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Central Issues in Automatism

by

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ABSTRACT

This thesis examines the issue of automatism as it appears in criminal law, and in various legal and theoretical texts. Automatism, as a criminal defence, and as a theoretical concept, is met with a considerable amount of debate, and its application in law reveals a number of areas of inconsistency and complexity. This thesis focuses on three main areas within the automatism debate: the role of automatism as it applies to the burden of proof in criminal law; the subset of automatism known as psychological blow automatism; and various attempts to provide a theoretical underpinning for automatism. The purpose here is to give a detailed and coherent analysis of these issues, conduct an assessment of various proposals for resolving certain inconsistencies and areas of contention in automatism, and contribute some original proposals regarding current and future thinking about automatism.

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Dedicated to my parents…all three of them.

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Chapter 1 – Introduction

The automatism defence, and the condition to which it refers, are interesting and important areas of discussion and debate. There is a considerable amount of vagueness, and even inconsistency, with respect to the defence in various systems of criminal law. And the *condition* of automatism has no clear or consistent delineation either in medicine or in law. This is not necessarily born of indolence or carelessness on the part of the medical or legal community; more often it echoes the effort to characterize or circumscribe a nearly impalpable phenomenon, but one which quite clearly motivates scrutiny and, to a degree, scepticism.

In a very general sense, automatism involves some sort of change in consciousness – some say *loss* of consciousness – such that an individual is not, or is at least only partially, in control of his actions, and not aware or only partially aware of those actions. Individuals who *enter into* a state of automatism have been known to converse with others, operate machinery, and perform complex tasks, among other things. And they often have little or no recollection of the actions they performed while in the *automatic* state. Sometimes, an individual in a state of automatism will commit a criminal act.

For example, in the case of *R. v. Parks*[1], evidence was given that the accused, Kenneth James Parks, fell asleep in his living room one night, later got up, put on his jacket and shoes, and drove 23 kilometres – most of which covers a busy Toronto freeway – to his in-laws' house. When he arrived, he retrieved a knife from the kitchen, made his way to his in-laws' bedroom, and proceeded to strangle his father-in-law until

[1] [1992] 2 S.C.R. 871.

he was unconscious, and then repeatedly stab his mother-in-law. Parks then drove to a police station where he turned himself in. The accused was under a great deal of stress at the time of the act, but was also on good terms with both of his in-laws. Psychiatric evidence suggested that Parks was sleepwalking throughout the sequence of events, and a judge and jury acquitted.[2] Both the Court of Appeal of Ontario[3] and the Supreme Court of Canada[4] upheld the decision.

Consider the circumstances in *R. v. Rabey*[5]: The accused, Wayne Kenneth Rabey, was a geology student at the University of Toronto. He became emotionally attached to a female student and friend, but this affection was not reciprocated. One day while they were walking alone, Rabey asked her what she thought of him. She responded that he was a "friend". Shortly after, Rabey struck her twice on the head with a rock, and then proceeded to choke her. When a witness came across the scene, Rabey tried to attack him as well, but the witness freed himself and went for help. A few moments later, Rabey appeared at the college health centre, and told a nurse that he thought he had killed someone. Rabey's testimony suggested that his recollection of the events of that day was fragmented. A psychiatrist who examined Rabey testified that, in his opinion, Rabey entered a dissociative state[6] just before he struck Miss X.[7] This state was caused from the emotional shock that Rabey received upon hearing what Miss X's opinion was of him.

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[2] The jury acquitted on counts of murder, and the trial judge acquitted on a charge of attempted murder.
[3] (1990), 56 C.C.C. (3d) 449.
[4] *Supra* note 1.
[5] (1977), 37 C.C.C. (2d) 461.
[6] "Dissociation" is sometimes used interchangeably with "automatism" in legal circles, though it appears more often in medical literature. It is usually characterized with references to a change or disruption in consciousness.
[7] "Miss X" is the Court's terminology.

The trial judge acquitted, though the Ontario Court of Appeal ordered a new trial. The Supreme Court of Canada upheld the ruling of the Court of Appeal.

In the Australian case of *Falconer*[8], the accused, Mary Falconer, shot her estranged husband, Gordon, after a history of physical, sexual, and emotional abuse by him. On the day of the shooting, Mr. Falconer showed up at his wife's house unexpectedly. Mary Falconer testified that he sexually assaulted her and then physically abused her. This, in addition to the fact that Mr. Falconer had sexually abused two of their daughters, caused Mrs. Falconer considerable stress. Further, on the day of the shooting, Mr. Falconer made taunting statements to Mrs. Falconer that gave rise to her belief that he in fact also abused a 7 year old foster child in their care. At this point, Mary Falconer tried to walk away from her husband, but he followed her and continued to taunt her. Mrs. Falconer testified that at this point her recollection of the events trails off, and picks up after she finds herself on the floor with her shotgun beside her and her dead husband nearby.[9] At trial, Mrs. Falconer's counsel attempted to raise the issue of non-insane automatism, which can potentially result in an outright acquittal. Two psychiatrists testified that Mrs. Falconer was sane at the time of the shooting, but the psychological shock precipitated by the history of abuse, and the events of that day, caused her to dissociate. The trial judge ruled that the psychiatric evidence was not admissible. This decision was overturned by the Court of Criminal Appeal of Western Australia, and upheld by the High Court of Australia, and a new trial was ordered.

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[8] (1990), 171 C.L.R. 30.

[9] Febbo, S., F. Hardy, and R. Finlay-Jones. *Dissociation and Psychological Blow Automatism in Australia,* at 46. International Journal of Mental Health, 22, 4, 39 (1993-1994).

The preceding cases give a brief and general overview of what characterizes automatism, and how it makes its way into the courts. These cases and others will be examined in more detail in subsequent chapters.

Now, because individuals such as the above have diminished or total loss of awareness of, and control over, their actions, the task of handling these individuals in the judicial system often involves negotiating murky legal territory. For instance, a survey over various cases where automatism has been advanced in some capacity, and a look through a number of medical and psychiatric texts, confirms the lack of, and the struggle to achieve, a degree of satisfactory coherence, structure, and predictability. Automatism does not lend itself well to either end of the medico-legal spectrum. Legally, the characterization of automatism varies between judges *and* jurisdictions. In *R. v. K.*[10], for instance, Lacourcière J.A. describes the term "automatism" as meaning "unconscious, involuntary behaviour, the state of a person who, though capable of action, is not conscious of what he is doing. It means an unconscious, involuntary act, where the mind does not go with what is being done." But, as Edwin Tollefson and Bernard Starkman point out[11], "[i]t does not appear that total unconsciousness is necessary in order for the defense of automatism to operate. Glanville Williams[12] suggests that perhaps the term 'impaired consciousness' is more appropriate." And note Dickson J.'s dissenting judgement in *Rabey v. R.*:

> At common law a person who engaged in what would otherwise have been criminal conduct was not guilty of a crime if he did so in a state of unconsciousness or semi-consciousness...The fundamental precept of our

[10] (1970), 3 C.C.C. (2d) 84 at 84.
[11] Tollefson, E.A., and B. Starkman. *Mental Disorder in Criminal Proceedings,* at 50. (Canada: Thomson Professional Publishing, 1993).
[12] Williams, G. *Textbook of Criminal Law, 2nd ed.,* at 662-663. (Stevens, 1983).

> criminal law is that a man is responsible only for his conscious, intentional acts.[13]

The lack of consensus speaks for itself.

The medical characterization of automatism is equally confusing. The most obvious reason is that automatism *per se* is a legal term. One will not find the condition named in clinical manuals such as the *DSM-IV*[14] or the *ICD-10*[15]. These manuals, rather, speak in terms of dissociative states, and describe certain symptoms such as amnesia, change of consciousness, identity, and perception, that appear in various conditions. But these symptoms are not to be found in all cases of automatism. Sometimes automatism appears to accompany a medical condition such as diabetes or epilepsy, and in other cases it accompanies a psychiatric condition such as depression or post-traumatic stress disorder. Further still, automatism has been seen in hitherto *normal* individuals with no history of medical or psychiatric disorder. This, with the fact that it manifests itself in various ways – for example, full or partial loss of consciousness, ability or inability to recall specific events – makes characterization and classification of automatism exceedingly difficult, hence the various legal interpretations seen above.

Matters become more complicated when one attempts to understand and negotiate these vagaries in a practical legal setting. It's perhaps a truism to say a lot is at stake for both sides in a criminal case, but this fact is underscored in automatism cases because often the results do not accord with popular normative notions of justice and morality.

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[13] [1980] 2 S.C.R. 513. See also Stuart, D., and R.J. Delisle. *Learning Canadian Criminal Law*, at 674. (Canada: Thomson Professional Publishing, 1995).

[14] *Diagnostic and Statistical Manual of Mental Disorders, 4th ed.* (Washington: American Psychiatric Association, 1994).

[15] *The International Statistical Classification of Diseases and Related Health Problems: 10th Revision.* (World Health Organization, 1992).

Individuals have committed extremely violent acts, argued that they were in a state of automatism at the time, and been acquitted. Others have been unsuccessful at arguing automatism, and been sent to psychiatric institutions. Arguing whether someone committed a crime is quite different from *acknowledging* that someone committed a crime (or at least performed the actions that constitute the proscribed elements of an offence), and arguing that he or she should be acquitted. So, it is a natural response to want to, quite simply, *get it right*, but because of the very nature of the condition and the defence, descrying, navigating, and charting the legal terrain presents a substantial challenge.

For instance, one potentially troublesome area with respect to automatism involves what is known as the onus or burden of proof. Aside from there being different burdens of proof, there are a number of different ways in which each burden can be interpreted. The *legal* or *persuasive* burden of proof, for example, usually falls on the prosecution in a case. What this amounts to is the requirement that the prosecution prove what is known as the *actus reus* (or voluntary act), as well as the *mens rea* (or culpability element) of an offence, beyond a reasonable doubt. This obligation on the prosecution serves in part to uphold an important moral and legal principle that a person is innocent until *proven* guilty. There are instances in automatism, however, where this fundamental principle seems to be overridden by other considerations. The individual, in essence, has to do the proving, and if she fails, she may very well be convicted. This constitutes a unique inconsistency in criminal law and, as such, has created substantial debate.

Another area of contention in the law concerns a sub-condition known as *psychological blow automatism,* which characterizes an individual who enters into a state

of automatism after incurring some sort of psychological trauma. It is held that, in some instances, this trauma will take place because of some pre-existing psychological condition; in others, the trauma will be held to have affected a *healthy* or *sane* mind, and in these instances the individual may receive an acquittal. The Canadian and Australian courts have attempted to construct procedures for determining whether an individual should be classified under the disease of mind distinction, which entails significantly different adjudication procedures than if the individual were classified as not having a disease of mind. And in some instances, the linchpin upon which defendants are channelled into either classification of psychological blow automatism is very subtle, and this has created considerable debate over whether these procedures are fair, practical, sensible, and the like.

There is also significant effort on the part of theorists to come up with a plausible theoretical model for automatism that essentially describes how the condition operates, and how it should best be interpreted and/or justified under the law. These models incorporate various theories of action and behaviour in an attempt to present a plausible, consistent, and morally defensible framework for understanding automatism and the defence of automatism. Naturally, a reasonable theory underlying the defence and the condition is a desirable, and some would argue, necessary component under a legal system that strives for justice and consistency.

In this thesis I take up these and other areas in the automatism debate. It is my intention to examine the areas in significant detail, through which I intend to accomplish the following: give a well-detailed, yet understandable, analysis of some of the contentious territory in automatism; isolate important points and crucial issues; define

and assess alternative proposals and solutions to some of the problem areas; develop and present my own proposals for some of these areas; and make suggestions in terms of areas that may benefit from further discussion. Now, it should be noted that automatism figures differently under different systems of law. And although I canvass various approaches under these systems, my main focus will be on automatism as it appears under the Canadian criminal law system[16], and to a lesser extent, the Australian criminal law system.

Automatism is a complex and interesting issue, fraught with myriad perplexities. The need for a settled approach to dealing with automatism is morally and legally desirable, if not *vital* in the interests of justice, but that approach, whatever it may be, seems distant at this point, and our progress is glacial. What is important now is to understand the nature of a condition that defies precise definition. Much of the literature on this subject, however, tends to focus on one issue, one problem. My task here is to present a relatively comprehensive discussion on the legal issue of automatism. We need to get a general sense of what is entailed when we raise the issue of automatism, for in broadening our understanding we will be making progress toward delimiting the boundaries of the condition, and we will be better able to understand how the intricacies in one area connect with, confirm, or deny those in another. I hope that readers will find this discussion interesting, and come away from it with a general understanding of how automatism functions in the courts, and what questions need to be addressed in order for there to be progress in this field of research.

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[16] The analysis of the Canadian system in this thesis applies to automatism *mainly* as it proceeds through *Rabey* (*supra* note 5), up to *Parks* (*supra* note 1). Current developments in the Canadian system are found in *R. v. Stone* [1999] 2 S.C.R. 871. See note 44.

Chapter 2 – The Legal Territory, Burdens of Proof, Sane and Insane Automatism

This discussion begins by outlining some basic legal facts and principles as they relate to automatism in the criminal law system, and more specifically, the Canadian system up to *Parks*[17] (note that much of this preliminary information will facilitate the discussion in this chapter and subsequent chapters). After this, we turn to some of the practical and theoretical difficulties with respect to automatism and its legal treatment in the courts. In short, many of these difficulties arise from the (at least) *prima facie* inconsistent application of the law regarding the burden or onus of proof. Now, because automatism shares an uneasy association with the insanity defence, much of the discussion will focus on the latter as well. In talking about the insanity defence, I am indirectly characterizing the automatism defence as well – the classification of *insane automatism*, under the law, shares many analogous features with the insanity defence.

Concepts and Processes

In the common law, in order for a criminal offence to have (by definition) occurred, two elements must be present: *actus reus*, or what is generally considered the actual "act" of the offence; and *mens rea*, or the requisite state of mind. Now, two points need to be mentioned. First, as the previous definitions suggest, these terms paint very broad strokes at best. And one can see that much of the intricacies of the automatism defence stem directly from different (sometimes *subtly* different) interpretations of these requirements. Secondly, not all theorists subscribe exclusively to this terminology. Robert Schopp, for instance, prefers to use the nomenclature of the American Law Institute's *Model Penal Code* (covered below), which uses the terms *voluntary act* and *culpability* requirements

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[17] *Supra* notes 1, 16.

respectively. In answer to both points: it is probably desirable to speak in general terms *unless more specific description is required.* As well, I think it preferable to use such terms as *actus reus* and *voluntary act* (requirement) somewhat interchangeably, if it benefits or does not hinder the discussion.

To repeat, in the various Anglo-American systems of law (e.g., the Canadian), for the prosecution to get a conviction for an offence, it must satisfy both the *actus reus* and the *mens rea* requirements of that offence.[18] The prosecution (or state, Crown, etc.) carries the burden of proof, the burden of satisfying the two requirements. Note that I am here talking about what is called a *persuasive* burden – there are different types of burdens, which I will address shortly. And a conviction entails fulfillment of the *actus reus* and *mens rea* requirements for an offence .[19] Very simply, if agent A is charged with an offence, A will only be convicted (hypothetically, and absent strict liability, which is covered below) if the state shows that A performed the prohibited act in question, *and* A performed that act with some sort of intention, knowledge, or awareness that he was actually performing that act. These latter requirements are by no means concrete. *Mens rea* is and has been subject to much discussion and interpretation. Variously described as "culpability", "blameworthy state of mind", and "fault"[20], among others, fulfillment of *mens rea* entails, very generally, that the subject knew what he was doing. The American Law Institute, alternatively, prefers to drop the traditional notion of *mens rea*, and instead

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[18] Schopp, R. *Automatism, Insanity, and the Psychology of Criminal Responsibility,* at 1. (Cambridge: Cambridge University Press, 1991).

[19] Note, however, that a conviction is a necessary, but not always sufficient, condition for establishing liability. There are cases where both the *actus reus* and *mens rea* are satisfied, but the defendant escapes liability by virtue of a general defence or excusing condition.

[20] Stuart, D. *Canadian Criminal Law, 2nd ed.*, at 117. (Canada: The Carswell Company Limited, 1987).

uses a *culpability requirement* in its *Model Penal Code*[21], whereby an individual is culpable if she acted *purposely, knowingly, recklessly,* or *negligently.*[22] These nuances of responsibility appear in virtually all systems of common law. It should be noted, however, that *mens rea* is not a requirement of all offences in the criminal law. Some offences are offences of *absolute* or *strict* liability, and do not require *mens rea*. Running a stop sign, for example, is a case of strict liability – generally, the state does not have to show that the driver ran it intentionally. And also note that some systems partition *negligence* into a special category (as it indicates an absence of guilty mind; that is, an absence of awareness of one or more prohibited elements of an offence).

Now, there are a number of ways in which a defendant can avoid liability. One method is for the defendant to advance a *failure of proof* defence, and argue that the state has not discharged its burden of proving all offence elements.[23] Alternatively, even if the state accomplishes its task of proving *actus reus* and *mens rea* – that is, if it discharges its burden of proof – the defendant may yet avoid being held liable if he can establish a general defence.[24] General defences, such as *justification* or *excuse*, exculpate the defendant even though he may have fulfilled all the material elements of the offence.[25] An individual who acts in self-defence, for instance, can be excused from liability, despite the state having discharged its burden of proof.

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[21] This code, recommended in 1962, has been adopted by many U.S. states in their criminal codes, and is generally considered the dominant trend in contemporary American law. See Schopp, *supra* note 18, at 2.
[22] Stuart, *supra* note 20, at 118. Note that these formulations cover more categories of offence conditions than the *mens rea* requirement described by Stuart.
[23] Schopp, *supra* note 18, at 14. (citing Robinson, P.H. *Criminal Law Defenses.* St. Paul, MN: West Publishing Company, 1984).
[24] *Ibid,* at 2.
[25] *Ibid,* at 16 (citing Robinson, *supra* note 23). There is considerable debate over whether a sustainable distinction can be made between justifications and excuses (see Stuart, *supra* note 20, at 388). It is not necessary to explore these arguments here.

Unfortunately, automatism and insanity share virtually no coherent or consistent relationship with each other *or* with the wider system of defences. Automatism is left stranded amidst both practical and theoretical uncertainties. And insanity, though recognized in the courts more consistently, does not escape theoretical confusion. According to Schopp, "automatism has been accepted as a defence in the United States and Britain, but it has been interpreted in various cases as relevant to the voluntary act provision, the culpability requirement, or the insanity defence."[26] And he adds:

> The history of the insanity defense reveals a similar picture of theoretical uncertainty. Although the defense is long established, the courts and legislatures continue the search for a satisfactory standard of exculpation. [And] Theorists also continue to debate the status of the insanity defense in the broader system of criminal liability. Some interpret it as a special defense, based on considerations uniquely appropriate to the mentally ill, whereas others argue that it is merely a special application of the common excusing conditions of ignorance or coercion.[27]

A number of these practical and theoretical uncertainties are to be found among the different burdens of proof.

There are two kinds of burdens: *persuasive* and *evidential*. Now, if there were two distinct definitions, the following discussion would proceed rather easily; however, I agree with Stuart[28] when he notes that "[t]erminological confusion abounds." To Stuart, I would also add that *theoretical* confusion abounds. "The distinction," he says, "between a persuasive and evidential onus may be crucial."[29] Thus, I will try to draw a fine line between clarity and description, and focus only on what is certain and/or generally recognized as so.

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[26] *Ibid,* at 3 (citing LaFave, W. and A.W. Scott Jr. *Substantive Criminal Law.* St. Paul, MN: West Publishing Company, 1986).
[27] *Ibid.*
[28] Stuart, *supra* note 20, at 39.
[29] *Ibid.*

It was earlier mentioned that the state, in order to get a conviction, must prove all the offence elements in a case beyond a reasonable doubt. A conviction will only occur (following discussion notwithstanding) if this happens. Again, this requirement, in part, instantiates an important moral and legal principle that *a person is presumed innocent until proven guilty*. This dates back to the English case of *Woolmington*[30], where it was affirmed that "[n]o matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."[31] So, this necessity of proving both *actus reus* and *mens rea* – this particular burden of proof – belongs to the prosecution. It amounts to the obligation to establish the *actus reus* and *mens rea* of an offence, and to do so beyond a reasonable doubt. This obligation captures, in legal procedures, the presumption of innocence.

