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Automatism is never a defence

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Introduction

In 2009, Andrew Simester's article 'Intoxication is Never a Defence' effectively highlighted a point he described as 'a simple one, and not entirely new'; that despite the longstanding (and enduring) description of the intoxication rules as a defence, this is not (and never has been) accurate.¹ The classification of intoxication as a defence is one of the criminal law's more peculiar self-delusions, not least because of the generally uncontroversial reasons for reaching the opposite conclusion. This is not a point of pedantry. As Simester explains, the appropriate classification of the intoxication rules as *inculpatory* leads us to evaluate those rules through a different set of norms and (as a logical conclusion) to question whether the law would be better served by a new voluntary intoxication-based offence.²

Following a similar pattern (albeit one that is likely, due to its relative novelty, to face greater resistance), it is our contention that the 'defence' of automatism is also incorrectly categorised.³ A claim of automatism is a claim that D is not responsible for an (otherwise) criminal event because her acts were not voluntary. Therefore, automatism is never a defence; it is a description of an event that does not amount to an offence. Or, as we will see (in circumstances of prior fault), it provides a method of inculpation. Having explored and justified this interpretation, the article will discuss what this means for the development of the law when addressing longstanding debates surrounding automatism, such as the

* The authors thank Dr Tanya Palmer for comments on an earlier draft.

1 Andrew P Simester, 'Intoxication is Never a Defence' [2009] Criminal Law Review 3.

2 Ibid 14. A similar conclusion, based on similar reasoning, is reached by ??INITIALS?? Smith and Williams in the Criminal Law Revision Committee, *Offences Against the Person* (1980) 113–14. See also Rebecca Williams, 'Voluntary Intoxication—a Lost Cause?' (2013) 129 Law Quarterly Review 264; and John Child, 'Prior Fault: Blocking Defences or Constructing Crimes' in Alan Reed and Michael Bohlander (eds), *General Defences: Domestic and Comparative Perspectives* (Ashgate 2014).

3 See Law Commission, *Criminal Liability: Insanity and Automatism* Discussion Paper (July 2013) para 1.27: 'If a person totally lacked control of his or her body at the time of the offence, and that lack of control was not caused by his or her own prior fault, then he or she may plead not guilty and may be acquitted. This is referred to as the *defence* of automatism. It is a common law defence and it is available for all crimes.'; and see William Wilson, Irshaad Ibrahim, Peter Fenwick and Richard Marks, 'Violence, Sleepwalking and the Criminal Law (2) The Legal Aspects' [2005] Criminal Law Review 614, 618: '[A]utomatism floats relatively unchecked in the space between denials of capacity, denials of free choice and denials of bad character.' For a wider discussion of prior fault and the categorisation of offences and defences see Child (n 2).

necessary degree of involuntariness, as well as issues that emerge as a direct result, such as questions of fair labelling. As with the parallel analysis of intoxication, the logical conclusion of this debate is also the discussion of the potential for a new (prior) fault-based automatism offence.

Presentation of automatism in the current law

As with the intoxication rules, automatism is almost universally presented and discussed as a defence: defeating liability with the claim that D's acts were involuntary. This is reflected in the presentation of automatism in textbooks, where the concept is often touched upon during early chapters on *actus reus* and *mens rea*, but then quickly referred to in a later and fuller discussion as a general defence. It is also an interpretation that appears consistently within the appellate courts, with the 'defence' only defeated by evidence of prior fault. In *Quick*,⁴ Lawton LJ quotes with approval that:

Automatism is a defence to a charge . . . provided that a person takes reasonable steps to prevent himself from acting involuntarily in a manner dangerous to the public. It must be caused by some factor which he could not reasonably foresee and not by a self-induced incapacity.

Similarly, Lord Justice Hughes has recently stated in *C*⁵ that:

. . . the defence of automatism is not available to a defendant who has induced an acute state of involuntary behaviour by his own fault.

As with similar statements relating to intoxication, these passages are not substantively wrong. They are misleading because they present the role of automatism in reverse: they present automatism as a defence capable of exculpating D from liability *unless* it is defeated by evidence of D culpably creating the conditions of her own defence.

