphones. The use of cellphones in prisons has become widespread and dangerous enough to warrant federal attention.¹⁰⁴ In response, many States have begun addressing cellphone use in

103. Take for example the case of *State v. Boykins*, where the defendant tried to ship thirty cellphones, tobacco, and codeine to his brother. There, the recipient (the brother), the quantity of one of the items (fifty cellphones), and the quality of the items (three items forbidden in prison) all point toward intent to deliver and not personal use accidentally present at a correctional facility. No. W2012-01012-CCA-R3-CD, 2013 WL 1229393, at *1 (Tenn. Crim. App. Mar. 27, 2013).

104. *Contraband Cell Phones in Correctional Facilities: Public Safety Impact and the Potential Implications of Jamming Technologies: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 111th Cong., 1st Sess. (2009), <https://www.gpo.gov/fdsys/pkg/CHRG-111shrg56406/html/CHRG-111shrg56406.htm> [<https://perma.cc/Y3W7-VDCM>]; Erin Fitzgerald, Comment, “Cell Block” Silence: Why Contraband Cellular Telephone Use in Prisons Warrants Federal Legislation to Allow Jamming Technology, 2010 WIS. L. REV. 1269, 1269 (2010).

prisons by adding cellphones to their lists of contraband.¹⁰⁵ The addition of cellphones to contraband lists poses a major problem considering so many State courts' interpretation of their introducing-prison-contraband statutes. While perhaps few arrestees possess marijuana or a weapon at the time of their arrest, nearly everyone will possess a cellphone.¹⁰⁶ Under the interpretation espoused in cases like *Winsor* and *Barnes*, any person present on or about the premises of a correctional facility, who voluntarily possesses his or her cellphone, will be in violation of an introducing-prison-contraband statute. Arizona has already charged someone in such a circumstance under its introducing-prison-contraband statute.¹⁰⁷ In *State v. Francis*, an arrestee used his cellphone to call his attorney. The defendant remained in possession of his cellphone when law enforcement transported him to jail.¹⁰⁸ The defendant was acquitted on the grounds that he was not aware his cellphone was contraband,¹⁰⁹ but States lacking statutes with similar knowledge requirements will have to confront the problems posed in the *Francis* situation.¹¹⁰

These three proposed changes, (1) mandatory officer warnings, (2) mandatory written disclaimers, and (3) a reworking of our introducing-prison-contraband statutes, each ensure an objective level of culpability where the single voluntary act requirement does not. By employing one of these three methods, a State's legislature can make certain that any person arrested and taken to jail with contraband will only be held liable if he or she meets an explicit

105. For legislative responses see, for example, N.M. STAT. ANN. § 30-22-14 (2013) ("C. As used in this section, 'contraband' means: . . . (5) an electronic communication or recording device brought onto the grounds of the institution for the purpose of transfer to or use by a prisoner."); OKLA. STAT. ANN. tit. 57, § 21 (2015) ("E. Any person who knowingly, willfully and without authority brings into or has in his or her possession in any secure area of a jail or state penal institution or other secure place where prisoners are located any cellular phone or electronic device capable of sending or receiving any electronic communication shall, upon conviction, be guilty of a felony . . ."). For judicial responses see, for example, *People v. Green*, 927 N.Y. S.2d 296 (Sup. Ct. 2011) (holding that cell phones are dangerous contraband within the meaning of the prison contraband statute, N.Y. PENAL LAW § 205.00(4)); *Mays v. State*, 76 A.3d 778 (Del. 2013) (noting a cellphone was within prison contraband statute, DEL. CODE. ANN. tit. 11, § 1256 (2008)).

106. Pew studies showed that roughly ninety-two percent of Americans use a cellphone. Monica Anderson, *Technology Device Ownership: 2015*, PEW RES. CTR. (Oct. 29, 2015), <http://www.pewinternet.org/2015/10/29/technology-device-ownership-2015/> [https://perma.cc/2EJ5-S6RU].

107. *State v. Francis*, 388 P.3d 843, 844 (Ariz. Ct. App. 2017).

108. *Id.*

109. *Id.* at 848.

110. Missouri may soon become such a state. Missouri's House of Representatives member Paul Fitzwater has proposed HB 207 which adds cellphones to Missouri's list of contraband. However, because Missouri's statutes are written such that the defendant need only knowingly possess the cellphone and not additionally know the cellphone is contraband, any person who finds him or herself in Francis's situation will be in violation of Missouri Revised Statutes section 221.111 (2017).

level of culpability. Otherwise, judges will continue to employ the arbitrary selection of voluntary acts with the help of time-framing and disjoining/unifying acts in order to reach results they find satisfy personal notions of guilt.

CONCLUSION

The voluntary act requirement should do what it was meant to do: ensure culpability. Under a single voluntary act view it does not. Nowhere is this more evident than in our introducing-prison-contraband cases. Right now, the majority of States find a woman, arrested, placed in the back of a police car, and driven to a correctional facility with drugs in her pocket, to be guilty of introducing prison contraband. This woman could have no desire to commit the crime, or, if the drugs were a cell phone, she might not even know the crime was being committed. Nevertheless, courts have time and again found these defendants liable.

In response to the seemingly limitless boundary of the single voluntary act requirement, I propose the explicit addition of culpability. And in response to the hopelessly subjective nature of culpability I propose three statutory solutions which will assure culpability where the voluntary act requirement does not. These three solutions, a statutory warning, a signed disclaimer, and a clarifying of the statute, ensure that the introducing-prison-contraband statutes punish only those who either intend to bring contraband into a correctional facility or at least were well aware that retaining the contraband would incur higher charges.

To end, I return to the question that opened this Paper: When has one committed the crime of introducing prison contraband? In a certain sense, the answer is as soon as one possesses contraband. For it is that action, possession, on which the court bases liability. This paper has argued that answer is unjust: unjust because possession does not foreseeably result in introducing prison contraband; unjust because the crime was not intentional; and unjust because, despite passing the letter of our voluntary act statutes, the act does not reflect culpability.

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