Now, there are different standards of obligation, to which are attached different burdens. The one just mentioned is known as the *legal* and/or *persuasive* burden – what is generally called a *burden of proof*. There are certain important characteristics about this burden[32]. Firstly, a persuasive burden always remains on one party to the proceedings, usually the prosecution. For instance, the legal burden on the prosecution of *proving guilt,* which comes from the presumption of innocence of the defendant, always stays with the prosecution. As well, the legal burden is always evaluated at the end of a case; that is, the question of whether it has been satisfied is resolved at the end of trial. For example, a jury will decide at the end of a case whether the state has proven the

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[30] *Woolmington v. D.P.P.* (1935) A.C. 462.
[31] *Ibid*, at 481.
[32] Stuart, *supra* note 20, at 39.

offence elements. It never (in theory) shifts to the defendant, such that he has to *prove* his innocence. Finally, a persuasive or legal burden requires, in criminal cases, proof beyond a reasonable doubt. It is not overcome in borderline cases. In other words, if the scales are balanced with respect to a particular legal burden, the trier of fact must decide *against* the burden-holder. So, if a jury has found equally convincing reasons *for and against* whether the prosecution has satisfactorily overcome (or discharged) its burden, then the jury must find against the prosecution.

There is one other relevant distinction to be made regarding the persuasive burden: It was mentioned above that a persuasive burden requires proof beyond a reasonable doubt. This is the standard in criminal cases. In civil proceedings, however, the persuasive burden requires proof *on the balance of probabilities.* This burden is not as demanding as the former. The reason it is important to mention here is that, though this is generally the civil standard, it does come into play in criminal cases involving the issue of insanity. This is discussed in the next section.

Now, an *evidential* burden is different from a *persuasive* burden in a number of respects.[33] In fact, these differences are sometimes said to describe different *kinds* of evidential burdens. One way of describing the difference is that one sets a more demanding *standard*; that is, the persuasive burden is more rigorous in terms of what is needed in order to satisfy it. The evidential burden, according to Jones, refers

> ...to the responsibility of a party to show that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue (e.g., whether the accused committed the offence involuntarily and in a state of sane automatism). If there is insufficient evidence to make the issue a live one, there will be a ruling by the trial judge that

[33] *Ibid.*

> the existence or non-existence of the fact cannot be considered by the jury.[34]

So, rather than having to persuade the jury beyond a reasonable doubt, as is the case in a persuasive burden, a defendant need only adduce enough evidence to convince the judge that the issue merits consideration. Thus, if an agent A wants to argue that ϕ (e.g., she was acting in self-defence), then the agent must adduce enough evidence for ϕ (e.g., she must introduce evidence that suggests she was acting in self-defence); that is, A bears the evidential burden of adducing evidence to suggest ϕ, but she does not, necessarily, have to prove ϕ. Now, it is important to note that though an evidential burden is sometimes referred to as a *burden of proof*[35] (though different in kind from a persuasive burden), the designation may be somewhat misleading.[36] Again, this is partly because evidential burdens do not necessarily require any sort of proving; the evidential burden merely requires that the accused put forth enough evidence to make the issue real, plausible, and so forth.

A second way of thinking about the evidential burden is that, in a criminal case, it usually rests on the defence, while the persuasive burden rests on the prosecution. Thus, the prosecution is held to a higher standard of proof (i.e., beyond a reasonable doubt) than is the defence, who only has to adduce enough evidence to call into question whether the prosecution has made out their case beyond a reasonable doubt.

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[34] Jones, T. *Insanity, Automatism, and the Burden of Proof on the Accused,* at 475, note 2. The Law Quarterly Review, 111, 475 (1995).
[35] *Ibid.*
[36] See Stuart, *supra* note 20, at 39-40 incl. notes 249, 251. (E.g., "[a]n evidential burden is not a burden of proof in any sense").

Thirdly, unlike a persuasive burden, "[e]vidential burdens [can] arise continually in the ebb and flow of a trial,"[37] and whereas a legal burden remains on the burden holder throughout the case, an evidential burden may, *but not necessarily*[38], shift "in the limited sense of 'diverting a finger of suspicion.'"[39] This definition is often referred to simply as the onus of proof. So, as a case progresses, this onus shifts to whomever is at risk of losing the case if they don't produce more evidence to either support their own case or to rebut the other side's case. These onuses "may arise in respect of each fact and issue forming the fabric of the case and may fall on the Crown or the accused."[40]

With these concepts in mind, let us now move on to an examination of some of the problem areas in automatism.

Practical Difficulties and Associated Theoretical Problems

There are a number of places where the consistency in the automatism defence is wanting. Part of this stems from the automatism defence itself, and part of this comes from the inconsistencies that carry over from the insanity defence. I will begin by discussing one of the more salient problems in the automatism defence (in the British and Canadian courts), after which we will be able to branch out into insanity (where we will find some of the origins of this problem), and into other areas of difficulty in automatism.

Take two individuals, A and B, both in a state of automatism; so, both are in some sense unaware of their actions. A and B both commit the same (type of) criminal act, and they both have similar (if any) recollections of their experiences. Now if, according to

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[37] *Ibid,* at 40.
[38] In one respect, the evidential burden does stay with the defence: it has the stable burden of raising enough evidence to create a reasonable doubt, and the prosecution has the stable burden of proving what it has to prove beyond a reasonable doubt.
[39] Stuart, *supra* note 20, at 39 incl. note 249 (citing Williams, *supra* note 12).
[40] *Ibid,* at 40.

Schopp and Robinson, for instance, it is the functional impairment that justifies the availability of a defence[41], then both A and B should be able to employ the same defences. Where this reasoning seems to run aground, however, is when we consider the courts' direction to look to the *source* of the impairment, rather than the nature of the impairment itself. The current standard comes from Martin J.A. in *R. v. Rabey*[42], which was later upheld by the Supreme Court of Canada:

> In general, the distinction to be drawn is between a malfunctioning of the mind arising from some cause that is primarily internal to the accused, having its source in his psychological or emotional make-up, or in some organic pathology, as opposed to a malfunctioning of the mind which is the transient effect produced by some external factor such as, for example, concussion.

In other words, Mr. Justice Martin has drawn a line to distinguish between *sane automatism* (a "transient effect" arising from some "external factor") and *insane automatism* ("a malfunctioning" from a "cause...primarily *internal* to the accused"). Now, keep in mind that these are legal terms such that, according to Ritchie J. in the Supreme Court decision in Rabey, "whether or not such a state [of automatism] amounts to 'a disease of the mind' is a question of law for the Judge to determine."[43] So, despite agents A and B having similar functional impairments, if it is the case that agent A is classified as having suffered from sane automatism while agent B is classified as having suffered from insane automatism, then it follows that not only will A and B have to employ different defences (i.e., sane vs. insane automatism), whereby the outcomes will be different; but also that, for reasons to be discussed shortly, A and B will have to

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[41] Schopp, *supra* note 18, at 133. Robinson, *supra* note 23, at sec. 25 (b).
[42] (1977) 37 C.C.C. 2d (461). See also Stuart and Delisle, *supra* note 13, at 673.
[43] [1980] 2 S.C.R. 513. See also Stuart and Delisle, *supra* note 13, at 673.

discharge different burdens of proof.[44] This seeming arbitrariness is underscored when we consider how a diabetic might be classified under the law.[45]

Suppose A went into a state of automatism as a result of hypoglycaemia; that is, A, a diabetic, took too much insulin, his blood-sugar dropped dramatically, and he went into an automatic state. In this case, the hypoglycaemia, and the resulting automatic state, was caused by an external factor: taking too much insulin. Thus, A would have the defence of sane automatism available. Now, suppose B went into a state of automatism as a result of *hyper*glycaemia; that is, B, a diabetic, failed to take her insulin, and/or had a hyperglycaemic reaction, and her blood sugar *rose* dramatically, causing her to go into an automatic state. In this case, the hyperglycaemia, and the resulting automatic state, was caused by an internal factor: the diabetes. Here, B's only defence, since the "malfunction" was internal, would be insane automatism.

It seems difficult to justify the rationale behind channelling an accused into sane or insane automatism based on these facts. "Quite apart from the absurdity of labelling a diabetic as insane," writes Jones, "both accused may have acted in precisely the same way and with precisely the same state of mind (though with differing aetiologies)."[46] Note that diabetes is not a unique anomaly:

> The classic example of an external cause is a blow to the head, but other causes of a dissociative state are more difficult to characterize. For example, hypoglycemia caused by not eating after taking insulin, and possibly exposure to toxic fumes are considered external causes. On the

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[44] *Supra* note 16. After *Stone*, individuals who wish to raise the defence of automatism will have to satisfy a persuasive burden with respect to proving automatism, regardless of whether the issue is one of sane or insane automatism. It follows that some of the conclusions presented in this chapter regarding burden of proof would need to be modified to accommodate *Stone*.

[45] For examples, see Jones, *supra* note 34, at 498; Febbo et al., *supra* note 9, at 42; and Grant, I. and L. Spitz. *Acquittal or not Guilty by Reason of Insanity*, at 227. The Canadian Bar Review, 72, 224 (1993).

[46] Jones, *supra* note 34, at 499.

> other hand, epilepsy, and hyperglycemia caused by diabetes are both considered factors internal to the accused...[47]

One can think of other examples where the distinction becomes blurred. Suppose an agent goes into a state of automatism as a result of an epileptic attack, but it was an external blow that caused the attack. Alternatively, suppose an agent goes into an automatic state as a result of a psychological blow, but the agent also has a history of mental illness. Of course, some may argue that it is up to the judge to decide on a case-by-case basis (e.g., whether the epilepsy or the external blow caused the automatism), but this moves away from consistency, for one, since different judges may arbitrate similar cases differently, thereby calling into question the desirability and effectiveness of the standard laid out by Martin. Secondly, cases such as those involving diabetes seem to be less flexible, less open to interpretation and debate (at least under Martin's criteria), and therefore more arbitrary (in light of the above discussion).

There is another area of debate in this line of thinking that has to do with psychological blow automatism; for instance, whether a so-called "normal" or "ordinary" person would (or could) conceivably withstand a particular psychological trauma. This question is particularly interesting: "Nowhere has legal ambivalence been so prominent as in cases in which the alleged automatism is claimed to have resulted from...'psychological blow' automatism".[48] Although this complex area has linkages with the present discussion, we will explore it separately in chapter three. Here, let us examine the significance of the sane/insane debate.

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[47] Grant and Spitz, *supra* note 45, at 227.
[48] Febbo et al., *supra* note 9, at 42.

What is most problematic about the cases discussed earlier is not necessarily the arbitrariness of the distinction. Rather, it is the particular options open to a defendant once she has been placed on either side of the distinction. If it were the case that the sane/insane dichotomy was merely a terminological difference, the discussion would be somewhat trivial. The fact that different burdens of proof apply, as well as different standards of treatment and/or exculpation, makes the issue much more pressing.[49] What is perhaps obvious is that a successful defence of insane automatism (tantamount to a successful defence of insanity) means "the trial judge must order the detention of the accused in strict custody in a place and manner directed 'until the pleasure of the lieutenant governor of the province is known'".[50] A successful defence of sane automatism, however, means that the accused may very well receive an absolute acquittal. The implication of this for the diabetic (especially the one who forgot to take his insulin) cannot be overestimated.

Equally important, yet more complex, are the different burdens of proof in these cases. If an individual, A, wants to raise a defence of sane automatism, then A, after having satisfied an evidential burden as to whether the defence of sane automatism is worth consideration, will *not* have to satisfy a persuasive onus. The prosecution still carries the burden of proving the voluntariness of A's conduct in this case.[51] If, however, the only available defence for an agent, B, is insane automatism, then it is up to B to prove, on the balance of probabilities, that he was indeed suffering from insane automatism at the time of the offence; that is, B carries the persuasive burden with

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[49] The Canadian legal landscape has changed since 1999. See *supra* notes 16, 44.
[50] Stuart, *supra* note 20, at 322. Enclosed quotations refer to *Canadian Criminal Code*, s. 542(2).
[51] Jones, *supra* note 34, at 499.

respect to the defence of insane automatism. Thus, if, at the end of the trial, there exists reasonable doubt as to whether B was sane at the time of the offence, then B will not have discharged the persuasive burden upon him – B will be convicted.[52] As Lamer C.J. noted in *R. v. Chaulk*,

> If an accused cannot discharge the persuasive burden with respect to his insanity, the trier of fact may well be obliged to convict the accused despite the existence of a reasonable doubt as to sanity, and therefore, as to guilt.[53]

"Both the unsatisfactory nature of this area of law," Jones writes, "and the problems caused by placing the persuasive burden in respect of insanity on the accused, are highlighted by the distinction which the law draws between sane and insane automatism."[54] And it seems *particularly* hard to sustain this distinction when we look at certain cases (e.g., diabetes).

So far, this chapter has examined how similar individuals (i.e., with similar conditions) can have different standards of proof levied against them, and we have seen how these same individuals may face different standards of exculpation as a result of these burdens and/or as a result of how they are classified under the law. Now, let us explore more deeply the insane automatism classification.

Recall in the last example that B was trying to make a successful defence of insane automatism. We saw how B would have to prove, on the balance of probabilities, that he was in a state of insane automatism at the time of the offence, and we observed how this greater burden at least appeared arbitrary compared with A. Now to a further problem: since an agent has to prove, on the balance of probabilities, that he was insane

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[52] *Ibid.*
[53] [1990] 3 S.C.R. 1303 at 1332.
[54] Jones, *supra* note 34, at 499.

at the time of the offence, it is possible for him to be convicted despite the existence of reasonable doubt as to his guilt, and this runs up against the presumption of innocence guaranteed since *Woolmington*.[55] This raises a number of issues.

Is it fair? Here, one does not (necessarily) have to look for an objective notion of fairness; rather, it should suffice to ask whether the reverse onus (i.e., the persuasive burden on the accused) is fair *at least compared with other common-law defences*. Many writers contend that insanity's special status cannot be maintained:

> In Canada, in the case of serious federal offences, our courts have been doggedly determined that an accused is to bear only the burden of adducing evidence *(i.e., an evidential burden)* of act and fault and common law defenses such as intoxication, duress, self-defence, necessity and provocation. No one has suggested that this is unfair to the Crown, or unworkable. Why should just a few defenses continue to be treated differently?[56]

Is there something about insanity that is unique and/or sufficient to justify its *sui generis* status? Two striking features about insanity are that, firstly, insanity is easy to fake; and secondly, dangerous offenders may escape punishment (either by committal to a psychiatric institution or, in some cases, by absolute acquittal). Now, whether or not they play a direct role in motivating legislation, these worries do seem to be reflected in judicial scepticism. In *Cooper v. Mckenna*, for instance, Stable J. remarks that blackout is "one of the first refuges of a guilty conscience and a popular excuse."[57] Similarly, Mr. Justice Schroeder in *Szymusiak* states that insanity may "be the last refuge of a scoundrel."[58] But are these worries sufficient (or would they be sufficient) to maintain

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[55] And since *Stone* (*supra* notes 16, 44), this applies to all individuals who wish to raise the defence of automatism.
[56] Stuart, *supra* note 20, at 44.
[57] (1960) Qd R. 406 at 419.
[58] (1972) 8 C.C.C. (2d) 407 at 411-413.

the reverse persuasive onus on the accused? It seems unlikely. According to Timothy Jones:

> ...there is no convincing explanation offered as to what it is about the defence of insanity which sets it apart in this respect from other legally recognised defences. A prosecutor can be faced with equal difficulties of proof in cases of, for example, sane automatism or voluntary intoxication.[59]

Why do they maintain the distinction?

For one, public policy considerations should not necessarily reflect or be based on mere suspicion or scepticism. Levying a persuasive onus on an accused seems tantamount to stacking the deck in one person's favour because there is the possibility that the other person may cheat. Why is it acceptable to impose higher standards of proof on a defendant simply because it may be more difficult to prove her or his guilt? We do not impose higher standards on the suspicion that one is a particularly adept criminal, or on the fact that one has a particularly successful defence team, or on defendants whose alleged crimes are ones from which it is easier to escape punishment. So why do we impose higher standards – indeed, why do we suspend, in other words, the presumption of innocence – on those who were allegedly insane or at least unaware of their actions at the time of the offence? "The prosecutor's problems of proof," according to Fletcher, "does not compel the conclusion that the defendant must bear the burden of persuasion on the issue."[60] Stuart sums up the issue:

> The judicial concern is undoubtedly another indication of the reluctance to see an accused leave the court a free person...The courts have overreacted. There does not seem to be a difference from the point of view of social defence between an acquittal on the basis of involuntary conduct and an acquittal on the basis of lack of *mens rea* or a successful defence of self-

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[59] Jones, *supra* note 34, at 492.
[60] Fletcher, G.P. *Two Kinds of Legal Rules*, at 908. Yale Law Journal, 77, 880 (1968).

> defence. In each of these cases the accused might still be dangerous when he walks out of court. *Yet we cannot simply convict by warping fundamental principles.*[61] [italics mine]

It seems that one of the principles that gets *warped* in the process is the presumption of innocence. Could it be that there is a "presumption" of sanity, such that it justifiably *warps* or overrides the presumption of innocence?

From one perspective, it is natural to conclude that, since there is a burden on the accused to prove insanity, the law presumes sanity. But does "presume" in this sense carry the same force as in, for example, the presumption of innocence? Healy and Jones suggest that the presumption of sanity is more appropriately a "rule of substantive law"[62] than a presumption, as "it does not contemplate a process of inference from a premise of relevant fact to a conclusion of relevant law or fact."[63] If this is the case, then it seems difficult to justify a persuasive burden on the accused to prove she is or was insane, especially since, if she fails to prove insanity on the balance of probabilities, she will be convicted. This conviction may come despite the existence of a reasonable doubt as to her guilt, which would, if the presumption of innocence were in force, ordinarily lead to an acquittal (since the prosecution must prove the material elements of the offence beyond a reasonable doubt).

But, even if it could be argued that the sanity of an accused is a presumption in the same way that the innocence of an accused is a presumption, it is still doubtful whether a presumption of sanity is or should be more powerful than a presumption of innocence. As Stuart writes, "it is a dramatic inroad on the presumption of innocence to

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[61] Stuart, *supra* note 20, at 100.
[62] Jones, *supra* note 34, at 476.
[63] *Ibid.* And Healy, P. *R v. Chaulk: Some Answers and Questions on Insanity* (1991) 2 C.R. (4th) 95 at 99.

demand that the accused do the proving."[64] The presumption of innocence, we must remember, reflects an important moral principle that underwrites the general shape and structure of the criminal law. The presumption of sanity, however, does not share in this ubiquitous and foundational importance; rather, it reflects an empirical appeal to the high probability or likelihood of sanity. So why should the former presumption, one which figures so prominently in our system of law, take second-seat in a small range of cases? According to Stuart:

> The presumption of innocence is so fundamental that it is difficult to justify exceptions even in the case of less serious offences, including the full range of provincial offences and lowly traffic violations. It is the essence of any criminal justice system which deserves the name that an accused should always have the right to a public trial at which he is allowed to plead not guilty and to require that the state prove his guilt beyond a reasonable doubt.[65]

Is this reversal, in the words of Glanville Williams, just an "anomalous exception", or could there be other reasons not yet considered?

If one grants that the presumption of innocence is "fundamental" to our criminal justice system, and it seems there is widespread support for this position, then is it possible that, though a presumption of sanity is not sufficient *by itself* to override the presumption of innocence, public policy reasons may attach to the former presumption, and thus together with it, outweigh the latter, or at least necessitate consideration before the latter? Indeed, public policy reasons are not sufficient to outweigh the presumption of innocence. And the presumption of sanity is not sufficient to outweigh the presumption of innocence. But together, perhaps they provide enough justification for transgressing the presumption of innocence in a few cases.

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[64] Stuart, *supra* note 20, at 343.
[65] *Ibid*, at 45.