The significance of automatism, as presently constructed, is to facilitate the individual actor with a means for raising a doubt as to whether she acted with the requisite culpability for the offence, and behaved voluntarily.⁶ The common law, in broad terms, has made three classificatory distinctions related to perceived automatistic exculpation. First, the substantive law has demarcated automatism deriving from a disease of the mind (internal cause), and transmogrified such cases under insanity and mental defect provisions: mind referring herein to the 'ordinary sense of the mental faculties of reason, memory and understanding'.⁷ A wide range of disposal powers has attached to the special verdict in this regard, viewed as essential for societal protection⁸ and as a deterrent against recurrence of

4 [1973] QB 910.

5 [2013] EWCA Crim 223 [24].

6 See T H Jones, 'Insanity, Automatism and the Burden of Proof on the Accused' (1995) 111 *Law Quarterly Review* 475; and see generally, Stephen J Morse, 'Culpability and Control' (1994) 142 *University of Pennsylvania Law Review* 1587; William Wilson, 'Impaired Voluntariness: The Variable Standards' (2003) 6 *Buffalo Law Review* 1011; and R D Mackay and B J Mitchell, 'Sleepwalking, Automatism and Insanity' [2006] *Criminal Law Review* 901.

7 *Kemp* [1957] 1 QB 399, 407 (Devlin J); and see Patrick Healy, 'Automatism Confined' (2000) 45 *McGill Law Journal* 87 [22]: 'The crux of the approach is based on a double fiction: that automatistic involuntariness is presumptively internal in its origin, and that anything in the nature of an internal mental cause of automatism is presumptively mental disorder.'

8 *Sullivan* [1984] AC 156, 172 (Lord Diplock): 'The purpose of the legislation relating to the defence of insanity, ever since its origin in 1800, has been to protect society against recurrence of the dangerous conduct.'

violence.⁹ Second, extant law has deontologically adduced involuntariness causally related to externally verifiable conditions, ‘some external factor such as violence, drugs, including anaesthetics, alcohol and hypnotic influences’.¹⁰ The prevalence of external factors, evidentially raised by the defendant and supported by medical evidence as to effect, may allow an absolute acquittal.

The binary divide created between internal/external causes has been problematic, and at times capricious,¹¹ in that it fails to make an appropriate classificatory division between physical and mental disorders, and both factorisations may operate simultaneously, for example, in relation to sleepwalking or hypnosis.¹² The defendant may be stereotyped in a particular taxonomy, despite acting in a similar involuntary manner, notably as diabetes is viewed as an internal factor whilst the administration of insulin is external.¹³ Problems have also arisen over the correct ascription of disparate types of dissociative states.¹⁴

The classificatory system adopted has been vituperatively criticised as ‘illogical’,¹⁵ ‘little short of a disgrace’¹⁶ and as ‘making no sense’,¹⁷ and on occasions a judicial divining-rod has been needed for cause identification. A third ingredient is added to the mix in that culpability (prior fault) may operate to constitutively superimpose responsibility and deny exculpation, particularly evident in terms of driving offences and the intoxicated defendant. For example, in *C*,¹⁸ a driving case, Moses LJ set out the orthodox view that D would ‘have to provide an evidential basis for asserting that he could not reasonably have avoided the hypoglycaemic attack by advance testing’.¹⁹ Prior fault principles, as stated, have been developed at common law for inculcated policy derivations to regulate the automatistic intoxicated ‘offender’.

9 *Parks* [1992] SCR 871, 901 (*La Forest J*) in the Supreme Court of Canada: ‘The continuing danger theory holds that any condition likely to present a recurring danger to the public should be treated as insanity . . . The two theories share a common concern for recurrence, the latter holding that an internal weakness is more likely to lead to recurrent violence than automatism brought on by some intervening external cause.’

10 *Quick* [1973] QB 910.

11 See *C* [2013] EWCA Crim 223 [20] (Hughes LJ): ‘It is well known that the distinction drawn in *Quick* between external factors inducing a condition of the mind and internal factors which can properly be described as a disease can give rise to apparently strange results at the margin.’

12 Wilson et al (n 3) 617: ‘The line drawn between sane and insane automatism can never make medical sense’: It makes illogical, hair-splitting distinctions inevitable, allowing some ‘an outright acquittal while condemning others to plead guilty or take the risk of a special verdict’.