I suspect, however, that this possibility is untenable, for a number of reasons. First, we have seen how public policy reasons in support of maintaining a reverse onus most likely do not provide sufficient justification, as they are based on such things as judicial scepticism, public fear, and public suspicion. And if these reasons do not merit consideration on their own, that is, if they have little weight to begin with *when compared against the presumption of innocence*, then it seems difficult to see how adding something else (i.e., a presumption of sanity) is going to make a collective whole that will now outweigh the presumption of innocence. Again, the presumption of innocence reflects and underlies a cornerstone principle of our legal system; it is a fundamental moral and legal right. Wilson J. (in dissent) in *R v. Chaulk,* states that shifting the burden to the accused, based on policy considerations, represents a "prophylactic measure designed to fend off a hypothetical social problem that might arise if accused persons pleading insanity had to meet only an evidentiary burden."[66] Indeed, the presumption of innocence is embodied in section 11d of *The Canadian Charter of Rights and Freedoms*:

> 11. Any person charged with an offence has the right
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal

Remember, we have to measure things *against* the presumption of innocence – it stands regardless of whether or not one endorses certain public policy considerations. It is not as if that presumption is suspended as soon as another presumption comes into conflict with it, thereby clearing the way for those policy reasons to operate.

But yet, one does not want to discount these public policy reasons entirely. It is one thing to argue that they have little force, either by themselves *or* combined, against

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[66] *R. v. Chaulk.* [1990] 3 S.C.R. 1303 at 1375.

the presumption of innocence, but it is quite another thing to say that they are not based on legitimate fears or concerns. Certainly, the fear that an accused may escape punishment, be released from a treatment facility, and come after the parents of the victim (for instance) is a fear nonetheless. And given that these unfortunate consequences sometimes occur, we may even be able to say that it is a legitimate fear. Similarly, but to a lesser degree, judicial scepticism may be a natural response arising from the knowledge or belief that some sane defendants will argue that they were or are insane. Is this a legitimate scepticism? Perhaps. But, the fact remains that one should not sanction illegitimate treatment based on legitimate concerns. In other words, one may remain convinced that the presumption of innocence cannot be overridden by other presumptions or public policy reasons, and yet still acknowledge that those policy concerns are legitimate.

Is there another way, then, to deal with these concerns? Well, with respect to judicial scepticism that the offender is faking his condition, one must rely on the prosecution. As with any case in which an accused's mental health is in question, both sides are likely to parade a number of expert witnesses to speak to that issue. "It is highly unlikely," according to Stuart, "that a judge or jury, if there is one, will believe the mere word of the accused that he blacked out or was suffering from amnesia."[67] The cardsharp's ability to cheat is partly a function of the skill of the players, and the ability of the defence to be successful is partly a function of the skill of the prosecution. Further, one should not revise the rules in special cases on the fear that the defendant or the cardsharp has better chances than normal of "getting away with it", especially since it

[67] Stuart, *supra* note 20, at 100.

happens more often than not that the cardsharp is not a cardsharp, that the defendant is not faking his condition.

With respect to fears that an accused may be set free (after treatment) only to re-offend, public policy may manifest itself in better treatment and assessment procedures. And here, we can see how the responsibility for addressing these concerns rightly should be post-trial. Even when the person re-offends, we may still be able to say that the criminal justice system did its job. One should not levy a reverse onus on the accused to correct a mistake that did not happen within the province of the system. We need to rightly acknowledge the proper source for our fears, be they legitimate or not. Our anxiety that an insane individual will be released prematurely, reflects our fear that the treatment institution fails in a particular case. Under these circumstances, there should not be a question of whether the criminal justice system failed, provided that the system rightly judged an insane person insane. If, on the other hand, one finds that the system judged a sane person insane, and that person was eventually released from a treatment institution and re-offended, then one may say that the system, if not the treatment institution, failed in that particular case. Of course, no system is foolproof – failures will happen. But we must realize that these mistakes are not sufficient to justify overriding the presumption of innocence.

If, then, a presumption of sanity, coupled with various public policy reasons, is not sufficient to justify overriding our fundamental presumption of innocence, then what is the alternative? A reasonable solution would be simply to address the origin of the problem: the reverse onus. We saw how this burden on the accused may result in a conviction despite the existence of a reasonable doubt, and this result goes against the

presumption of innocence. If we just relax this burden to an evidential burden, as is the case in such common law defences as intoxication, self-defence, and provocation, we will resolve a number of issues.

Firstly, it will maintain consistency within the criminal justice system. The insanity defence will no longer be "an historical anomaly"[68]; it will follow the same standard of proof requirements that other defences follow.

Secondly, the evidential burden will still function (albeit indirectly) to acknowledge that a person is presumed (keeping in mind a relaxed definition of "presumed") to be sane. Yet, the presumption is not so rigid or heavy as to tread over the fundamental presumption of innocence, as is possible in certain cases. "A presumption of sanity," writes Jones, "need mean no more than that the accused bears the burden of introducing evidence of insanity."[69] And again, it is doubtful that judges or juries will believe the word of an accused without credible evidence and credible testimony.

Thirdly, public policy concerns will indeed be recognized (again indirectly), but they will not, as the above discussion suggests, be unfairly and mistakenly used to support putting a persuasive onus on the accused, and/or overriding the presumption of innocence.

So, in requiring the accused to satisfy an evidential burden only, the presumption of innocence maintains its signature position of importance, the legal burden of proof remains on the prosecution, and the fears, concerns, and misgivings about the insanity defence are still acknowledged.

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[68] Cross, R. *The Golden Thread of the English Criminal Law: The Burden of Proof* (Rede Lecture, 1976). (cited from Stuart, *supra* note 20,at 44).
[69] Jones, *supra* note 34, at 476.

This chapter has examined some of the fundamental legal facts and principles as they relate to the automatism defence in our system of law. This survey has covered the *actus reus* and *mens rea* components with respect to automatism, as well as the different burdens of proof and how they create different procedural options for automatism defendants, and different standards of adjudication. Also, it has shown how these procedural requirements sometimes infringe on the common law presumption of innocence. And lastly, it has canvassed some alternatives to the current legal territory in automatism. The next chapter will take up the complex issue of psychological blow automatism.

Chapter 3 – Psychological Blow Automatism and the Disease of Mind Distinction

The last chapter examined some of the differences between sane and insane automatism in the common law. It noted how, in certain instances, the question of whether the trier of fact will be given for consideration sane or insane automatism often turned on a very subtle difference, such as may be found in cases involving diabetics. I will continue along a related area of discussion in this chapter, but whereas our focus in chapter 2 was the burden of proof, our attention now will be directed more closely at how the courts determine what constitutes a disease of mind, especially in the context of psychological blow automatism.

There are numerous cases that have come to be classified as cases of psychological blow automatism. For instance, there was the now famous case of *Rabey* (1980), where the accused, a third-year geology student, was charged with causing bodily harm with intent to wound and possessing a weapon for the purpose of committing an offence. It was held that the accused, Wayne Kenneth Rabey, had entered into a state of dissociation after learning that his feelings for a certain female friend were not reciprocated. In *Falconer* (1990), the accused, Mary Falconer, was held to have entered into a state of dissociation (after a long history of physical and emotional abuse by the victim) in which she fired a shotgun at her estranged husband, killing him. We will examine these cases in more detail shortly, but for now it should suffice to note that they are significant in that they involve what is known as psychological blow automatism, and this notion very often becomes the linchpin upon which cases are adjudicated. But what is psychological blow automatism?

It should be noted at the outset that psychological blow automatism is very much a legal notion (though one invariably influenced by medical factors), to be decided by the trier of fact. Essentially, psychological blow automatism involves a state of automatism precipitated by some sort of cognitive or emotional shock. Although we will see considerable overlap, contrast this kind of precipitating factor, a "psychological blow", with a "physical blow", such as a bump on the head, an injection of insulin, et cetera. Now, cases of psychological blow automatism exhibit features that align rather closely with the concept of "dissociation" prevalent in the medical literature. The *Diagnostic and Statistical Manual of Mental Disorders*, for example, describes dissociative disorders as involving "a disruption in the usually integrated functions of consciousness, memory, identity, or perception of the environment."[70] However, dissociation "remains a concept not fully understood medically,"[71] so it is difficult to give a precise definition or outline a specific aetiology. Febbo et al.[72] suggest that

> The current view of dissociation is that it need not be pathological, but can be considered a universal experience. Consistent with this is the notion of a dissociative continuum, with minor dissociations of everyday life at one end and major forms of psychopathology, such as multiple personality disorder, at the other.[73]

Somewhere in this continuum we can locate psychological blow automatism, but it, by legal definition, concerns "the immediate effects of trauma," and "there is a relative paucity of [medical] literature" on the subject.[74] Indeed, much of our knowledge about dissociation stemming from severe psychological trauma comes directly from the

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[70] *Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), supra* note 14, at 477.
[71] Febbo et al., *supra* note 9, at 55.
[72] *Ibid*, at 56.
[73] *Ibid.*
[74] *Ibid*, at 57.

testimony of psychiatrists called in criminal cases. And since "the nature of the psychiatric evidence given in relation to an alleged case of automatism will depend on the particular 'school' of psychiatric thought to which the expert witness belongs,"[75] any attempt at finding rigid criteria for psychological blow automatism will prove elusive. On the other hand, there do seem to be some correlations drawn about dissociation in general; for instance, that it has often been linked to post-traumatic stress disorder (PTSD)[76], childhood abuse[77], and that it sometimes occurs as a response in the wake of disaster.[78] Nevertheless, perhaps it is the latitude and vagueness which partially accounts for the way in which the legal notion of psychological blow automatism has developed, and encountered difficulty, in the courts:

> Although most of the early cases in which the issue of automatism was raised involved a malfunctioning of the mind of physical origin, it was inevitable that defendants would seek to apply it to instances in which the malfunctioning resulted from psychological causes. It has been in relation to these latter cases that the courts have found the greatest difficulty in determining whether the evidence entailed defenses of insanity, automatism, or both.[79]

We will consider two main areas of difficulty: the framework on which the evidence percolates to a judicial direction on which defences the jury may consider, and the concept of the ordinary person test. But first, it will be necessary to conduct a preliminary survey of the legal territory, beginning with *Falconer.*

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[75] Tollefson and Starkman, *supra* note 11, at 53.
[76] For instance, see Brende, J.O. *Dissociative Disorders in Vietnam Combat Veterans.* Journal of Contemporary Psychology, 17, 2, 77 (1987); and Bisson, J.I. *Automatism and Post-Traumatic Stress Disorder.* British Journal of Psychiatry, 163, 830 (1993).
[77] Sanders, B. and Giolas, M.H. *Dissociation and Childhood Trauma in Psychologically Disturbed Adolescents.* American Journal of Psychiatry, 148, 50 (1991) (citation from Febbo, et al., *supra* note 9).
[78] Wilkinson, C.B. *Aftermath of a Disaster.* American Journal of Psychiatry, 140, 1134 (1983) (citation from Febbo, et al., *supra* note 9).
[79] Febbo, et al., *supra* note 9, at 42.

The Australian case of *Falconer* is significant in that the High Court seems to have adopted a degree of judicial tolerance toward pleas of sane automatism which, if successful, would result in unqualified acquittals, and also in that the judgment of the High Court contained within it explicit criteria for determining which cases are to be classified as instances of psychological blow automatism and how they are to be adjudicated. Recall that, in general, courts have approached automatism with a good measure of judicial scepticism, for various reasons, not the least of which is the concern that it may offer a safe haven for criminals. In *R v. Radford* (1985), however, this tendency diminished somewhat. Chief Justice King's judgment, relied upon by the High Court in *Falconer*, deserves quoting at length:

> I appreciate that if it is true that a state of depersonalization or dissociation is not itself a disease of the mind, although it may result from mental illness, the result may be that certain cases of unwilled acts which would formerly have been treated as the result of temporary insanity and would have founded verdicts of not guilty on the ground of insanity, will now result in outright acquittals. I do not see any reason to shrink from that consequence. The consequence of a verdict of not guilty by reason of insanity is detention during the Governor's pleasure. If a person is not morally responsible for the action which is the subject of the charge because that action was an unwilled automatic act, he should not suffer conviction or punishment. If he is not mentally ill and there is, therefore, no reason to suppose that the act will be repeated, detention for the protection of others is pointless and an embarrassment to the mental health authorities.[80]

So, relying on this judgment, the High Court set out to establish a framework for differentiating, *in the eyes of the law*, whether psychological blow automatism in any particular case is the product of a sane or an insane mind. Stanley Yeo[81] succinctly

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[80] *R v. Radford* (1985) 20 A. Crim. R. 388.

[81] Yeo, S. *Power of Self-Control in Provocation and Automatism.* The Sydney Law Review, 14, 1, 2 (1992).

summarizes the framework into four sections, or tests; I see no reason to depart significantly from his analysis.

Firstly, the High Court acknowledged that dissociation as the product of a "psychological blow" *may* be automatism. If the blow is "extraordinary" (i.e., not the product of "ordinary stresses" encountered in daily life), then it *may* be sane automatism. Secondly, if the accused manifested the power of self-control of an ordinary person, then the accused is not insane. Thirdly, in assessing this "power of self-control", the ordinary person will possess "normal" temperament and "normal" self-control; evidence of the accused's emotional state and temperament at the time of the offence must be disregarded. However, the accused's objective circumstances will be ascribed to the ordinary person in order to determine the gravity or magnitude of the provocation. Fourthly, if it is determined that the power of self-control of the accused was below that of the ordinary person, then the accused may be insane, *if there is evidence of an underlying pathological condition, and if there is evidence that the state of automatism is prone to recur.*[82]

We will discuss the implications of this framework shortly, but first, let us examine a similar framework in the Canadian system. As with the maturation of psychological blow automatism in Australia, the criteria for determining and categorizing the condition in the Canadian system also comes from a judgment in the Court of Appeal, subsequently endorsed by the Supreme Court. Note the similarities between the following passage from Martin J.A. in *Rabey*, and the previous framework from *Falconer*. Again, I will quote at length:

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[82] *Ibid*, at 16.

> In general, the distinction to be drawn is between a malfunctioning of the mind arising from some cause that is primarily internal to the accused, having its source in his psychological or emotional make-up, or in some organic pathology, as opposed to a malfunctioning of the mind, which is the transient effect produced by some external factor such as, for example, concussion. Any malfunctioning of the mind or mental disorder having its source primarily in some subjective condition or weakness internal to the accused (whether fully understood or not) may be a "disease of the mind" if it prevents the accused from knowing what he is doing, but transient disturbances of consciousness due to certain specific external factors do not fall within the concept of disease of the mind...Particular transient mental disturbances may not, however, be capable of being properly categorized in relation to whether they constitute "disease of the mind" on the bases of a generalized statement and must be decided on a case by case basis...[83] In my view, the ordinary stresses and disappointments of life which are the common lot of mankind do not constitute an external cause constituting an explanation for a malfunctioning of the mind which takes it out of the category of a "disease of the mind". To hold otherwise would deprive the concept of an external factor of any real meaning. In my view, the emotional stress suffered by the respondent as a result of his disappointment with respect to Miss X cannot be said to be an external factor producing the automatism within the authorities, and the dissociative state must be considered as having its source primarily in the respondent's psychological or emotional make-up. I conclude, therefore, that, in the circumstances of this case, the dissociative state in which the respondent was said to be constituted a "disease of the mind". I leave aside, until it becomes necessary to decide them, cases where a dissociative state had resulted from emotional shock without physical injury, resulting from such causes, for example, as being involved in a serious accident although no physical injury has resulted; being the victim of a murderous attack with an uplifted knife, notwithstanding the victim has managed to escape physical injury; seeing a loved one murdered or seriously assaulted, and the like situations. Such extraordinary external events might reasonably be presumed to affect the average normal person without reference to the subjective make-up of the person exposed to such experience.[84]

When we follow Martin J.A.'s framework, we see a number of similarities with the High Court in *Falconer*. Firstly, he carves out a distinction between internal and external factors. If the psychological blow has an internal cause, then it may be a "disease of the

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[83] *R v. Rabey*, (1977) 37 C.C.C. (2d) 461, at 477-478.
[84] *Ibid, at* 482-483.

mind", and therefore may be insane automatism. If the psychological blow is externally caused, then it does not constitute a disease of the mind, and therefore, by implication, may be sane automatism. Next, if the psychological blow is the product of "the ordinary stresses and disappointments of life", then that suggests that the cause is internal, and thus is insane automatism. Finally, Martin J.A. *suggests* that, if the psychological blow is the product of an (extraordinary) emotional shock, then it may be presumed that the cause is external, since an ordinary person could respond in like manner (to an accused who goes into a state of automatism), and is therefore sane automatism. Further, it is worth noting that, inasmuch as the judgments in *Falconer* and *Rabey* resemble each other, what are absent (at least explicitly) from Martin J.A.'s judgment, and appear in the *Falconer* decision, are the two factors of "proneness to recur" and "underlying pathology".[85]

Let us now examine these frameworks more deeply. Specifically, we want to understand what they imply with respect to how they characterize and classify different individuals, and we want to assess the degree to which the approaches of each court are fair.

The initial concern is that these frameworks yield undefined answers when they are given certain scenarios to compute. Let's look at the Australian High Court first. According to their judgment, the framework or algorithm should look like Figure 2:

[85] Though "policy factors" are referred to by the Supreme Court in the later case of *Parks, supra* note 1.

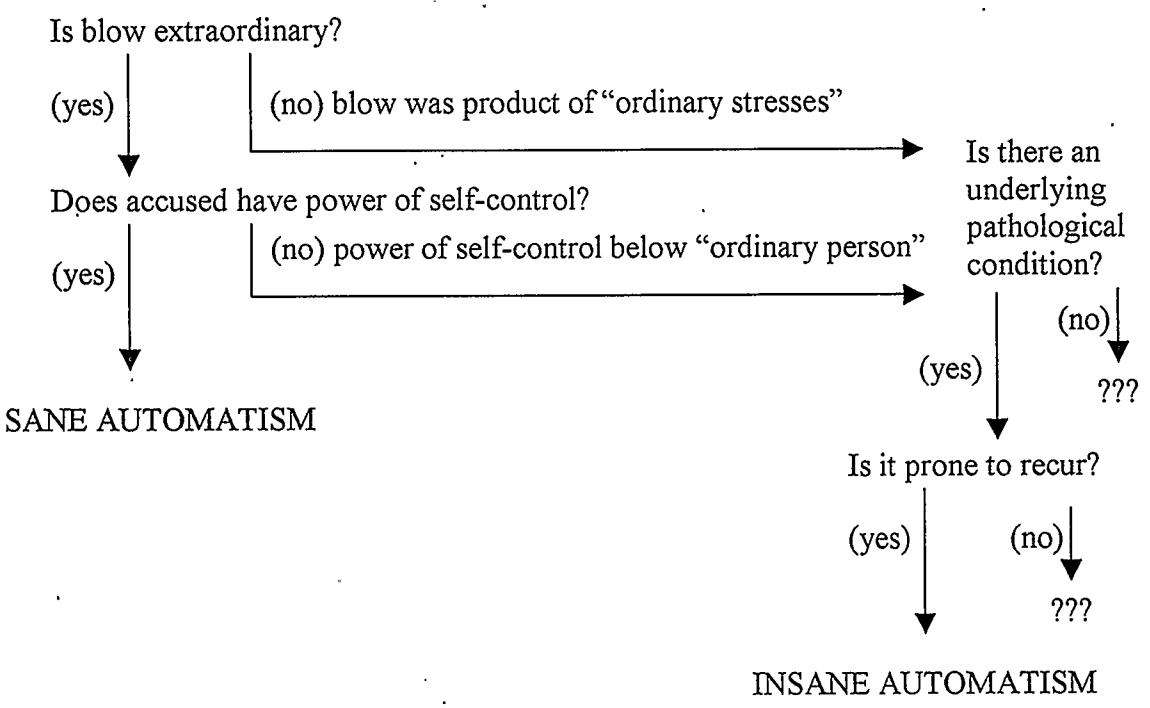

Figure 1. Australian High Court Framework

As you will notice, certain conditions trickle through to certain judgments. For instance, if it is decided that the "psychological blow" was of an extraordinary nature, and if the accused is judged to have the power of self-control of an ordinary person, then the jury should render a judgment of sane automatism. On the other hand, if it is decided that the "psychological blow" was *not* of an extraordinary nature (and therefore a product of "ordinary stresses"), and if it is concluded that there is some kind of underlying pathology, and if it is likely to recur, then the jury should render a judgment of insane automatism. In these cases, the above function renders judgments most likely in the spirit of the test that the High Court intended. However, it is not difficult to envision scenarios which could stymie the court and jury, whereby the final judgment is unclear. A

significant implication, *inter alia,* is that the defence, who has to decide on a strategy, may find themselves in an unfortunate position. What if, for instance, it is decided that the "psychological blow" was not extraordinary, yet it is also decided that there does not seem to be any underlying pathological condition? Does this mean that the jury should render a guilty verdict, and does it imply that the accused was not really in an automatic state at all? What if the evidence indicates otherwise, that the accused was in an automatic state, but that it was the product of some sort of "transient" mental disturbance?