13 See Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* 7th edn (Oxford University Press 2013) 94: ‘There can be no sense in classifying hypoglycaemic states as automatism and hyperglycaemic states as insanity, when both states are so closely associated with a common condition as diabetes.’

14 See K Campbell, ‘Psychological Blow Automatism: A Narrow Defence’ (1980) 23 *Criminal Law Quarterly* 342; and B J Kormos, ‘The Post-Traumatic Stress Defence in Canada: Reconnoitring the Old Lie’ (2008) 54 *Criminal Law Quarterly* 189.

15 Law Commission (n 3) para 1.46 (Lord Justice Davis), referring to para 1.31 of the *Supplementary Material to the Scoping Paper*.

16 *Ibid*. See Ronnie Mackay and Markus Reuber, ‘Epilepsy and the Defence of Insanity—Time for Change?’ [2007] *Criminal Law Review* 782, 791 stating this has led to the creation of ‘a complex body of law which is manifestly unsatisfactory’.

17 Ashworth and Horder (n 13).

18 [2007] EWCA Crim 1862.

19 *Ibid* [35] and [38].

A similar presentation is also reflected explicitly in most common law jurisdictions.²⁰ The Supreme Court in Canada, for example, has consistently viewed automatism as a 'defence'.²¹ In *Parkes*²² and *Stone*,²³ fundamental review of the parameters of this defence concluded that it is predicated on involuntariness constituting a complete lack of capacity to control one's conduct: unconsciousness, whether total or impaired is not supererogatory. Moreover, in *Stone* this defence has been deconstructed in reductionist terms: automatism is couched in a blanket of suspicion.²⁴ Trial judges, in light of the *Stone* decision, must weigh the adequacy of D's case to a balance of probabilities standardisation before the issue will even be put to normative fact-finders.²⁵ Policy-driven inculcations prevail in that it is believed that paternalistic considerations demand that it is necessary to protect the public from feigned claims of automatism. The judiciary should provide a bulwark against juries as moral arbiters who might be 'too quick to accept the story of an accused'.²⁶ Canadian courts have advocated a 'holistic' approach to dilemmatic choices presented and the adoption of a twin factorisation that embraces an internal cause test and the continuing danger test.²⁷ The former test invokes, as in English law, a bifurcation between internal and external causes of automatism, and in reality a dichotomous determination in cases where facts and circumstances typically reflect shades of grey, as in diabetes, sleepwalking and dissociative states. The latter test, as presaged by Lord Denning in *Bratty*,²⁸ determines that any condition of the defendant which is likely to recur and thereby present a danger to the public should be treated as a disease of the mind and subject to a wide range of disposal powers.

The presentation of automatism as a defence can also be seen, most recently, in the work of the Law Commission of England and Wales.²⁹ The recent Law Commission proposals, if adopted, would abrogate the schism that currently applies between internal and external causes of involuntary behaviour. A much broader template is suggested, creating a 'defence' predicated on a lack of capacity (total) arising from a recognised medical condition (RMC) embracing individuals with mental disorders and physical conditions, such as a person who suffers an epileptic seizure or who has a sleepwalking episode, or through a neurological defect such as Huntington's disease, but specifically excluding acute intoxication and where the condition was manifested solely or principally by abnormally aggressive or seriously irresponsible conduct.³⁰ The party seeking to raise the RMC defence must adduce evidence from at least two experts that at the time of the alleged offence they wholly lacked capacity: (i) rationally to form a judgment about the relevant conduct or circumstances; (ii) to understand the wrongfulness of what he or she is charged with having done; or (iii) to control his or her physical acts in relation to the relevant conduct or circumstances.³¹

20 See, for example, Scotland (*Ross v HM Advocate* (1991) JC 210); New Zealand (*Bannin* (1991) 2 NZLR 237); and Draft Criminal Code for England and Wales (1989) cl 33.

21 See Holly Phoenix, 'Automatism: A Fading Defence' (2010) 56 Criminal Law Quarterly 328; and Stanley Yeo, 'Clarifying Automatism' (2002) 25 International Journal of Law and Psychiatry 445.