One response might be that, when contingencies such as these arise, it is up to the judge to make the appropriate direction to the jury. This, however, diminishes the utility of the test in the first place, and underscores Richard Harding's criticism about the uncertainty involved in judicial discretion: "A consequence of this has been that some defendants who have led credible evidence of their mental state, imagining that in doing so they were meeting their evidential onus in relation to a plea of sane automatism, have suddenly discovered that they have opened up the issue of their own sanity."[86] Obviously, the defence will find this result unacceptable; clearly, there needs to be some standard on which both the prosecution and the defence can base their cases.

Another area of confusion in this framework concerns the interplay between the "policy factors", namely, the external factor test (which tests for an underlying pathological condition) and the proneness of recurrence test. The way that I have set up the algorithm[87] suggests that the proneness of recurrence test only mobilizes upon an

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[86] Harding, R.W. *Sane and Insane Automatism in Australia*, at 80. International Journal of Law and Psychiatry, 4, 73 (1981).

[87] This only *seems* to be its proper or intended construction, but is by no means definitive.

affirmative answer to the external factor (i.e., pathological condition) test. But is it even possible for a jury to conclude that there is an underlying pathological condition, but one that probably won't recur? Even if the tests were set up as conjuncts, or if the proneness to recur test was placed before the external factor test, we would still expect to see troubling results. The High Court did not address these issues. Paul Fairall highlights some of the concerns underlying this framework:

> Are the exempting qualifications sufficient or necessary conditions? Does *D* have to prove each of them? What if *D* establishes that the dysfunction was transient and not prone to recur but cannot prove that an ordinary person would have withstood the trauma? Is *D* then to be treated as insane? What if the jury is satisfied that the dysfunction was transient and not prone to recur, and thinks it *possible* but *unlikely* that an ordinary person would have succumbed. Presumably on those findings the jury should return a verdict of not guilty but insane. Why should a person be treated as insane if she is psychologically frail?[88]

Again, some might be inclined to leave these issues up to the individual judge, but however the arguments play out *for and against* this kind of discretion, the fact remains that the test set out by the High Court seems to have all the caprice of an arthritic knee, functioning fairly well in some cases, fairly miserably in others.

Let us now examine the criteria set out by Martin J.A. (and endorsed by the Supreme Court) in *Rabey* (See Figure 2). His judgment "determines, firstly, that a successful defence of sane automatism must identify an external factor and, secondly, that the disorder of the mind must not relate to some subjective weakness of the accused."[89]

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[88] Fairall, P. *Voluntariness, Automatism and Insanity: Reflections on Falconer,* at 92. Criminal Law Journal, 17, 81 (1993).
[89] Stuart, *supra* note 20, at 93.

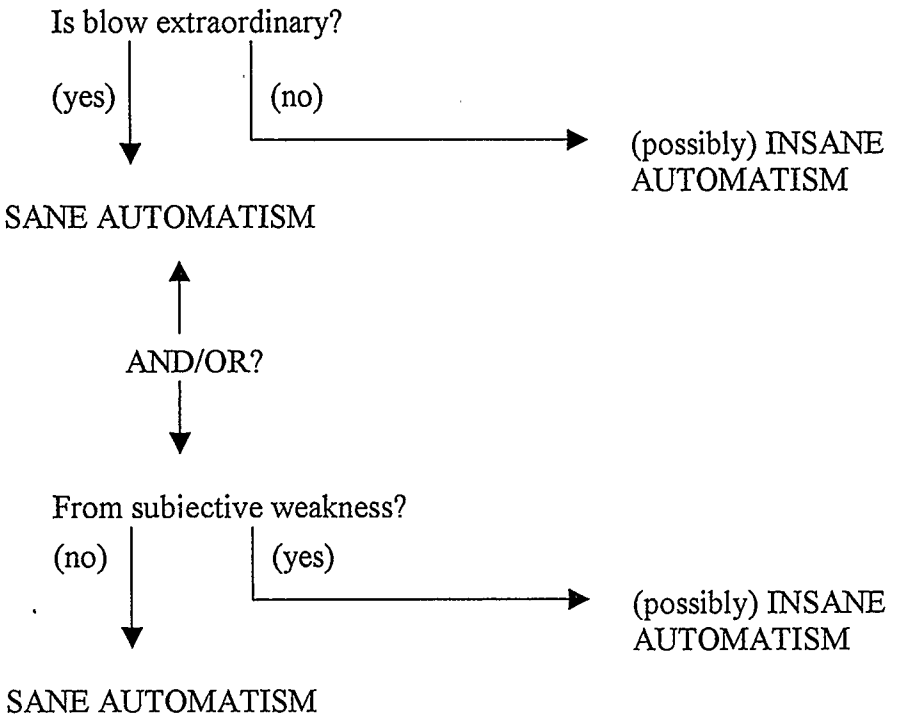

Figure 2. Canadian Supreme Court Judgement

To a point, the frameworks of Martin J.A. and the High Court are very similar. But a main concern is that the criteria Martin J.A. sets out do not specify where to begin, and how to proceed: Should one first ask whether the blow was extraordinary, or whether the automatism occurred as the result of some subjective weakness? As well, should one, having determined, for instance, that the blow was extraordinary, proceed to ask whether it occurred as a result of some subjective weakness? Or is it sufficient to determine the former only? Alternatively, if we first ask whether the automatism was the result of some subjective weakness of the accused, then do we proceed to ask whether the blow was

extraordinary nonetheless? It is unclear where Martin J.A. would have us begin, and in what instances, if any, we should move on to ask the second question.

What appears to be missing here is the policy component. This proves to be a double-edged sword, for though this approach avoids the attendant ambiguities that appear in the Australian framework (as a result of the inclusion of policy factors), it proves to be ambiguous *precisely because* it's missing those policy factors. Are we to assume (as Martin J.A. seems to) that an individual is insane if it is decided that the psychological blow was not extraordinary? Or should we first decide whether the evidence indicates some pathological infirmity? This is obviously important because we need to know, for instance, whether an individual represents a further danger to the public; yet, "[i]t would appear that the Canadian Court would make a finding of insanity based solely on the accused's lower level of self-control."[90] So in this instance, it seems that policy factors are needed in order to avoid rash categorizations. It remains to be seen, however, whether a successful framework can be implemented.

Part of the problem stems from the tension created by trying to outline a legal phenomenon (i.e., psychological blow automatism) that is invariably caught in a lock step with medical evidence, and whose shape, like a transposed picture, is governed by the outside borders of various policy factors. Note the interrelation:

> Historically, the courts have used two tests in resolving the legal question of what is a "disease of the mind." Both are only loosely based on medical knowledge. The first, spelt out by Lord Denning in 1963, is that a mental disorder that manifests itself in violence and is prone to recur is a "disease of the mind". The second, dating from 1973, is that a mental disorder caused by some external factor, such as drugs, alcohol, or a physical blow causing concussion, is not a "disease of the mind".[91]

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[90] Yeo, *supra* note 81, at 20.
[91] Febbo et al., *supra* note 9, at 42.

Indeed, in *Falconer*, Febbo et al. recognize that the external factor "test stresses the importance of dangerousness as an indicator of mental disorder...", and though they acknowledge that "the approach...has been criticized," they admit that "it is probably apt for the courts to categorize individuals vulnerable to recurrent episodes of dissociation as being mentally ill."[92] I suspect many would agree there is a certain appeal in this logic (but again, the problem lies in developing an acceptable framework).

This sentiment appears in the Canadian courts as well. In subsequent cases, such as *Parks* (1992), the role of policy factors (and how they shape psychological blow automatism) is much more explicit and significant, though, disappointingly, they still have not been coherently appended to Martin J.A.'s framework. What is interesting, however, is that, even in *Rabey,* these policy factors seem to haunt Martin J.A.'s judgment, with Dickson J. (in the Supreme Court appeal) for the dissent giving them form and substance. And even though "the majority in *Rabey* failed to address [Dickson J.'s] concerns..."[93], Dickson nonetheless raises some interesting points:

> There are competing policy interests. Where the condition is transient rather than persistent, unlikely to recur, not in need of treatment and not the result of self-induced intoxication, the policy objectives in finding such a person insane are not served. Such a person is not a danger to himself or to society generally.[94]

At least from Dickson J.'s point of view, had these policy interests been correctly served, then the accused's verdict of acquittal would not have been overturned. The evidence

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[92] *Ibid*, at 51.
[93] Stuart, *supra* note 20, at 94.
[94] *Rabey v. R.*, (1980) 15 C.R. (3d) 225 at 245, 256-258 (S.C.C.). See also Stuart and Delisle, *supra* note 13, at 676.

given at trial suggested that Rabey was not suffering from a recurrent condition in need of treatment:

> This finding [of insanity] was reached though the appellant exhibited no pathological symptoms indicative of a previously existing, or ongoing, psychiatric disorder. On medical evidence accepted by the trial Judge, the prospect of a recurrence of dissociation is extremely remote. There was no finding that the appellant suffered from psychosis, neurosis or personality disorder. He does not have an organic disease of the brain. This was an isolated event. The appellant has already spent several weeks in a mental institution undergoing psychiatric, neurological and psychological assessment, the result of which did not indicate need for treatment.[95]

Indeed, Martin J.A.'s judgment does not seem to ascribe much weight to the medical evidence presented at trial; he seems to rely more heavily on a judicial "line in the sand" to characterize what factors will elevate a cause into the "external" realm. The "ordinary stresses and disappointments of life" will not get beyond the "disease of the mind" classification.

But yet, if there is some credence to Dickson J.'s criticism that there was "no evidence to support Martin J.A.'s statement attributing the dissociated state to the psychological or emotional makeup of the appellant,"[96] then what are we to make of Martin J.A.'s judgment? One possibility is that policy factors may have had an implicit influence on the decision. To be sure, we can see how a classification of an "external" cause is a more or less salient by-product of the disease of mind distinction, but since Martin J.A. went against the medical evidence and returned a finding of insanity by postulating a new classificatory scheme, we may question whether a justified fear played a role in the judgment. As Dickson J. said in his dissent:

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[95] *Ibid.*
[96] *Ibid.*

> There are undoubtedly policy considerations to be considered. Automatism as a defence is easily feigned. It is said the credibility of our criminal justice system will be severely strained if a person who has committed a violent act is allowed an absolute acquittal on a plea of automatism arising from a psychological blow.[97]

So we arrive at a difficult position. Policy factors – did they or did they not contribute to the judgment in the Court of Appeal? Perhaps the answer to this question is "yes" and "no", a somewhat paradoxical conclusion. Yes, they did, in that by going against the medical evidence, Martin J.A. reflects a certain judicial scepticism toward defences of sane automatism; no, they did not, since they do not occupy a place in Martin J.A.'s framework, and since policy considerations, *appropriately followed*, would suggest an acquittal. As Stuart says:

> The trial judge had accepted the views of the defence psychiatrist and it was not for the Court of Appeal to overturn this finding of fact. The accused therefore was psychiatrically normal, the likelihood of recurrence was extremely remote and there was no need for treatment. On balance, policy considerations favoured an acquittal.[98]

What then, should we conclude?

I submit that a more consistent and coherent framework for automatism will involve specific recognition of policy factors, and how they function to affect the outcome of verdicts. This will avoid, for instance, the somewhat ambiguous reasoning demonstrated in the judgment in *Rabey*, and the possible undefined results exhibited in the *Falconer* framework. Indeed, *Falconer* seems to go a step further than *Rabey*, and when it functions correctly, it yields results that seem to align well with a conception of adjudication that embraces clarity and stability; clarity, in the sense that both sides of a particular case can understand the course of adjudication involved in psychological blow.

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[97] *Ibid.*
[98] Stuart, *supra* note 20, at 94-95.

automatism; and stability, which is a desirable feature in any system of law. Of course, there is much work to be done with respect to deciding how best to affix those policy factors to the framework.

The Ordinary Person Test

So far, we have examined psychological blow automatism from a more or less *formal* perspective – the mechanical interplay between its component parts. We now move into a more *substantial* evaluation; specifically, we want to analyze one of those parts – the ordinary person test – and assess it from a normative (in addition to a functional) standpoint. Obviously, the success of any framework will depend on the substantive building blocks that comprise it, and the ordinary person test is a crucial and, we will see, complicated area of the law. There are competing interests, and arguments can be advanced on different sides. Let us begin by examining how the test functions.

Both *Falconer* and *Rabey* strive to promote an objective standard for deciding whether a given individual reacted as a "normal" person would have reacted. The standard functions as a yardstick, and it asks whether the power of self-control (e.g. to withstand psychological trauma) of the individual in question is similar to that of an "ordinary" person. Spelled out more clearly in *Falconer*, the "ordinary person is assumed to be a person of normal temperament and self-control."[99] In *Rabey*, Martin J.A. implies that we should assess "extraordinary external events" in terms of how they "affect the average normal person".[100]

This characterizes abstractly the notion of an (hypothetical) ordinary person. Note that the attention at this point is directed away from the accused. Our next step,

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[99] *Falconer, supra* note 8. See also ALJR 65, at 20 (1990).
[100] (1977) 37 C.C.C. 2d (461) at 483. See also Stuart and Delisle, *supra* note 13, at 673.

then, is to disregard the personal characteristics of the accused, insofar as we are conceptualizing this ordinary person. As in *Falconer*, "the psychotic, neurotic or emotional state of the accused at the time is immaterial"[101]; and in *Rabey*, no "reference to the subjective make-up of the person exposed to such experience"[102] is to be considered. It seems likely that the rationale behind this direction is that to consider the personal characteristics of the accused, *in conceptualizing the notion of an ordinary person*, would be to deprive that notion of the very objectivity for which the test strives.[103] Presumably, imbuing the ordinary person with a highly precarious emotional state (for instance) could possibly make that (no longer) ordinary person react differently.

Now, one has a conceptualization of this ordinary person, though it is important to disregard the personal psychological characteristics of the accused. Next, one has to figure out the *magnitude* or *gravity* of the psychological blow. In order to do this, one needs to take into account what the High Court calls the "objective circumstances" surrounding the accused.[104] To take *Falconer* as an example, "the pertinent circumstances of [her] relationship could [help] the jury determine whether an ordinary person would have succumbed to a state of dissociation similar to that which Mrs. Falconer claims overtook her on that day."[105] Although there does not seem to be any similarly explicit direction in *Rabey*, I suspect consideration of "extraordinary external events" affecting "the average normal person" would usher in consideration of the

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[101] *Falconer, supra* note 8. See also ALJR 65, at 32 (1990).
[102] *Rabey, supra* note 94.
[103] Stanley Yeo (*supra* note 81) suggests that these characteristics are "irrelevant", and indeed the High Court ruling says "not relevant". But it seems to me that what is implied by the High Court is not that the characteristics are irrelevant in the sense that they do not matter; rather, it is likely that they are not relevant, *for if they were, different results of the ordinary person test would ensue.*
[104] *Falconer, supra* note 8. See also ALJR 65, at 32 (1990).
[105] *Ibid.*

objective circumstances of the accused. For one, Martin J.A. tells us specifically to ignore the "subjective make-up" of the accused, but he does not include any notion of objective circumstances in his exclusion criteria. But further, it would be difficult to conduct the ordinary person test without considering the objective circumstances of the situation at the time of the event. Take two "ordinary" persons, A and B: it will probably be a much more profound shock for A than for B to learn that X has been abusing person Y, if Y happens to be A's daughter, and is only a distant relative of B. A good formulation which sums up what a judicial direction to the jury should look like comes from the High Court:

> Speaking generally, the issue for the jury on this aspect of the case would be whether an ordinary woman of Mrs. Falconer's age and circumstances, who had been subjected to the history of violence which she alleged, who had recently discovered that her husband had sexually assaulted their daughters, who knew that criminal charges had been laid against her husband in respect of these matters and who was separated from her husband as the result of his relationship with another woman, would have entered a state of dissociation as the result of the incidents which occurred on the day of the shooting.[106]

This, essentially, comprises the substance of the ordinary person test in the Australian and Canadian courts. Let us now move on to a discussion of some of the issues surrounding it.

What are the merits of seeking an objective standard using the ordinary person test? Well, firstly, there seems to be an implicit appeal in postulating an objective standard for the ordinary person test. This gives the notion of consistency, which is obviously a desirable virtue in the law. Without the ordinary person test, it is argued, adjudication across cases of psychological blow automatism will resemble more of an

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[106] *Ibid.*

arbitrary, case-by-case approach. The objective standard minimizes the chances that different defendants with similar circumstances will receive different judgments. A related benefit is that one has a standard upon which one can decide whether or not it is safe to acquit. According to Yeo:

> The suggestion here is that the criterion of normality should be used to assess whether the accused suffers from mental abnormality. A finding of normal self-control would accordingly render it safe to acquit entirely since the accused is "like everyone else"...[107]

The objective standard draws a straight line across all cases.

Another purported benefit of the ordinary person test has to do with the aims of public policy. Namely, it works to ensure that successful defences of sane automatism are reserved for those who are supposed or intended to pass the test. Keep in mind, however, that a "pass" or "fail" does not map directly onto some psychiatric notion of sane and insane automatism; we must also remember the interplay among policy factors and the internal/external distinction – basically, we must remember that it is a legal definition. Nevertheless, a finding of sane automatism is most likely precluded if someone fails to pass the ordinary person test. Yeo highlights the test's rigidity:

> The test imposes a rather formidable obstacle to a successful plea of sane automatism since the accused is measured against a person of ordinary self-control or temperament. As such, any subjective mental conditions of the accused are discounted and indeed, if present, could be evidence of insanity.[108]

Yet, despite the apparent hardship that faces an accused who wishes to take this tack, Yeo makes the claim that those who pass the test in some sense *should* pass the test:

> This is not to say that a case of sane automatism can never be made out; when a such a case occurs the law should have no hesitation in ensuring

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[107] Yeo, *supra* note 81, at 4.
[108] *Ibid*, at 22.

> the unconditional return of the accused to society. However, the test does prevent a spate of claims of sane automatism...[109]

Indeed, this is at least one merit of a cautious approach. But there are other issues to consider, arguments against the ordinary person test that need to be canvassed. It is to these issues that we now turn.

Criticisms

There are a number of positive features about the ordinary person test, such that it has a framework in place that attempts to adjudicate cases fairly and consistently. But there are a few caveats – difficulties that call into question the utility or fairness of the test. I do not contend that these are fatal objections, but we should at least look to these areas as issues for future consideration.

A common concern[110] is that it is hard to imagine how one can take a hypothetical "ordinary person" with an ordinary temperament, and neatly deposit him or her into the context of an accused's objective circumstances, and (explicitly or implicitly) consider, if not the *particular* accused's emotional or cognitive state, at least some emotional or cognitive state in some sense appropriate or germane to the circumstances, and then make a meaningful and/or accurate claim about how an ordinary person would respond. Secondly, there is the danger that, by cleaving away the psychological characteristics of the accused, one is likely to negatively affect the sane accused and positively affect the insane accused; that is, someone who *should* pass the ordinary person test does not, while someone who *should not* pass the ordinary person test does.

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[109] *Ibid.*

[110] For instance, see Yeo, *supra* note 81; Febbo et al., *supra* note 9; and Harding, *supra* note 86.

To begin, note how the test tries to draw a sharp distinction between the subjective personal characteristics of the accused, characteristics which should not be considered as far as the test is concerned; and the "objective" circumstances of the accused, those that *can* be considered to determine the gravity or magnitude of the psychological blow. There are some concerns with this approach: One issue is that talk of someone's circumstances will find its way *back* into the question of someone's characteristics. Although the ordinary person test was designed to gauge the gravity of a psychological blow, it seems that the magnitude of a blow depends, at least in part, on the subjective characteristics of a person, and thus our notion of the ordinary person is not rich enough to explain the characteristics that will supervene on the circumstances. To be sure, one of the goals of the test is to come up with an objective standard precisely by precluding consideration of one's subjective characteristics, but the issue of how effective or fair this approach is remains up for debate. Stanley Yeo, speaking on provocation (though the same can be said for psychological blow automatism), highlights one of the problems:

> This [approach] is inconsistent with the opinion of behavioural scientists that the accused's personality must be taken as a whole and cannot be dissected into the way he or she would view some provocative conduct [or psychological blow] on the one hand and the way he or she would respond emotionally to that conduct [or blow] on the other.[111]

It seems a challenge to accurately evaluate the magnitude of a psychological blow, if all one has to go on is an accused's objective circumstances. To take an example, let us consider in more detail the case of Mary Falconer. She had been in an unsuccessful marriage to her husband, Gordon, for over thirty years. There was evidence of a long history of violence – both physical and emotional – toward her by him, as well as

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[111] Yeo, *supra* note 81, at 7.

evidence that the husband was having an affair with another woman. A few months before the shooting, Mrs. Falconer found out that the husband had sexually abused two of their daughters. At this point, she filed for divorce and brought criminal charges against the husband. According to Febbo et al., "[t]hese events caused her considerable emotional and mental stress."[112] Additionally, she believed that her husband might harm her or her daughters.[113]

Now, on the day of the shooting, Mr. Falconer came to his wife's house unbidden and unexpectedly and, it was alleged, physically and sexually assaulted her. As well, he taunted her about his coming court case, stating that the allegations of sexual abuse would not be believed.[114] Mr. Falconer alluded to the fact that "Erin", their once foster child, was not believed when she alleged that the Falconer's adopted son and a second man, who was never identified, assaulted her. Consequently, this "sparked a belief in Mrs. Falconer that her husband must have been the 'second man' Erin had always said had assaulted her."[115]

At that point, Mrs. Falconer attempted to walk away from her husband, but he followed, continuing to taunt her. Mrs. Falconer's recollection of the events interrupts when her husband reaches out toward her; the next thing she remembered was being on the floor with her shotgun beside her and her dead husband close by.[116]

Now, let us consider these events in the context of the test. I have already mentioned what the High Court suggested was relevant for the jury's consideration (see

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[112] Febbo et al., *supra* note 9, at 46.
[113] *Ibid.*
[114] *Ibid.*
[115] *Ibid.*
[116] *Ibid.*

supra note 103), and it is *prima facie* not difficult to understand what they are asking. The main question is how well it *can* be done, in the spirit in which the High Court envisioned.

We want to determine whether a particular psychological blow was of sufficient weight such that an ordinary person may have responded in a like manner (to the accused). But note the difficulty in assessing the magnitude or gravity of the psychological blow without taking into account certain subjective states that would help determine that magnitude. Given Mrs. Falconer's circumstances, for instance, it seems likely that there may have been a "compounding" effect on her emotional state, an effect directly relevant to the question of the size of the psychological blow. It is important to remember that this fact *in particular* leaves open the question of the accused's sanity – evidence of higher emotional stress may or may not indicate mental disorder, just as evidence of lower emotional stress may or may not indicate mental disorder. Equally important is the fact that "ordinary" people are subject to various vicissitudes of emotion within the realm of sanity. Nevertheless, in order to understand the magnitude of the psychological blow, there is going to be a certain degree of conjecturing with respect to the ordinary person's mental state. Now, a number of important events happened in the months preceding the Falconer shooting, and if we are to maintain some sort of procedural rigour, then we will need to understand the ordinary person as continuing through times t_1, t_2, t_3, and so on, corresponding to significant events during the period leading up to the shooting. The psychological reaction of Mary Falconer at t_2 (e.g., an instance of physical abuse), for instance, may influence her psychological reaction at t_3 (e.g., discovering that her husband sexually abused their daughters). Proceeding step by

step in this way seems preferable to collapsing the temporal flow and location of the events (which contribute to those objective circumstances the High Court refers to), and then making an assessment of the ordinary person's reaction. So, if the day of the shooting (and all the attendant events of *that* day) occurred at t_2 rather than at t_5, then it stands to reason that our ordinary person is likely going to *feel* that psychological blow differently. Why? Because there are fewer (relevant) objective circumstances, for one, and because the causal "build-up" is smaller. So, we can see how a certain, albeit limited, subjective make-up is developing for this ordinary person. And this subjective make-up determines in part the gravity of the psychological blow. By fiat, whatever responses this person makes at any point in the test will be "normal" responses. If they were "abnormal", the test would not be working as it should be.

So, in the case of Falconer, we will have come up with a reasonably sophisticated subjective personal makeup for our "ordinary person" – remember that we need this subjective makeup in order to understand the magnitude of the psychological blow. But how accurately does our ordinary person reflect what would happen to an ordinary person in Mrs. Falconer's circumstances? Is the subjective makeup of the ordinary person an accurate product of all of Mrs. Falconer's objective circumstances, or are there circumstances that were missed that could have contributed (and perhaps *did* contribute to Mrs. Falconer's subjective state) to one's assessment of the magnitude of the psychological blow? To be sure, it's a matter for speculation, but an important one, especially in cases such as Falconer, which are the product of a long history of abuse.

One must remember that there is a complex connection between one's personality and one's circumstances. The interplay between automatism and any particular person

seems difficult to fully assess and appreciate by segmenting aspects of one's personality and then making a determination as to whether that person's response was abnormal. "[A] compartmentalised notion of human personality," according to Harding, "...to most psychiatrists must seem absurd".[117] We can look at this in two ways: from the perspective of the accused, in that his or her reaction to the psychological blow must be considered holistically; and also from the perspective of our "ordinary person", in that he or she needs more "substance" or "personality" in order for us to understand and assess his or her reaction. As Febbo et al. recognise,

> The problem for an accused person when faced with meeting such an objective standard is that it is difficult to say *in a particular case* whether automatism can be explained without recourse to the person's subjective makeup (or temperament).[118] [italics mine]

This concern is expressed in Dickson J.'s dissenting judgement in *Rabey*[119]:

> I cannot accept the notion that an extraordinary external event, i.e., an intense emotional shock, can cause a state of dissociation or automatism if and only if all normal persons subjected to that sort of shock would react in that way.

Here, Dickson J. is commenting on both the phenomenon of automatism, and the legal treatment of it *vis-à-vis* the ordinary person test. What concerns Dickson J. is that a person *may* enter a state of (sane) automatism, though other certain "normal" persons – real, or hypothesized (upon application of the test) – may not[120]:

> [A]n objective standard is contemplated for one of the possible causes of automatism, namely, psychological blow, leaving intact the subjective standard for other causes of automatism, such as physical blow or reaction to drugs...As in all other aspects of the criminal law...the inquiry is

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[117] Harding, *supra* note 86, at 74.
[118] Febbo et al., *supra* note 9, at 51.
[119] [1980] 2 S.C.R. 513. See also Stuart and Delisle, *supra* note 13, at 677.
[120] Dickson J. also makes the claim that the test is not consistent when compared to other causes of automatism (though this claim is beyond the scope of the present discussion).

> directed to the accused's state of mind. It is his subjective mental condition with which the law is concerned. If he has a brittle skull and sustains a concussion which causes him to run amok, he has a valid defence of automatism. If he has an irregular metabolism which induced an unanticipated and violent reaction to a drug, he will not be responsible for his acts. If he is driven into shock and unconsciousness by an emotional blow, and was susceptible to that reaction but has no disease, there is no reason in principle why a plea of [sane] automatism should not be available. The fact that other people would not have reacted as he did should not obscure the reality that the external psychological blow did cause a loss of consciousness. A person's subjective reaction, in the absence of any other medical or factual evidence supportive of insanity, should not put him into the category of persons legally insane. Nor am I prepared to accept the proposition...that whether an automatic state is an insane reaction or a sane reaction may depend upon the intensity of the shock.[121]

What is important to remember here is that the magnitude of the blow *for the accused* will depend on that person's subjective characteristics. Whereas the "brittleness" of one's skull may in part determine whether one sustains a concussion and "runs amok", the subjective makeup of an accused determines in part the gravity of the psychological blow. Obviously, if one is psychologically "brittle" *in every respect*, then that may very well be evidence of persistent, internal mental dysfunction, and thus the issue of insanity is relevant. But I don't think this is the point that Dickson J. is making. It seems, rather, that a person may be "susceptible" to a particular psychological blow, though not others, and *not* have a persistent psychological dysfunction, though the ordinary person test may suggest that he does.

The gravity of the psychological blow for the ordinary person may not be the same as it is for the accused, and the magnitude of one may not accurately represent the magnitude of the other. This is by design: given that the subjective characteristics for the ordinary person are necessarily different than the accused's, taking the magnitude of

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[121] *Supra* note 119.

the psychological blow in one circumstance and inserting it into another deprives it of that magnitude. And this does not align well with one of the original goals of the test; namely, to understand the nature of the blow *for the accused.* As noted by the High Court in Falconer:

> The problem of classification in a case of transient malfunction of the mind precipitated by psychological trauma lies in the difficulty of choosing between the reciprocal factors – the trauma and the natural susceptibility of the mind to affectation by psychological trauma – as the cause of the malfunction.[122]

Even if the outcomes are the same between the real and the imaginary accused, we need to realize that information about the latter is going to tell us limited information about the former. This issue, at the very least, warrants further consideration.

The second criticism concerns the causal effect of the objective circumstances. Earlier, I pointed out that a separate psychological makeup is created for the hypothetical person. Though we cannot consider the accused's subjective mental state at the time of the dissociation, we do need to consider at least *a* subjective mental state (in light of the circumstances) to understand if the ordinary person *could* have gone into a state of automatism. Now, I say "could" because of course no automatic state is guaranteed to ensue in any circumstance, no matter how grave. Legally and medically, automatism is never "normal". Consider Harding:

> The policy underlying [Martin J.A.'s judgment] is revealed clearly when [he] refers to cases of extreme emotional or psychological shock where anyone in his view might well react dissociatively – for example, being involved in a serious accident, being the intended victim of a murderous attack, seeing a loved one murdered or seriously assaulted. *In such cases, it may well be that dissociation is, after all, a state of sanity rather than insanity. His Honour can thus be seen to be toying with the concept of a "reasonable dissociative reaction" – a psychiatric absurdity, one would*

[122] *Falconer, supra* note 8. See also ALJR 65, at 28 (1990).

> *think, but a very lawyerly way of keeping a new concept under firm control*[123] [italics mine]

It is entirely possible that any ordinary person would not succumb to a state of dissociation in a particular circumstance. But the structure of the test dictates that we consider whether it is possible to go into that state. And in order to do this, it seems that we must canvass the ordinary person's possible responses at each point along the causal chain. Yet, just as dissociation is not a guaranteed response, neither is any other response along that chain. What this suggests is that, in order to get a "yes, it (automatism) could happen to an ordinary person" response, we have to engage in a sort of *maximizing* exercise; that is, we must ratchet up the ordinary person's responses as high as possible (within normal bounds) before we make the final assessment. The significance is that this requirement actually seems to undermine the utility of the test. What may happen is that the accused may pass the test (because the ordinary person passed the test), despite the accused's *actual* responses, responses that would suggest he or she not pass the test. Again, this seems more likely to occur in cases that involve a long history of emotional trauma.

To return to the case of Mary Falconer, remember that a number of important events happened in the months preceding the Falconer shooting. So, we need to consider the ordinary person at time t_1, t_2, t_3, and so on. Now, in order to arrive at Harding's "reasonable dissociative reaction" at the end of the assessment, one must ascribe the maximum *reasonable* amount of stress, emotional trauma, et cetera, at each point t_n in the continuum. If this isn't done – if at point t_3, for instance, one does not ascribe a maximum reasonable amount of stress to the ordinary person – it is possible that, at the

[123] Harding, *supra* note 86, at 81-82.

end of the ordinary person test (i.e., at the point at which the actual agent enters into a state of automatism), one incorrectly finds that the ordinary person would not have entered this state. There is naturally a compounding effect on a person's mental state, and what may seem like an unreasonable response to an isolated instance of emotional abuse, may not seem unreasonable after months of repeated abuse. But, if we hold to this standard – that one must conjecture what a maximum reasonable response would be at each event – then the alternative scenario is that it is possible for an individual, who should not pass the ordinary person test, to in fact pass the test. If the accused's actual responses to each event fall short of what is considered a reasonable amount of stress, but nonetheless enters into a state of automatism at the time of the offence, then perhaps there is a higher likelihood of an underlying pathology. But again, since one cannot take into account the subjective mental states of the accused during the test, one is precluded from considering this.

Another way of looking at this issue is schematically. Let us assign a range of numbers to indicate a reasonable dissociative reaction, say, between 20 and 25. Let us also assign a range of numbers, 1 to 5, to indicate a reasonable amount of stress for any particular incident (5 indicating the most *reasonable* stress). Now, if 15 represents the minimum point at which an *ordinary* agent enters into a state of automatism, and 5 represents the maximum reasonable amount of emotional trauma for any single instance of abuse, and if in a particular scenario there were 5 instances of emotional abuse, and if there is a compounding effect such that the magnitude of the psychological blow increases after successive cases of abuse, then it follows that, in this scenario, the agent would have had to exhibit at least a 4 for each instance of abuse, in order to experience a

reasonable dissociative reaction. This is how we need to characterize the ordinary person test if we are to maintain fairness. If, in one instance of abuse, the ordinary person were hypothesized as experiencing a 3 (assuming that the other events achieved a 4) in terms of emotional stress, then the *ordinary* agent would have only reached 19 at the point that the actual agent went into a state of automatism. A 19 does not meet the threshold for automatism, and thus, the court might decide against the defendant, even though, in actual fact, she should have passed the ordinary person test. But, by maximizing the responses along the continuum, which is required so that the above mistake does not happen, the opposite scenario may result: an actual agent who only experienced 1's and 2's along the emotional continuum receives an acquittal, since the hypothetical ordinary person would enter a state of automatism under the test.

Thus, the test may negatively *or* positively affect the accused. On the one hand, its design prevents consideration of the accused's subjective mental state, and this may prove detrimental, since the factors needed to make an accurate assessment – factors that *may* or *may not* exonerate the accused – are left out. On the other hand, there is a chance that an accused, who would otherwise be considered as falling under the category of insane automatism (if his or her subjective mental state and characteristics were included), may in fact pass the ordinary person test. Of course, we can envision cases where the subjective mental state of the ordinary person maps nearly directly onto the actual subjective mental state of the accused, so that the test yields an answer consistent with what is expected of the test, but this result is not guaranteed, nor is it in any sense predictable.

Now, the preceding concern may be criticized for being too literal or too technical an interpretation of the ordinary person test. But what it should minimally do is draw our attention to the fact that there are many aspects of the accused's subjective mental state and objective circumstances that may need to be considered when one conceptualizes the concept of an *ordinary person.* The causal effect of any number of objective circumstances is difficult to ascertain with or without consideration of the accused's subjective state. A reasonable standard of adjudication should guide the search for theoretical improvement.

This chapter has examined the complex area of psychological blow automatism and the disease of mind distinction. It noted the similarities and differences between the Canadian and Australian interpretations, and outlined some of the areas in which further research is needed. As well, this chapter examined the concept of the ordinary person test, and some of its positive and negative implications for those accused who fall under the scope of the test. The next chapter begins a two-chapter discussion on theoretical models for automatism.

Chapter 4 – Michael Corrado's Theoretical Model for Automatism

The next two chapters examine two different approaches to automatism. The first approach, by Michael Corrado, centres on the notions of spontaneity and purpose; while the second, by Robert Schopp, deals with automatism from a process perspective. Both Corrado and Schopp root their ideas in action theory, and both analyses are reasonably well explained, although Schopp goes much further in his description and, it can be said, offers a more reasonable and compelling explanation in the end.

Let us begin with Corrado. For actions to be voluntary, he says, they must first originate within the actor, "and not be the outcome of a causal chain that extends outside of him." He calls this the requirement of *spontaneity*.[124] Second, the actions must be *purposive*; that is, they must be related to some purpose of the actor. Cases of automatism are cases where the actions may be purposive, but are not spontaneous. They don't originate within the actor. This nicely accommodates those cases, like Parks, where the knee-jerk response is to assume the actions were somehow voluntary.

Corrado places automatism between two extremes. On the one hand, I may commit a crime because I have been threatened with serious harm by someone if I don't. In this case, I may be excused on the basis of duress or necessity.[125] Alternatively, someone may restrain me and manipulate my arm so that my finger pulls the trigger of a gun, killing some third party. In this case, however, I have not acted at all.[126] The third option is one in which I have acted – exerted effort – but one in which I have been *caused*

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[124] Corrado, M. *Automatism and the Theory of Action*, at 1192. Emory Law Journal, 39 (1990).
[125] *Ibid*, at 1193.
[126] *Ibid.*

to make the effort.[127] Acting under hypnosis, brainwashing, or sleepwalking, while seeming to be the result of some effort (in that they don't appear to be random), does not seem to be voluntarily acting. What is generally accepted, however, in legal definitions of voluntariness, is some sort of *internal event* (e.g., volition), and some sort of resulting physical action connected to that event:

> In legal writing, there is a more or less standard definition of voluntary action. Its key features are (1) an internal event, called an effort of will, or a volition, or a determination, or something similar...(2) a physical manifestation of the internal event, generally a bodily movement or a muscular contraction; and (3) a causal connection between the two.[128]

Cases of automatism highlight what is problematic about this characterization.

Consider the following example (adapted from Corrado): a devious surgeon implants a device in my brain which allows him to control my volitions (ignore for a moment the implausible elements of this scenario). Now, by controlling my volitions, and not my bodily movements (as in the above case where someone manipulates my arm to fire a gun), he ignites in me the effort of will. And "a volition," says Corrado, "is something more than a mere desire that an event should occur; it is supposed to be the internal *push* by means of which we set the bodily movements in motion."[129] So, when the surgeon causes me to have a volition, *I* have an effort of will. If he wanted me to pick up a gun and shoot someone, I would, in a sense, choose to pick up the gun myself and pull the trigger. Now, as far as the standard legal definition of voluntariness is concerned, I have indeed acted voluntarily (though I may not be culpable, if the requisite *mens rea* is not present), for I have had an internal event (the volition), and there has been

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[127] *Ibid.*
[128] *Ibid*, at 1194.
[129] *Ibid*, at 1196.

a connected physical action as the outcome of that internal event. But, standard legal definitions notwithstanding, I have not acted voluntarily, since the evil surgeon is responsible for the internal event, the volition.

Instances of automatism, according to Corrado, are similar. The agent does not spontaneously have the volition. It is caused. Indeed, it is an interesting question to ask whether automatism causes the volition in the same way that the evil surgeon does. But for our purposes let us grant that any conditions that, "together with the appropriate laws of nature, entail the occurrence of the event,"[130] are causally sufficient. What this means, then, is that "caused actions may be voluntary under the standard definition,"[131] since there still exists a volition, a physical manifestation of it, and a connection between the two. The important task for Corrado is to establish the causal history of an action: "If the action is the outcome of a causal sequence in which the actor has no part, that actor is not responsible for his behaviour or for the resulting harm."[132]

Well, if Parks truly was sleepwalking, then, at least under Corrado's framework, he should not be held responsible (again, the issue of *mens rea* need not concern us, nor would it in this case). But, critics object, the chances that his actions were not voluntary, or at least random (that he could drive 23 kilometres, obviously responding to environmental stimuli), are virtually nil. Some internal event (volition) must have precipitated Parks' physical actions, and there must be some connection between them. Under the standard definition, at least as Corrado has construed it, Parks *was* acting voluntarily. Stuart, speaking about Canadian judicial reasoning on voluntary action,

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[130] *Ibid*, at 1200.
[131] *Ibid.*
[132] *Ibid*, at 1201.

remarks that "[t]he common thread in these approaches [to defining automatism] is that total lack of consciousness seems to be required,"[133] and thus the standard definition may accord closely with prevailing judicial sentiment (i.e., scepticism) about automatism. It should be noted, however, that Parks' acquittal survived a Supreme Court appeal, which suggests possibly that the Court's reasoning was indeed peculiar in this case. Lamer C.J.C. noted that though Parks was sleepwalking, he wasn't acting voluntarily. But this is precisely where critics might object that, given the facts of the case, Parks' actions *were*, at least in some sense, voluntary. Isabel Grant and Laura Spitz highlight the apparent tension created by ruling that Parks' actions were not voluntary:

> Parks did not strike out in a random fashion at just "anybody". Yet, no question was raised as to whether [Parks' actions] might have been the actions of a directed, if not conscious, mind, nor was any examination made of the significance of the lack of randomness suggested by Parks' actions. *If Parks' mind did not direct his twenty-three kilometre drive to a specific location, what did?*[134] [italics mine]

Corrado's solution, then, is that automatism fits into the causal framework in the same way that the evil surgeon fits into the causal framework. The volition (and the resulting physical act) was caused (somehow) by whatever caused the automatic state of sleepwalking. The volition was not spontaneous.