22 [1992] 2 SCR 871, 75 CCC (3d) 287, 15 CR (4th) 289.

23 [1999] SCJ No 27, 134 CCC (3d) 353, 24 CR (5th) 1.

24 *Ibid* [180] (Bastarache J).

25 *Ibid*.

26 *Ibid* [29].

27 Phoenix (n 21) 352; and see Yeo (n 21) 449: 'Defendants pleading automatism are claiming that they are not criminally responsible for their conduct because they lacked the capacity to control such conduct.'

28 [1963] AC 386, 409.

29 Law Commission (n 3)

30 *Ibid* para 4.158–63.

31 *Ibid* para 4.160.

The broader gateway proposals for the new RMC defence are aligned with a more delimited role for automatism *per se*. The ‘defence’ of automatism would be available only where there is a total loss of capacity to control one’s actions which is not caused by a recognised medical condition and for which the defendant was not culpably responsible.³² An accused who successfully pleaded automatism would be simply acquitted. The Law Commission schema, consequently, restricts automatic behaviour to automatic reflex reactions, or to transient states or circumstances, and only if an individual’s condition persists and worsens it might then qualify as an RMC.³³ The difficulty, of course, as presented herein is the underlying premise of defence nomenclature, and the counterfactual assumption created thereby.

It is our view that this presentation of automatism does not conform to conventions relating to the division offences and defences; conventions (ironically) that have been consistently authorised by these same legal bodies.

Not a defence, even exceptionally

Offence elements are designed to target criminal wrongs; defining external (*actus reus*) and internal (*mens rea*) requirements in order to specify and isolate proscribed events. In contrast, criminal defences, strictly conceived, work in the opposite direction; defining certain circumstances where, despite committing the criminal offence, D’s conduct should nevertheless be excused from liability.³⁴ For example, D may commit the offence of theft (satisfying both *actus reus* and *mens rea* elements) and yet be acquitted on the basis of a successful defence of duress: D is inculpated by her satisfaction of the offence elements, but then exculpated again by the defence. The distinction is a simple one, but it is also vitally important in order to make sense of the law in both substantive and moral terms.³⁵

At the core of every criminal *offence* (including so-called strict or absolute liability offences) is the requirement that D’s acts or omissions were performed voluntarily.³⁶ Criminal offences are generally constructed from a variety of external circumstances and results, but it is D’s voluntary role within these elements that acts as a nexus of agency to hold them together: they become a single criminal event for which D may be held responsible. Thus, if D’s conduct is involuntary (for example, D is unconscious or is being physically manipulated by X) then there is no nexus and D cannot have committed an offence. Automatism, as a denial of voluntary conduct, is therefore not a defence, it is a denial of this nexus and thus a denial of the offence itself. As Fletcher explains:

Excuses arise in cases in which the actor’s freedom of choice is constricted. His conduct is not strictly involuntary as if he suffered a seizure or if someone pushed his knife-holding hand down on the victim’s throat. In these cases there is no act at all, no wrongdoing and therefore no need for an excuse.³⁷

32 Law Commission (n 3) para 3.18; and see Andrew Ashworth, ‘Insanity and Automatism: A Discussion Paper’ [2013] Criminal Law Review 787.

33 Law Commission (n 3) para 5.110.

34 In the context of partial defences, their role is to block liability for murder (leading to liability for voluntary manslaughter instead).

35 For a discussion of this, see John Gardner, ‘Fletcher on Offences and Defences’, in *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press 2007) 141, 144–46; Susan Dimock, ‘*Actio Libera in Causa*’ (2013) 7 Criminal Law and Philosophy 549, 554; and William Wilson, ‘The Structure of Criminal Defences’ [2005] Criminal Law Review 108.

36 Ingrid Patient, ‘Some Remarks about the Element of Voluntariness in Offences of Strict Liability’ [1968] Criminal Law Review 23. The very rare exceptions to this rule have met with heavy criticism. See, for example, *Larsonneur* (1933) 24 Cr App R 74.