This lack of spontaneity, Corrado suggests, "is a better explanation of why we excuse some actions than the explanations routinely given by the courts and commentators."[135] Well, what are some of the current explanations? With respect to hypnosis, for instance, Corrado maintains that some of the common excuses include such reasons as the agent being unconscious of what he does, or that the agent is missing an

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[133] Stuart, *supra* note 20, at 84.
[134] Grant and Spitz, *supra* note 45, at 231.
[135] Corrado, *supra* note 124, at 1213.

element of *mens rea*, or that the agent's movements are not the result of volitions. And all of these excuses, he argues, are not adequate.

Lack of consciousness, for instance, seems to imply some lack of awareness of one's surroundings, yet the hypnotized agent does seem aware of his surroundings because his behaviour is responsive to them (notice the analogy with *Parks*):

> Someone who knocks a lamp off his nightstand because he flails about in his sleep may be excused because *he is unconscious of what he does*; someone who does the same thing under a hypnotic suggestion cannot be excused for the same reason.[136] [italics mine]

One may be tempted to say that the person under hypnosis obviously is not acting with full awareness, since full awareness or normal consciousness would simply mean the person is not under hypnosis. Indeed, there is a sense in which this is correct. We may grant this, but still say that the person is at least aware of his or her surroundings, and if this is so, then we may not be able to excuse the actor on the basis that his actions were performed unconsciously. Of course, this depends on which judicial interpretation of automatism the court is working under.

What about *mens rea*? Corrado wants to suggest that excuses based on a perceived lack of *mens rea* fail for a similar reason. This is because he argues that *purpose* "is not a mental attribute anyway but a quality of the action itself," and "is evident in the subject's behavior."[137] Criminal intent and knowledge may indeed be present in the hypnotized subject, even if they "may be cut off from the subject's general body of intentions and knowledge."[138] But Corrado warns that we are treading on shaky

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[136] *Ibid*, at 1214.
[137] *Ibid.*
[138] *Ibid.*

ground in measuring liability according to the intention that the agent had when he performed the action, and the rest of his spectrum of intentions:

> It would not be enough, for example, for a defendant to protest that although he intentionally killed his wife, that intention did not make sense given his other intentions. Whether he killed her on the spur of the moment, without any further purpose in mind, he is still liable for her death.[139]

In the next chapter, we will see that Schopp is encouraging us to do exactly what Corrado admonishes us not to do.

What about the third possibility? Can we excuse a defendant, acting under hypnosis, because his movements are not the products of a volition? Corrado warns that we cannot, for it is a mistake to conclude that because an action was not voluntary (in the traditional legal sense), it was not the product of a volition.[140] It is simply the case that the volition was not spontaneous in that it was caused by the hypnotist. So, even though the hypnotized or automatic agent pulls the trigger – an action that is the product of a volition – Corrado suggests that the agent is not liable since the volition was not caused by him, but by the hypnotist, or by the automatism.

Corrado's analysis of *Fulcher v. State*[141] provides a testing ground for his theory, and raises some interesting questions about judicial reasoning. The defendant, Fulcher, had severely beaten his cellmate. He claimed that he was in an automatic state during the assault. The Supreme Court of Wyoming acknowledged the defence thusly[142]:

> The defense of unconsciousness perhaps should be more precisely denominated as the defense of automatism. Automatism is the state of a person who, though capable of action, is not conscious of what he is

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[139] *Ibid*, at 1214-15.
[140] *Ibid*, at 1215.
[141] 633 P.2d 142 (Wyoming, 1981).
[142] Corrado, *supra* note 124, at 1217.

> doing. While in an automatistic state, an individual performs complex actions without an exercise of will. Because these actions are performed in a state of unconsciousness, they are involuntary. Automatistic behavior may be followed by complete or partial inability to recall the actions performed while unconscious. Thus, a person who acts automatically does so without intent, exercise of free will, or knowledge of the act.[143]

The court's reasoning, Corrado suggests, does not "fit the facts".[144] If the defendant had indeed been unconscious, then the explanation would have supported the facts. Evidence to the contrary, however, supports the contention that Fulcher was aware of his surroundings, and did perform purposive actions. For one, a jailor heard commotion and went to inspect. When he arrived at Fulcher's cell the noise stopped, but as soon as the jailor started to leave, he noticed Fulcher "kicking and stomping" on the victim's head.[145] This suggests that Fulcher was indeed aware of his surroundings and, since it appears his foot was not hitting the victim's head by accident, was acting purposively. Do these facts support the court's claim that he was in a "state of unconsciousness"? Probably not, based on most definitions of unconsciousness, and at least not in the way most of us perceive unconsciousness. Obviously the court would not make this kind of mistake, so it follows that, either the court was operating on a different definition of unconsciousness, or (having not considered thoroughly the nature of consciousness) simply needed an avenue for which to channel defendants who find themselves in this unique situation.

Suppose that, here, the court equated unconsciousness (at least minimally) with persons who "perform" actions though they are not "conscious" of performing them. One possibility to consider is that the sense in which they used "unconsciousness" was

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[143] *Supra* note 141, at 145.
[144] Corrado, *supra* note 124, at 1217.
[145] *Supra* note 141, at 143.

one in which the actor was unconscious of performing the action, though conscious of other things. Well, for one, is there any reason to suspect that, at least in this particular case, the defendant was only conscious on a level other than that level where he would have been aware of "kicking and stomping" on the victim's head? It seems unlikely, especially since the defendant refrained from the assault when the jailor came to inspect. And further, to proceed along this line of assessment – namely, on which levels of consciousness one is operating – will cause myriad practical and theoretical problems. Anyone raising the automatism defence will be inclined to take this line of argument – that they were not conscious, at least on the level concerning where *actus reus* can be ascribed. And it would seem to be a daunting task for the defendant to establish that he was indeed unconscious *on that level.*[146]

Even if it were the case that one could table a theoretical model on which voluntariness or *mens rea* were negatived because the actor was not conscious of the proscribed act, yet conscious on some other level, it seems that, *ceteris parabus*, the course of adjudication would remain the same, based on a simpler theoretic model. Suppose it were the case that, under this "levels of consciousness" model I am suggesting, a defendant successfully proved that he was not aware of committing the proscribed act (on whatever level it was that he committed it). Then, we would not convict, since he did not fulfill one or both of the *actus reus* and *mens rea* components required for responsibility. Next, consider the same case, except that the only requirement is one of the defendant establishing that he was in a state of automatism at

[146] This problem holds true for the prosecution as well: in a case of *sane automatism*, how difficult would it be for the prosecution to show that the accused was acting voluntarily *on a specific level of consciousness*?

the time of the proscribed act. Again, if he successfully proves this, we would not convict, though yet to be determined would be whether the case was one of sane or insane automatism; however, in either case, this second determination would not depend on the theoretic model (so described) that we used to adjudicate. It is doubtful that the court in *Fulcher* was considering a definition of consciousness such as the one I have just proposed. The case, according to Corrado, "is illustrative of the way in which courts have grappled with [automatism]."[147]

Under Corrado's model, however, Fulcher can be seen as lacking spontaneity. This fact carries the explanatory power of Corrado's theory. Fulcher's movements are suggestive of purposive action; that is, he performed his actions for a purpose (e.g., to kick his cellmate's head), and the actions were seemingly ignited by an effort of will. Under the standard definition, there was an internal event, and a physical manifestation of that event, and a causal connection between the two. So, in order to avoid the charge that the actions were voluntary, Corrado appeals to the fact that the actions were part of a causal sequence that originated outside of Fulcher, the actions were not spontaneous.

To this point, Corrado's theory of automatism appears to provide a *prima facie* plausible, or at least interesting, explanation of how certain agents may perform actions that appear to be voluntary, yet nonetheless are not because the actions lack spontaneity.

Criticisms

Now, there are indeed some conceptual difficulties that one has to sort through with Corrado. His account may seem initially compelling, especially when we are presented with conditions such as hypnotism, and clever examples such as the "malicious surgeon".

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[147] Corrado, *supra* note 124, at 1216.

But upon closer inspection there is what appears to be, at best, confusion. Nevertheless, there is a reason for this lengthy exposition, beyond suggesting one implausible model of automatism...

Let us begin with a perhaps more obvious difficulty:

> If it is the case for Corrado that an action is not voluntary when "the act of will itself is caused by something beyond the actor's control," then how does Corrado account for other causal sequences, characteristic in some sense of "normal action", which also seem to originate with factors beyond the actor's control? [148]

For instance, to take a purely hypothetical example, agent A is driving down an unfamiliar road on which is situated, a few blocks ahead, his favourite fast-food restaurant. Before A sees the restaurant, the smell of it reaches his olfactory sense-organ, and thus A searches for the source of the smell; however, while A is scanning the buildings for the familiar logo, he fails to notice that the traffic ahead of him has come to a stop. He slams into the back of another car.

Let us look at this in terms of Corrado's notion of spontaneity. At the very least, we will see some degree of ambiguity. First, what would be the act of will in my example? I submit that it is probably something similar to initiating the reconnaissance for the fast-food sign. And, in keeping with Hart's important point that we don't "exert effort" for every act of will that is ours, we can suggest either that agent A decided to search for the logo, or that agent A automatically began to search for the logo.

So, how is this example different from Corrado's examples of hypnotism and automatism, or the example of the malicious surgeon? The surgeon "trigger[s] in the

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[148] I thank Brenda Baker for pointing out "the obvious" to me.

[agent] the effort of will that he desires [the agent] to have."[149] Likewise, the smell of the food triggers in the agent his volition, effort of will, etc. to search for its source. Similarly, "what distinguishes action under suggestion [i.e., hypnotism] from other sorts of action is not the lack of purpose, but rather the lack of spontaneity..."[150] And again, agent A's action may be distinguished on the grounds that it too lacks spontaneity. Finally, "[c]ases like sleepwalking and epilepsy [cases of automatism]...are somewhat more satisfactorily described, although not perfectly, as instances in which the actor's volition was caused or in which spontaneity is lacking."[151] We have already seen the analogy.

Before proceeding, I would like to point out one possible objection, which can be dispelled by explaining what it means for something to be considered an action. In the fast-food example, one might object that A's purpose was to find the source of the smell, and therefore it seems that hitting the back of the car may not have been an action of his. But, if we accept Alvin Goldman's view of acts[152], as does Corrado and Robert Schopp[153], we see that A's hitting the back of the car is indeed an action of A. Essentially, Goldman would argue that hitting the back of the car was an act in a causal chain, ultimately derived from what he calls a *basic act*, such as deciding to search for the source of the smell. In this case, Goldman would argue, the act of hitting the car was performed perhaps negligently, in that the agent did not countenance the possibility of an

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[149] Corrado, *supra* note 124, at 1199.
[150] *Ibid*, at 1215.
[151] *Ibid*, at 1214-1215.
[152] Goldman, A. *A Theory of Human Action*, at 10 (Princeton: Princeton University Press, 1970).
[153] See chapter 5.

accident by taking his eyes off of the road. We will examine Goldman's theory in more detail in chapter 5.

What is necessary for something to be considered an action is that, at least, it must be (to borrow Corrado's phrase) "rooted in purpose". Note that there are many instances in ordinary language where we may be apt to attach the word "action" to something that, at least under the definition we are working with, is not really an action. For instance, you may want to say that, when you fell out of the top bunk in your sleep at summer camp last year, you did something – an action occurred. And in a wide sense it did. Something "happened".[154] But we want a narrower definition of action, one which makes sense from a legal perspective. We wouldn't want to be held legally responsible (considerations of negligence, perhaps, aside) for falling out of the bunk and landing on our cabin-mate's forearm, breaking it in the process. So, from the larger set of "happenings", we can identify a subset, "actions", that are done intentionally, purposely, or that are done *in the process of* doing something intentionally, purposely. Now, why the latter? If it is hard to come to terms with the idea that happenings can be actions even without purpose, perhaps an example attempting to show the converse – that happenings without purpose cannot be actions – will clarify the distinction.

Say, for instance, that agents B and C are walking down a hallway at the end of which is a door. B tries to open the door, but it seems to be jammed. While B pulls against the door handle with all of her strength, C stands quietly behind. All of a sudden the door releases, and B's elbow comes flying back into the side of C's head, knocking

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[154] Corrado wants to use the word "doing" or "doings" as naming the set from which actions can be derived. I find it hard, however, to think of (to borrow Corrado's example) being shorter than my uncle as something I "do". I prefer to think of the set as "happenings". Thus, being shorter than my uncle is just something that "happens".

him down. Now, even though B's purpose was something to the effect of un-jamming the door, it may be somewhat difficult to maintain the idea that one particular "happening" – namely, B's elbow connecting with C's head – was not an action: it was done in the process of doing something intentionally.[155] It is important to remember that this is primarily a semantic distinction we are making, and we are drawing the line along legal grounds. But I do not think this line ventures too far from our ordinary, everyday ascription.

There is one other reason why it makes sense to view these events as actions without explicit purpose (but rooted in purpose). In cases of strict liability we need to be able to assign responsibility even without purpose. So, for instance, if someone fails to stop at a stop sign and "T-bones" another vehicle, it would not be sufficient for that person to say he did not see the stop sign. In other words, even if he did not purposely (though the action may be rooted in purpose) or voluntarily run the stop sign, he is still to be held responsible for the "action". If no action occurred, it would be difficult to justify assigning blame.[156]

So, if one views "actions" in this sense, one will be able to say (returning to the example) that A's hitting the back of the car is an action. It is "rooted in purpose,"[157] and is an outcome one is responsible for. With some degree of precision, one can say that it

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[155] This particular action is not explicitly voluntary; it is an unintended action. B's intended action was to un-jam the door, and as such is a voluntary action. Note, however, that the action of B's elbow hitting C's head is considered weakly intentional according to Goldman, as it is generated from a basic act.

[156] There are certain instances in which one *can* be held responsible for an act of omission. So, if someone who is prone to epileptic seizures chooses to drive a vehicle, has a seizure while driving the vehicle, and hits a pedestrian, then that person may be held responsible for what some would call an "involuntary" act. Others, such as Stuart (*supra* note 20, at 72), suggest that the "problem of responsibility for an omission may legitimately be avoided by characterizing the act rather as one of commission on the basis that there was an earlier positive act and the conduct should be viewed as continuous."

[157] Corrado, *supra* note 124, at 1212.

was A's purpose to find the location of the fast-food restaurant. Hitting the back of the car was done *in the process of* A's search.

Now, let us return to the original question: how are Corrado's examples different from my example? If there is a difference, I do not think it has to do with automatism lacking spontaneity, and agent A (in my example) not lacking spontaneity. In both situations, the so-called volitions are caused by something that originates outside the agents. At this point, it might be useful to keep in mind that I am using "outside" very loosely (at least for now). In one sense, it may very well be an external physical cause, such as a particular smell, a concussion, or an overdose of insulin. But in another sense "outside" simply means caused, non-spontaneous (if you like), extrinsic to the normal workings of consciousness, et cetera. This helps to accommodate less clear-cut cases such as those involving psychological blow automatism, or automatism as a result of an epileptic *not* taking his insulin. Regardless, it seems that Corrado cannot base his distinction only on whether or not a volition is spontaneous.

Unfortunately, this is precisely the distinction with which Corrado is primarily pre-occupied in his paper. Now, in fairness to Corrado, it should be noted that he does attempt to carve out an explanation of spontaneity in anticipation of this kind of objection, but the explanation remains largely inconclusive:

> Fortunately, our ability to identify the phenomenon exceeds our ability to define it: we know generally when what someone did was up to him, and when it was not. It will be enough for our purposes to require that someone acts spontaneously only when what he does is up to him, and to make note of the fact that spontaneity is defeated both by evidence of causation by prior events and by evidence of randomness.[158]

It seems Corrado himself is unwilling, or unable, to take a decisive stance.

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[158] *Ibid*, at 1227.

Now let us turn to a different problem. Consider my previous objection:

> If it is the case for Corrado that an action is not voluntary when "the act of will itself is caused by something beyond the actor's control," then how does Corrado account for other causal sequences, characteristic in some sense of "normal action", which also seem to originate with factors beyond the actor's control?

So far, I have talked about causal sequences that originate or extend outside of the agent. Now I will focus on the notion of "control". For Corrado, "[a]utomatic actions...are not events whose happening is within the actor's control...he was caused to undertake them and had *no say* in the matter. [italics mine]"[159] From this perspective, Corrado's account seems ambiguous at least.

Adding to his notion of non-spontaneity, Corrado suggests that the actor in an automatic state has no control over his actions. No control? Is this perhaps too strong? Or is it what is needed for Corrado to link the notions of "control" and "spontaneity"; that is, to posit a less demanding notion of control (i.e. less than *no control*) would undermine the foundation on which spontaneity rests. When one examines the various manifestations of automatic behaviour seen in case law, it seems a less restrictive notion of control is a more accurate description of much of that behaviour; that is, the agent seems to have *some* control. Parks, for instance, had *some* control of the vehicle; Fulcher seems to have had some control over his actions. To be sure, in some instances non-spontaneity and lack of control align reasonably well with automatism. We may be able to attribute non-spontaneity to someone who is clearly sleepwalking when he performs some act, or someone who performs an act while coming out of an epileptic seizure. And even though these cases are debatable, we can at least see how, in some way, the causal

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[159] *Ibid*, at 1221.

sequence originated outside of the agent, and more importantly, how the agent did not have control over his actions. If someone goes to sleep, or goes into a seizure, it would be hard to prove, let alone believe, that the individual saw the automatic state coming, and could have averted it.

But what happens to control, and therefore spontaneity, when the automatic state is not as easily pinpointed as the source of the "control" (as opposed to "normal", conscious control) in the causal chain? For instance, what happens in cases where the individual does seem to have a choice, or at least it appears that the individual has some degree of control? In *Rabey*, for instance, was the volition that led to the attack caused by Rabey receiving the news from Miss X that he was just "a friend"? We also have to remember that Rabey did respond verbally to Miss X during the attack, and to a witness immediately after the attack. Now, this doesn't *necessarily* negate Corrado's connection between automatism and a lack of control, but we should compare this situation to possibly *stricter* forms of non-control, such as reflex actions, sleepwalking (though some sleepwalkers do also talk), convulsions, et cetera.

Remember, Corrado wants to tag the automatism as dictating the volitions that the agent has. If we look across the continuum of automatic behaviour, it at least seems worthy of investigation that some agents in a state of automatism manifest what seem to be greater degrees of control. If this turns out to be true, then Corrado's argument that the agent's volitions originate outside the agent is suspect. This also relates back to our earlier criticism that all sorts of volitions, if construed under Corrado's model, seem to originate outside of the agent. On one end we have the person who smells the fast food, and experiences the volition of looking for the restaurant, and on the other end we have a

case of reflex action after an epileptic seizure. Following Corrado's model, it seems we need to say that neither agent had control over his or her actions. But of course, we don't want to say this, so what tool in Corrado's model differentiates here?

This chapter has examined Michael Corrado's theoretical model for automatism. Although Corrado offers an interesting thesis, there are some conceptual difficulties that he needs to address. We have discovered two main problems here: First, the problem of differentiating spontaneity and non-spontaneity in cases that extend beyond those of automatism, hypnosis, and the like. And second, the problem of Corrado's notion of non-control, and how it potentially falters because a strict notion is needed for his agents to lack spontaneity. The next chapter will examine another thesis on automatism, presented by Robert Schopp. This model argues that automatic agents are not responsible for their actions because they don't have access to their complete spectrum of wants and beliefs.

Chapter 5 – Robert Schopp's Theoretical Model for Automatism

Robert Schopp has advanced a particularly insightful model for automatism, finding its roots primarily in action theory. And whereas Corrado's account seems to leave a number of questions unanswered, or at least up for speculation, Schopp provides a reasonably trenchant analysis of the legal and theoretical territory in automatism. This by no means implies that his theory is perfectly sound, or practicable in the courts, but there are many aspects of it – his theory – that raise interesting questions.

I will begin by outlining Schopp's model of automatism, including a description of the action theory as well as the theory of behaviour upon which he relies. Next I will apply his model to certain cases we have previously discussed, followed by an examination of some of the virtues and shortcomings of the theory.

It might be helpful to note at the outset that Schopp develops an argument for automatism that is rooted in action and, as far as offence elements go in the courts, finds its utility in the *actus reus* component of the law. Schopp incorporates Alvin Goldman's theory of action[160] into his account of automatism. Essentially, Goldman "individuates actions as a particular person's exemplifying an act-type at a particular time."[161] In other words, an *act-type*, for instance such as moving one's arm, pushing an iron, or ironing a shirt, is something that can be done (exemplified) by a particular person at a particular time. An *act-token* is the actual instantiation of an act-type by a particular person at a particular time. For example, I performed, or exemplified, last Saturday, the act-type of ironing a shirt. And that *particular* action – last Saturday, performed by *me* – is an act-token.

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[160] Goldman, *supra* note 152.
[161] Schopp, *supra* note 18, at 86.

An act-token is identical with another act-token only "if they consist of the same actor's exemplifying the same act-type at the same time."[162] So, my moving my arm and my ironing my shirt at a particular time t_1 are in fact two different act tokens, exemplifying two different act-types. This description characterizes what Schopp and Goldman refer to as *level generation.*[163] That is, my moving my arm (A_1) under the conditions (C) that I have an iron in my hand and a shirt on the ironing board, entails or *generates* my pushing an iron (A_2), which generates my ironing my shirt (A_3) – A_1, A_2, and A_3 occur simultaneously, though one does not necessarily have to have knowledge of all of the act-tokens involved (e.g. One probably does not reflect on A_2 during the act of ironing a shirt).

Now, let us distinguish *generation* from *causation*. As I have noted, generational relations among act-tokens occur simultaneously, and occur under certain conditions (e.g., having an iron in one's hand). Causal relations, under Goldman's theory, occur sequentially. Schopp states that "When A_1 causes A_2, the two acts occur sequentially and the first gives rise to the second, but it does not constitute the second."[164] So, suppose that I ironed my shirt by pushing an iron with my arm, but in the process of doing so I burned my hand and went to the sink. In this case, my burning my hand and going to the sink was *caused* by my ironing my shirt which was *generated* by my pushing an iron and so forth.

Suppose we were to trace act-tokens in a generational relation back to an initial point; that initial act-token would exemplify a *basic act-type*:

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[162] *Ibid*, at 87.
[163] *Ibid*, at 88.
[164] *Ibid.*

> Basic act-types are the sort of act-property that can be exemplified at will. If an act-property is a basic act-type for S at t1, then in standard conditions as to that property, if S wanted to exemplify it, S would do so without recourse to causal or level generational knowledge.[165]

Recall that, in my example, my pushing an iron is level generated from my pushing my arm. But, my pushing my arm is not level generated from any more basic act. It may be helpful to conceptualize this in terms of *giving reasons for* performing certain actions. So, if someone were to ask me, "How did you iron your shirt?" My response might be, "I did so by pushing an iron," at which point that person might ask, "Well, how did you push the iron?" My response might then be, "By moving my arm," at which point that person might ask, "Well, how did you move your arm?" My response might then be, "Well, I just did." This characterizes the basic act-type of moving one's arm. "The central characteristic of a basic act-type," writes Schopp, "is that it is the kind of act-property that an actor can exemplify merely by deciding to, without any further knowledge."[166] Of course, there are other mechanisms that come into play in my example. There is the physiological signal from the brain which depends on action potentials among neurons, neurochemicals, and so forth, but these occur without conscious knowledge (whether one tries to conceive of them or not) and at least in this context can largely be dispensed with.

Note that basic act-types are the starting point of any and all *action-plans*. One action-plan is to iron a shirt, which begins, for the sake of argument, with the basic act of moving one's arm (though we can conceive of that basic act as being causally generated by an earlier act, say, of getting the ironing board out of the closet). And all basic act-

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[165] *Ibid*, at 89.
[166] *Ibid.*

types are "inherently intentional"; they are done *at will*. However, the want or intention of the actor is usually something, A_n, that is level generated *n* acts away from the basic act A_1 in the action plan (e.g., ironing a shirt, reading a sign, hitting a home run).[167] Now, Schopp argues that all rational individuals move from intentions to action in a "characteristic way". Consider the following summary:

> This [Goldman's] conception of action reserves an important role for the wants, beliefs, and intentions of the actor. All act-tokens are either basic act-tokens, which are inherently intentional, or they are generated from basic act-tokens under certain circumstances. Hence, all act-tokens are produced, either directly or indirectly through level-generation, by the wants and beliefs of the actor *in the characteristic way that actors' wants and beliefs cause acts.*[168] (italics mine)

This "characteristic way" relies heavily on Fred Dretske's[169] theory of behaviour "in which reasons for acting provide a causal explanation of behaviour by virtue of their nature as reasons."[170] The following description introduces some fundamental aspects of the theory.

Dretske's theory incorporates the notion that learning occurs through association. An internal state (C) represents certain actual conditions (F). So, an internal state (C) begins to associate (and "acquires") a certain movement or action (M) in certain conditions (F) if that movement (M) in those conditions "promotes success" in those conditions.[171] Eventually, through continued success of that movement or action (M) in those conditions, the internal state (C) becomes a reason (or internal cause) to do that movement in those conditions (by virtue of previous success). Discrimination occurs

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[167] *Ibid*, at 92.
[168] *Ibid*, at 91.
[169] Dretske, F. *Explaining Behavior.* (Cambridge: MIT Press, 1988).
[170] Schopp, *supra* note 18, at 120.
[171] *Ibid*, at 123.

when an actor encounters, for instance, F' in C, which evokes M, without success. Here, the actor either learns to associate F' with C', and performs M', or continues to associate F' with C, without success, eventually causing the "successful" relationship to fade, and thereby diminishing C as a *reason* for action. To take a primitive example, suppose there exists the condition (F) of being in a cold house. I experience internal state (C) of being in a cold house (which represents F). I switch on the heater (M), which warms the house. Through continued success (through switching on the heater), my internal state C, which represents F (being in a cold house), becomes a cause for M (switching on the heater). However, if I encounter F' (being in a cold house without having paid the heating bill), and I associate F' with C and perform M (without success), then either I will learn that F' represents C' (the internal state of being in a cold house without having paid the heating bill), and perform M' (say, paying the heating bill), or I will continue to represent F and F' with C, thereby diminishing the success of M. As a result, C will become less of a cause and rationalization for M.[172]

Now, the internal cause (C) can be further subdivided into beliefs (B) and desires (D).[173] This distinction is important since it accounts for situations in which one has beliefs about certain rewards (R), yet does not perform the movement (M) that is associated with those conditions (F) in which R is possible. In other words, my belief (B) that switching on the heater will warm the house (R) will elicit (M), *provided that* I desire R. So, C stands for *belief-desire sets*, and the conjunction of B and D serves as a cause for M.

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[172] *Ibid*, at 124.
[173] *Ibid*, at 124.

What is important to note about Dretske's theory is that it "does not render the actor infallible because C rationalizes M whenever it portrays M as rational in light of the actor's wants and beliefs."[174] If I am in a friend's house, and that house is cold, my act of switching on the heater may be seen as a rational act (even if the heater is broken) given my beliefs and desires. The following summary by Schopp should help to put Goldman and Dretske's theories in context:

> The actor forms an action-plan when he decides to perform a basic act in order to do a target act. The action-plan consists of the intent to perform the target act and all intentional acts...that the actor selects. When the actor acts on an action-plan, the beliefs and desires represented by that action plan cause the basic act and the rest of the [level-generated acts] in the manner that beliefs and desires characteristically cause acts by virtue of their representational content. These mental states provide a structuring cause for acts when their representational content supplies the actor with reasons that rationalize those acts as a means to satisfying a want by achieving some identified result. When an actor acts on an action-plan under ordinary conditions, his beliefs and desires cause his acts in this characteristic manner.[175]

With this framework in mind, let us now consider Schopp's model for automatism.

In many of the cases we have looked at, the defendant has had little or no recollection of the act constituting the objective elements of the offence. Mary Falconer, for instance, did not remember shooting her husband; Wayne Kenneth Rabey's recollection of events during the attack is fragmented to say the least. So, with respect to automatism, it is easy to say, for defendants and observers alike, that they (the defendants) did not know what they were doing *at the time of the act.*[176] Yet, Schopp makes the sensible claim that defendants who were unaware of what they were doing do

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[174] *Ibid*, at 128.
[175] *Ibid*, at 129.
[176] One should acknowledge that some defendants will have no recollection of performing the act, *after the fact*, because of repression or some other psychological defence mechanism.

not need the automatism or insanity defences in the first place.[177] One would expect that they would advance a failure of proof defence regarding the culpability element. "A defendant who did not know what he was doing," writes Schopp, "almost certainly did not perform the objective elements of the offence purposely, knowingly, recklessly, or negligently."[178] But here's the problem: "when one reviews the cases, there seems to be no good reason to believe that the defendants did not know what they were doing."[179] Case in point: Parks drove 23 kilometres to his in-laws'. If, as Schopp argues, a defendant's mental state is "usually inferred on the basis of evidence regarding his behavior and speech,"[180] then it may be more difficult, on balance, to say that Parks did not know what he was doing. It looks as if Parks selected an *action-plan* and acted on it. We can say the same for Rabey. At least as far as Goldman's action theory is concerned, many automatism defendants do indeed seem to know what they are doing.

The linchpin for Schopp has to do with the manner in which an agent's belief-desire set (recall Dretske) causes his or her action. Again, a normal agent acts in a *characteristic manner*, characteristic in so much as all normal agents act in that manner; namely, "the actor's wants and beliefs caused his action by virtue of their representational content as reasons for actions in the manner that reasons cause the actions of practical reasoners."[181] In cases of automatism, you may guess, the "normal causal process" is absent. Automatism involves a change in consciousness, be it termed a "clouding", "alteration", "diminishing", etc. Generally, a normal state of consciousness involves,

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[177] Schopp, *supra* note 18, at 134.
[178] *Ibid.*
[179] *Ibid.*
[180] *Ibid*, at 135.
[181] *Ibid*, at 137.

minimally, an awareness of oneself and one's environment. A clouding of consciousness means that these relationships are impaired. "This condition of partial isolation from access to orienting information," write Schopp, "is directly relevant to the process by which an actor's wants and beliefs characteristically produce his actions."[182] So, in what way does this clouding of consciousness inhibit the normal causal process?

To begin, when an agent considers an action-plan, she may choose to pursue that plan without further reflection. Schopp uses the following simple example[183]:

> I am cold and want to be warm.
>
> I can become warm by donning the sweater.
>
> (conclude) I want to don the sweater.

In this case, the agent will probably don the sweater. It is perhaps obvious that not all action plans are as simple as this. But more importantly, however, not all action-plans occur without consideration of other action-plans. Some action-plans conflict with other action plans. And herein lies the problem (according to Schopp): a person in a state of automatism does not have full (or *normal*) access to his wants or beliefs. He can only retrieve a subset of the wants and beliefs that he can normally retrieve.[184] So, for example, certain action plans that would normally be held in check by competing (or conflicting) wants and beliefs are acted upon, resulting, predictably in this context, in proscribed behaviour.

Consider another example. Suppose a student engages in the following deliberation:

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[182] *Ibid.*
[183] *Ibid*, at 138.
[184] *Ibid*, at 145.

I need to get an A on the final exam to pass the course.

I can get an A on the final exam by cheating.

(conclude) I want to cheat on the final exam.

Now, many students have been in the position of needing an A on a final exam to pass a course. And it can be said with relative certainty that many have believed that cheating on the final exam would get them an A and enable them to pass the course. However, it can also be said that most people would not act on the conclusion; that is, to cheat on the final exam.[185] Why? Because, in Schopp's words, a conclusion such as the one above "would usually elicit further deliberation". This stands to reason. We all have a number of wants and beliefs, all intermeshed in a complex network of thought. For instance, many of the students in the above example likely have other wants, such as to maintain integrity, not get expelled, *earn* grades rather than procure them, etc. And normally – as in a non-automatic state – the student would not cheat on the final exam because in the process of considering cheating, the student would also reflect on the consequences, his other wants, beliefs, and so on. But these other wants and beliefs may be obscured for the student because he is in a state of diminished consciousness (for whatever reason; e.g., extreme stress). Hypothetically, a student may enter into a state of automatism and decide to cheat on a final exam.

How, then, does Schopp incorporate Dretske and Goldman's theories to account for his (Schopp's) theory? Earlier, we saw how an internal state (C) "elicits movement (M) in conditions (F) because M has previously succeeded in F by achieving reward R,

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[185] *Ibid*, at 138.

satisfying receptivity state (D)."[186] Through associative learning, the recurrence of F, represented by C, will cause M, again satisfying D. C serves as a reason for M.[187] But what if M has also proven to prevent another want D' from achieving a different reward (R'). Then, the agent's belief-desire set (C) (the conjunction of B & D), may provide reasons *for and against* performing M. In this scenario, the agent's reasons conflict, and thus "should trigger a process of deliberation in which the actor searches his memory for some alternative M' that will satisfy both D and D' in F," or will, on balance, result in the greatest satisfaction of the relevant wants.[188]

For example, suppose I encounter the condition F of walking by an unlocked vehicle. F corresponds to my mental or internal state C which has previously elicited M (my hot-wiring the vehicle), achieving R (my unloading the vehicle at a chop-shop), satisfying D (my desire to have R). But suppose, however, that I have broken parole twice previously by performing M, thus inhibiting another desire D' (my desire to stay out of jail) and preventing R' (to indeed stay out of jail). And in the present instance of opportunity, I find that I am in both receptivity state D *and* D'. Thus, I have a reason to perform M and *not* to perform M. Under normal circumstances, I will engage in a process of deliberation (the length or extent of which varying, of course, on a number of factors), and perhaps find an M' that will accommodate D and D'; for instance, I can call a friend to hot-wire the vehicle, and charge him a finder's fee, thereby diminishing the possibility of getting caught and thereby breaking parole. Of course, there may be an

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[186] *Ibid*, at 142.
[187] *Ibid.*
[188] *Ibid.*

alternate desire D" (not to be *implicated* in the crime), but nonetheless I still choose M', based on a net satisfaction of D, D', and D".

More needs to be said about how a competent practical reasoner associates certain beliefs and desires with other beliefs and desires in a *non-random* fashion. If it is true that our wants and beliefs are connected together via a complex network, what, for instance, prevents one from becoming hopelessly mired in an unending sequence of deliberation? Here Schopp invokes Goldman's notion of *occurrent* and *standing* wants and beliefs:

> Occurrent wants and beliefs are mental events that are active in consciousness...In contrast, standing wants and beliefs are *propensities* or *dispositions* to have certain occurrent wants or beliefs under certain conditions.[189] (italics mine)

As an example of the former, someone who is experiencing hunger will probably be *aware* of the sensation, and desire *not* to be hungry, and thus believe that eating will sate the desire. Standing wants, alternatively, remain largely out of consciousness until certain conditions trigger them into consciousness, where they become occurrent wants. I doubt Schopp could give a better example here: "Most people...have a standing want to avoid paying fines, but that want does not become occurrent until flashing lights appear in the rear view mirror."[190] So, in the process of deliberation, certain scenarios will elicit certain wants and beliefs. Dretske's theory of associative learning describes how certain beliefs (B, B', etc.) and receptivity states (D, D', etc.) become associated with certain rewards (R, R', etc.), and certain actions (M, M', etc.). Goldman describes the retrieval

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[189] *Ibid*, at 143.
[190] *Ibid.*

mechanism by which standing wants and beliefs become occurrent wants and beliefs, thus providing an answer to the question of how agents reason effectively:

> Generally...the unimpaired adult considers most of his relevant wants and beliefs just because his mental states that represent various conditions and potential actions retrieve associated standing wants and beliefs to occurrent status.[191]

So, returning to Schopp's thesis, an agent in a state of automatism is in a state of impaired or clouded consciousness. This state inhibits her from accessing her full spectrum of wants and beliefs – including the relevant beliefs in the instant case, predicated by her awareness of herself and her environment and the relationship between them – that would obtain under normal circumstances.

Again, the affected agent can only access a certain subset of her wants and beliefs, and thus may act on a desire that would normally be inhibited or overridden by an alternate desire. The automatic state may have cleaved off certain connections between occurrent and standing wants, important connections insofar as they are necessary to prevent proscribed action. So for instance, individual X harbours a certain degree of animosity toward co-worker Y. When X entertains notions of physically assaulting Y, X's occurrent want (a) to assault Y retrieves a standing want (j) to avoid losing his job. But when Y manages, through some strategic jockeying, to get promoted over X, the shock causes X to enter a state of automatism. Unfortunately for X, the towline connecting *a* to *j* gets severed – the subset includes only *a* – and thus X performs movement M that corresponds to *a*.

Remember that Schopp makes the sensible claim that many individuals who act while in a state of automatism often appear to be acting purposefully, appear to be

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[191] *Ibid.*

selecting, and acting on, certain action plans, and "thus the relation specified by the culpability level between the act-token constituting the objective elements of the offense and the action-plan can obtain."[192] But the causal process is abnormal by virtue of its limitedness; therefore, it is not characteristic of the way in which normal agents deliberate and choose action plans.

How does Schopp's theory apply to some of the cases we have discussed so far? In *Rabey*, recall that the accused, Wayne Kenneth Rabey, allegedly entered a state of dissociation after discovering that his feelings for a female friend were not reciprocated. Consider some of the specific actions of the accused. Martin J.A., in the appeal, states that, during the attack, the victim

> [T]urned around to see what was happening, and the respondent grabbed her around the arms and struck her on the head twice. She then became unconscious, and when she recovered consciousness the respondent was on his knees, leaning forward and choking her. She asked him why he was doing this, and he yelled, "You bitch, you bitch", after which she again lost consciousness.[193]

As Schopp writes, "The defendant's mental states at the time of the offense are usually inferred on the basis of evidence regarding his behavior and speech."[194] So, what might be a likely inference given the above description of events? Well, one may certainly draw the conclusion that the defendant at least *prima facie* appeared to be acting voluntarily. He wasn't flailing about as in some cases of post-epileptic seizure. He seemed to acting with at least one purpose in mind: to choke the victim. Also, when a witness happened upon Rabey shortly after the attack, Rabey said to him "I've killed her

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[192] *Ibid*, at 145.
[193] *R. v. Rabey.* [1980] 2 S.C.R. 513.
[194] Schopp, *supra* note 18, at 135.

and I am going to kill you too."[195] This demonstrates that the defendant also seemed to be in one sense aware of himself and his environment, and the relationship between the two. Again, defendants who are unaware of what they are doing at the time of an offence do not, under the law, "perform the objective elements of the offence purposely, knowingly, recklessly, or negligently."[196] But it at least *seems* that, in this case, Rabey *did* act voluntarily and *with purpose*; therefore, a failure of proof defence (as opposed to the automatism defence) regarding the *culpability* requirement is an unlikely option. How then do we reconcile this with the tendency for judicial definitions of automatism to describe the condition as one in which the actor does not have control over, or knowledge of, his actions?

Under Schopp's model, the defendant *does* choose an action plan, and in a limited sense, *does* act voluntarily and purposefully. This is enough to fulfill the objective elements of the offence. "There is no obvious reason," writes Schopp, "to think that this process [of selecting and executing action plans] operates differently for the person who suffers clouded consciousness than it does for the person who experiences ordinary consciousness."[197] But again, this is only one part of the larger process associated with competent practical reasoners. Another part of the process involves *being able to access one's full spectrum of wants and beliefs*. Having uninhibited access safeguards the inter-connections between occurrent and standing wants and beliefs. When this access is distorted or disrupted, the agent is not, under Schopp's definition, acting voluntarily. Indeed, it may yet be a difficult task to argue that this model fits current judicial

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[195] *Supra* note 193.
[196] Schopp, *supra* note 18, at 134.
[197] *Ibid*, at 146.

definitions of automatism, but it may inch closer toward an understanding of automatism and its relationship with action.

Returning to Rabey, it may have been the case (assuming Schopp's model) that the defendant would not have acted violently toward the victim had he had normal (i.e., unrestricted) access to his wants and beliefs. Perhaps Rabey's occurrent want (to choke the victim), would under normal circumstances have triggered a standing want not to suffer criminal sanctions, to be physically violent toward others, etc. The emotional shock for Rabey may have been such that he lost the connection between the occurrent want and the standing want; that is, between *a* (the desire to attack the victim), and *j* (the desire not to go to jail). The occurrent want *a* gets stranded in the subset of wants and beliefs available after the change in consciousness.

Consider another case. Recall that, in *Fulcher v. State*[198], the defendant severely assaulted a cellmate. Fulcher claimed that he was in an automatic state when he attacked the victim. Now, if we infer a person's mental state at the time of an offence based on his or her behaviour and speech, then we see that Fulcher's actions appear to be purposive: moments after the guard left Fulcher's cell, he (the guard) heard a noise resembling that of someone being kicked. When he returned to the cell, Fulcher appeared to be standing near his cellmate (but not kicking). After the guard left again, he heard the same noise, and returned to find Fulcher kicking his cellmate repeatedly about the head. Here we see the defendant acting in such a manner as to suggest that he was acting purposively. And his response to the guard's first inspection (i.e., not kicking) seems to imply that Fulcher was in some sense aware of himself, his environment, and the relationship between them.

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[198] 633 P.2d 142 (Wyo. 1981).

Thus, a failure of proof defence regarding *mens rea* may seem an unlikely option. Fulcher *intended* to assault his cellmate, it appears. Further, most definitions of automatism characterize the actor as one who does not know what she is doing at the time of the offence. A curious example in point: recall how the Supreme Court of Wyoming defines automatism:

> [t]he state of an individual who, though capable of action, *is not conscious of what he is doing.* While in an automatistic state, an individual performs complex actions *without an exercise of will.* Because these actions are performed in a state of unconsciousness, *they are involuntary*...Thus, a person who acts automatically does so *without intent*, exercise of free will, or knowledge of the act.[199] [italics mine]

As Corrado notes, it is difficult to reconcile the Court's comments with the particular actions of the defendant upon which these comments were partly based.

How does Schopp's theory account for Fulcher's actions? A possible explanation is that, after Fulcher entered an automatic state, access to his normal matrix of wants and beliefs became limited. Certain standing wants became severed from certain occurrent wants, impeding the normal deliberative process. So, for instance, Fulcher's occurrent desire to assault his cellmate was uninhibited by his (possibly) usual standing desires to maintain favour with the guards, not increase his sentence, etc. Even though Fulcher selected and followed through on an action plan, he did not act voluntarily (under Schopp's model) because his deliberative process is not characteristic of the way in which normal actors' desires lead to action – "normal" in this case meaning *full access to one's network of wants and beliefs.*

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[199] Schopp, *supra* note 18, 145.

So far, this discussion has outlined the important elements of Schopp's theory and model for automatism. Incorporating both Goldman's theory of action, and Dretske's theory of behaviour, Schopp has provided a relatively extensive and intricate descriptive framework, as well as a reasonably thorough normative thesis of how automatism should be viewed in the eyes of the law. As well, Schopp's model seems to function as expected when applied to actual cases.

One of the virtues of Schopp's theory is that it provides a conceptual structure that accounts for automatism within the existing legal framework. What is interesting about his approach is not that he advocates substantial legal reform; rather, Schopp supports a change in perspective, one which actually appears to strive for a legal best-fit. It is a proactive, rather than reactive, approach. If we change our way of conceptualizing automatism, Schopp suggests, then we will be able to accommodate the disorder within the existing legal framework. Rather than rewrite laws to somehow patch up the perplexing inconsistencies that currently frustrate the defence, what we need is simply to understand automatism as a disorder that affects one's ability to *act* in a manner consistent with ordinary action, as a disorder that, legally speaking, affects the voluntariness of one's conduct. The automatism "defense can consistently be interpreted as a failure-of-proof defense regarding the voluntary act requirement," writes Schopp; this *deus ex machina* may be realized through precedent.

As we saw in *Rabey* and *Fulcher*, the theory appears to work within existing law. A "consistent" interpretation (i.e., as a failure-proof-defence) is a virtue in both legal theory and legal practice. Obviously, this makes the law more attractive, since it helps to promote predictability, important and necessary for those wishing to establish a case.

Further, "consistency and coherence as between related legal rules in similar areas of law," writes Neil MacCormick, "is itself an important legal value, being indeed one aspect of justice, of treating like cases alike and refraining from arbitrary differentiation of cases."[200] As we have seen, the defence of automatism is interpreted and adjudicated in many different colours. This happens for a variety of reasons. Often judges appear to be applying their own interpretation of the defence, whether it be spawned by technical peculiarities within the law, or because the law simply does not provide any solid direction as to how automatism should be adjudicated. As an extension of this, prosecutors and defenders have little in the way of steady footing and reliable strategy, since there is a lack of agreement among the legal community about how automatism affects, for instance, the voluntary act or culpability requirements, or how it will be interpreted by judge and jury.

Another merit of the theory is its relative detail, yet overall simplicity. Schopp has spent a good deal of time teasing out the finer points of both Goldman and Dretske's theories and how they apply to his hybrid. To be sure, initially it is somewhat tedious being encumbered by numerous details, but once they are assembled into the larger picture, the theory takes on a refreshing simplicity. The details, of course, are important because they provide the foundation from which Schopp's central arguments are constructed. The more one understands the make-up of the theory, the easier it is for one to understand the whole theory and to make an assessment of it. In this instance, we seem to have a *prima facie* robust theory in terms of its explanatory power. There do not seem to be any glaring inconsistencies at least, and if any merit or value can be ascribed

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[200] MacCormick, N. *Legal Reasoning and Legal Theory,* at 179. (Oxford: Oxford University Press, 1995).

to the relative coherence of the rest of the criminal legal system, then the fact that Schopp's theory fits within this system surely warrants consideration.

So, by interpreting automatism in Schopp's vein, one has a model that accords with what may seem to be a common-sense understanding of how the disorder affects people, a model that does not necessitate extensive legal overhaul, and a model that seems to work when applied to real-life scenarios. This, taken together with the fact that it appears to be formally consistent across cases, constitutes a reasonably compelling argument in favour of this approach. Let us now examine some possible criticisms.

Criticisms

The first cluster of criticisms concerns the theory itself. Recall that, according to Schopp, when a person is in a state of automatism, he does not have access to his full spectrum of beliefs and desires. The automatic state severs certain portions of the agent's set of wants and beliefs from the entire set, and thus he only has access to this limited subset. Therefore, a set Ψ, including a belief B, associated with a desire D and a movement M, under normal circumstances would bring to occurrent status the set Φ of B', D', and M'. In a case of automatism, however, this association may lie precisely on the fault line, and thus the resulting *automatic* subset would include only B, D, and M. Now, if Φ, under normal circumstances, performs an inhibitory function on Ψ, say, to prevent an agent from assaulting a co-worker after a perceived slight, then it follows that, in its (Φ's) absence, Ψ will proceed; that is, M will occur (the agent will assault the co-worker), possibly fulfilling the proscribed element of an offence.

Two points need to be mentioned here. First, given that automatism inhibits an agent's access to his normal set of beliefs and desires, we must ask, what are the chances

that the automatic state just happens to inhibit an inhibitory belief-desire set, such that the agent now performs a proscribed act that he would not have performed otherwise? How can one be sure, that is, that the automatism has cleaved off those beliefs and desires that would normally cause the agent to refrain from performing a proscribed offence? The upshot of course is that the agent could have performed the proscribed act regardless of whether or not he was in fact in an automatic state. One could argue that it almost seems "convenient" for a defendant to argue along Schopp's reasoning – the defendant has free reign to (in some sense) *assign* certain beliefs, desires, and actions to one set, but other beliefs, desires, and actions to another set. So, the co-worker who has been entertaining thoughts of giving another co-worker "his due", and for the sake of argument would have followed through on these thoughts, happens for whatever reason to lose normal consciousness and assaults his colleague. Then is it possible for him to use the automatism defence in the spirit in which Schopp envisions it?

Second, under Schopp's model, an agent in a state of automatism is in a state of clouded consciousness such that she has only limited access to her wants and beliefs. And it is possible that she will act on certain actions that, under normal circumstances, normal consciousness, she would not act on. Some may think, however, that this description bears a close resemblance to another kind of behaviour that is not normally considered to be abnormal behaviour deserving of a special defence. In layperson's terms, Schopp's model has a strong likeness to what people often refer to as *tunnel vision.* Tunnel vision as a psychiatric diagnosis involves a narrowing of the field of vision, used to describe, for instance, what law enforcement agents experience during a high-speed chase. But people sometimes use it as a catch-phrase to describe a condition

in which one's field of thought is somehow restricted, such that one experiences a narrowness of intent and will. When one is determined to accomplish a task, for example, she or he may report having had "tunnel vision" until that task was done. And when one is incited to anger, one often uses such phrases as "seeing red" or "having tunnel vision" to describe the particular state or feeling. Yet, "seeing red" before assaulting someone will not usually be the exculpating factor in a case. But if automatism as Schopp describes it denotes the same internal make-up as the colloquial tunnel vision (perhaps a "glorified" tunnel vision), then what is unique to automatism that separates it from the latter? Where do we draw the line? Of course, we may be inclined to say that automatism involves a change in consciousness, and it seems that this is different from tunnel vision. But regardless, that is not the important issue. What we need to examine is Schopp's model *per se*, and whether it can or should differentiate the condition of automatism in a meaningful way.

Well, in order to understand and answer the first criticism, it is necessary to focus our attention on two possible justificatory functions of Schopp's theory: There is the *process* associated with automatic behaviour; that is, the process is *not* normal by virtue of the fact that an individual has limited access. And then there are the beliefs that the agent actually has, according to Schopp, while she is in an automatic state. As we can see, the criticism seems most damaging to the latter justification. It would seem that the *ideal* automatic agent is the one who performs the proscribed elements of the offence because she is unable to control her actions via an inhibitory desire. *Pre-* Schopp, the provisions outlined in M'Naghten or the MPC would cover the agent since, under M'Naghten, she or he did "not know the nature and quality of the act he was doing; or if

he did know it...he did not know [what] he was doing was wrong"; and under the MPC, "he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law." But what if the automatic agent *does* have access to those inhibitory desires that would prevent her from committing the offence? Is the individual then more culpable, despite being in an automatic state? Legally, it may seem so, for the agent is not insulated by the excusing provisions of the law. To be sure, Schopp carefully navigates the legal territory to allay the concern that many automatic individuals do indeed seem to know what they are doing at the time of the offence. But again, part of his explanation deals with those missing belief-desire sets, and he doesn't seem to consider the criticism that some automatic individuals may have access to the belief-desire sets that would inhibit the proscribed act. In other words, the individual performs the proscribed act, but that individual had access to those belief-desire sets that would prevent his committing the offence, thus the individual did not have only partial access to the relevant belief-desire sets. What, then, is doing the work in Schopp's theory? It is at least interesting that Schopp endeavours to explain the substantial elements of automatism, rather than just the formal (albeit disrupted) process. While automatism construed under his model is a failure of proof defence regarding the voluntary act requirement, his explanation of the substance of the process suggests that he is at least giving a nod to the culpability requirement.

What this seems to indicate is that, of the two justificatory functions I earlier proposed, the crux of the theory lies in the disrupted process, rather than in the substance of the agent's beliefs, or at least it would hypothetically have to in cases where the agent had access to any belief-desire sets that would, pre-automatism, prevent the proscribed

action. And so we arrive at the conclusion that, despite individuals possibly performing actions while in automatism that they would perform under full consciousness as well, the fact that the process is disrupted will have to stand as a valid or plausible reason, under this model, for a successful failure of proof defence. To be sure, it would be difficult to speculate on an individual's propensity to commit an offence under different states of consciousness – the threshold point of action (where an individual *crosses the line*) seems quantum-like in its slipperiness. But it is probably less difficult to confirm or deny a fractured consciousness. One may argue that what matters is what was going on *at the time of the offence*, not what *could have been going on at the time of the offence.* And of course, the degree to which the defendant's actions are, so to speak, out of the ordinary will also have some bearing on the case. Nevertheless, Schopp's theory leaves this question unanswered.

The second criticism shares some of the same problems as the first. Again, the crucial point is whether Schopp's theory can or needs to account for a difference in *kind* between automatism and tunnel vision. Let it be said now that, although I do not see a relevant differentiating factor that distinguishes how or when an individual *becomes automatic*, I believe that this missing feature of Schopp's theory is not detrimental to the theory overall. Note that one major quality of automatism cases seems to be a marked change between pre-automatic behaviour and automatic behaviour. So, even though I pointed out in the first criticism that it would be very difficult to speculate on when an individual *would have* crossed the line under normal conditions of consciousness, we do seem to be able to narrow down considerably that point at which an individual enters into a state of automatism. Thus it seems to be more of an empirical question, the answer to

which lies in the facts of the case, and on interpretation of those facts by witnesses and/or expert testimony. Of course, there will be instances where the question of whether an individual really was in a state of automatism comes up for debate, and I don't think Schopp's theory has the theoretical tools to calculate the result, but what his theory is doing is describing how and why an individual is not acting voluntarily *if he is in a state of automatism*.

The next two questions we must address concern not the theory itself, but the theory *in practice*. First, is the theory manageable in terms of juries and their ability to understand how it works and how it differentiates between individuals? We have seen how the theory, at its deepest level, is indeed quite intricate in terms of belief-desire sets, reasons for action, the will, et cetera. How much, if any, of this does the jury need to know? And is it reasonable to think that the jury will understand?

Second, will Schopp's model pave the way for more claims of automatism? In other words, does the theory make it easier for defendants to make a defence of automatism? And thus will defendants more readily attempt to employ it whenever possible?

Let us deal with the former. How much does the jury need to know? At first blush, it might seem a daunting task to convey what the adjudicating factors are, but as we noted earlier, Schopp's theory does seem to take on a degree of simplicity after the nuts and bolts have been assembled. The important question is whether juries need to delve into the finer details of the theory in order to appreciate what Schopp is describing. For one, it seems that the factors the jury would have to weigh in order to come up with a decision are no more difficult than in other judicial directions the jury has to understand.

It seems entirely plausible that a jury could deliberate over the question of whether or not a defendant did have access to his complete spectrum of wants and beliefs. In one sense, this question is simply reduced to whether or not the individual was in a state of automatism. The adjudicating framework is there for inspection, but it does not seem to be the case that the jury must understand the entire framework in order to competently make an assessment of automatic behaviour. Additionally, the role of expert testimony will play an important part in conveying to the jury what the important factors are. Of course, at this point, we can only speculate on whether or not Schopp's theory will gain enough currency to be employed as a standard model in the courts, and it is not a manageable question here; we are only concerned with assessing aspects of its plausibility, and inasmuch as the jury has to deal with judicial directions and expert testimony, it seems likely that Schopp's proposal is workable.

How easy is it for individuals to use the automatism defence, if it is anchored by Schopp's model? Scrutiny is natural, as people will want to know whether it increases or decreases the ability of defendants to use the defence. Again, if we construe the model as a justificatory and explanatory entity, then it is not inconsistent to think that there will be relatively little change in the amount that the defence is employed. Defendant's still have to present a compelling case for raising the defence in the first place; they must overcome an evidential burden, and this will largely depend on expert testimony, whether or not they are arguing under Schopp's model.

What about satisfying the persuasive burden? Is it easier under Schopp's guidelines? Will there be a change in the amount that the defence is successful? This question is more difficult to answer. The most obvious reason is that Schopp's model, or

any model for that matter, if employed, would introduce consistency in an area that has in the past been lacking a consistent standard. If counsel is clear on what the relevant conditions and exculpating factors are, then that of course is going to influence whether or not they use the defence; however, the prosecution will also have a level playing field, and thus they might be better able to predict and influence the course of opinion as well. Note, again, the importance of witnesses, and the degree to which they affect the outcome.

This chapter has gone into a considerable amount of detail covering Robert Schopp's theory of automatism. By incorporating Alvin Goldman's theory of action with Fred Dretske's theory of behaviour, Schopp has mapped out a comprehensive analysis of what happens to individuals affected with automatism, and he has given some compelling justificatory reasons for why his model is supported under the law. I have noted, however, that there are some interesting areas of discussion under this model, and we have seen that his model is potentially operable in the courts. Whether or not this model succeeds is an empirical question, one which is outside the scope of this report, but one can at least safely say that Schopp's analysis warrants serious consideration.

Chapter 6 – Conclusion

Examining automatism and its legal treatment in the courts is a difficult, yet interesting, task. Automatism, as an area of research and practical concern, offers a number of perplexing issues, with a wide variety of interpretations, theories, suggestions, and implications. I have here attempted to provide a general, yet reasonably detailed survey of some of the main issues surrounding automatism and the automatism defence.

After examining some of the fundamental legal principles and facts as they relate to automatism in the criminal law system, chapter 2 identified some of the difficulties between automatism and the various burdens of proof. It showed how it is theoretically possible for certain individuals with similar circumstances to face different standards of proof, such that one individual may in fact be acquitted, while the other individual is convicted or only allowed a successful insanity defence.[201] Chapter 2 also questioned whether public policy considerations were sufficient to override the presumption of innocence in certain cases, and concluded that relaxing the persuasive burden to an evidential burden for insane automatism defendants would resolve many of the concerns in this area.

Chapter 3 examined the area of psychological blow automatism, and the various ways in which the Canadian and Australian courts have attempted to deal with this phenomenon. An interpretation of the standards of adjudication under these systems revealed that both frameworks – the Canadian and the Australian – while functioning appropriately in certain situations, were seemingly undecided when computing other

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[201] Note that, since *Stone* (*supra* notes 16, 44), the Canadian legal landscape with respect to automatism has changed. Chapter 2 examines automatism in the Canadian system as it proceeds through *Rabey* (*supra* note 5), up to *Parks* (*supra* note 1).

scenarios. With respect to the Australian system, chapter 3 suggested that public policy factors were not significantly delineated in the framework, such that judges and juries could encounter difficulty in following the High Court's standard of adjudication. The Canadian approach, however, was wanting in that it needs a way of incorporating policy factors into its framework. Without a consistent standard guided to a small extent by policy factors, the Canadian framework leaves the adjudication of certain automatism cases up for speculation. The section concluded by suggesting that an acceptable framework for automatism will recognize the importance of policy factors, and incorporate them into a consistent framework.

Additionally, chapter 3 made a normative and functional evaluation of the ordinary person test. It highlighted some of the positive features of the ordinary person test, such as the fact that it attempts to create an objective standard by which to judge individuals who suffered from psychological blow automatism. As well, chapter 3 acknowledged a possible difficulty with severing the subjective characteristics of the accused from the hypothetical ordinary person; namely, that personality cannot so easily be compartmentalized, especially when one is trying to evaluate and determine the gravity of a psychological blow. A second criticism was that the ordinary person test diminishes in functional utility when it has to take into account longer case histories – the build-up of trauma can lead to a maximizing cumulative effect such that it may yield incorrect results. The chapter concluded by advocating further theoretical development to assess whether subjective factors be incorporated into the ordinary person test.

Chapter 4 examined Michael Corrado's theoretical approach to automatism, an approach that attempts to ground automatism through the notions of spontaneity and

purpose. It discovered that one of the major difficulties with Corrado's theory is that it fails to offer a distinguishing mechanism for automatic and non-automatic causal sequences. Another problem facing Corrado's theory is that it requires a strict notion of control for his spontaneity thesis to get off the ground; specifically, for Corrado's agents to lack spontaneity, they cannot have any control over their volitions, and this creates problems when one examines the various different manifestations of automatism.

Robert Schopp's theoretical approach to automatism was addressed in chapter 5. The chapter conducted a substantially detailed examination of Schopp's proposal, and concluded that, of the two theoretical approaches canvassed in the thesis, Schopp's was much more plausible in terms of providing a consistent and thorough model. One of the problems highlighted in chapter 5 was that Schopp's theory doesn't explain how to demarcate the correct belief-desire sets in pre- and post-automatism conditions. As well, chapter 5 made the reasonable conclusion that witnesses and expert testimony are needed in order to determine when an individual entered automatism, as Schopp's model cannot calculate the result. Finally, chapter 5 made an affirmative conclusion to the question of whether Schopp's model is theoretically practicable in the courts.

There is a great deal of research that still needs to be done on the automatism defence in the common and criminal law. I hope that this thesis contributes to increased understanding of some of the main issues at stake in developing a clearer legal conception of automatism.

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