37 George Fletcher, *Rethinking Criminal Law* (Little Brown 2000) para. 10.3.2.

A similar point is made by Lord Denning in *Bratty*, although he goes on in this case to discuss automatism as a defence:

No act is punishable if it is done involuntarily: and an involuntary act in this context—some people nowadays prefer to speak of it as ‘automatism’—means an act which is done by the muscles without any control by the mind, such as a spasm, a reflex action or a convulsion. . . .³⁸

Of course, talking loosely, even outside of automatism, it is possible to describe the denial of an offence in terms of a defence: this is common among barristers and particularly in civil law. Such descriptions are not consistent with the label ‘defence’ within the substantive law. For example, where D is brought to court on charges relating to burglary, she may claim that she was out of the country when the crime took place and therefore could not have been responsible. This is not a defence, it is an alibi, it is a denial that she completed the elements of the offence. The same is true with automatism.

It is worth noting here that there is some disagreement about which offence elements are denied when D claims to be acting in an automatic state. In Scotland, for example, involuntary conduct is described as a denial of *mens rea*: D may have acted in the sense of moving her body, but the movement was not internally willed.³⁹ This is also our preferred method of analysis.⁴⁰ Williams, in this regard, has identified that the capacity to act otherwise is constitutively the essence of voluntariness:⁴¹ automatism is reviewed through a legal prism whereby it is an ‘unnecessary refinement’⁴² to view the doctrine as going beyond the denial of *mens rea*. Moreover, conduct is voluntary for the purposes of criminal responsibility, ‘when the person could not have refrained from it if he had so willed; that is, he could have acted otherwise or kept still’;⁴³ metaphorically, we should ask if D could have acted in a different fashion, if there had been ‘a policeman at his shoulder’.⁴⁴ English courts⁴⁵ (and the Law Commission of England and Wales)⁴⁶ have generally described automatism as a denial of the *actus reus*: involuntary action not being considered as action at all. It may be that this uncertainty has encouraged use of the non-element specific terminology of automatism and perhaps thereby contributed to its presentation as a form of defence. However, this is mere speculation. What is important is that, whichever side of this debate one prefers, there remains the concession that the central role of automatism is

38 *Bratty* [1963] AC 386, 409.

39 *Ross v HM Advocate* (1991) JC 201, 213; and see, Pamela R Ferguson, ‘The Limits of the Automatism Defence’ (1991) 36 *Journal of the Law Society of Scotland* 446; Iain MacDougall, ‘Automatism—Negation of *Mens Rea*’ (1992) 37 *Journal of the Law Society of Scotland* 57; Pamela R Ferguson, ‘Automatism—A Rejoinder’ (1992) 37 *Journal of the Law Society of Scotland* 58; and Claire McDiarmid, ‘How Do They Do That? Automatism, Coercion, Necessity and *Mens Rea* in Scots Criminal Law’ in Reed and Bohlander (n 2).

40 As little turns on this debate for the current article, it will not be pursued in detail.

41 Glanville Williams, *Textbook of Criminal Law* 2nd edn (Stevens & Sons 1983) 148.

42 *Ibid* 663.

43 *Ibid* 148.

44 *Ibid*.

45 *Bratty* [1963] AC 386.

46 Law Commission (n 3) para 5.8. Some commentators have viewed automatism as a denial of either *actus reus* or *mens rea* simultaneously: see Emily Grant, ‘While You Were Sleeping or Addicted: A Suggested Expansion of the Automatism Doctrine to Include an Addiction Defence’ (2000) *University of Illinois Law Review* 997, 1002–03: ‘Theoretically, the defense may be viewed from either standpoint, and thus it may be considered as relieving criminal liability either because the defendant lacks the mental state required for approval of a crime, or because the defendant has not engaged in an act—that is, involuntary bodily movement.’; and see Paul H Robinson, ‘A Functional Analysis of *Mens Rea*’ (1994) 88 *Northwestern University Law Review* 857, 896: ‘Voluntariness might be thought to be more akin to *mens rea* than to *actus reus* elements.’

to deny something essential within the offence. Where all offence elements are satisfied, where we naturally move to consider defences, automatism has no role.⁴⁷

In the US, the standpoint, in both the Model Penal Code (MPC) and across respective jurisdictions, has been that the demand that an act or omission be voluntary can be viewed as a preliminary requirement of culpability:⁴⁸ '[a] person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable'.⁴⁹ The MPC, although not specifically defining the term 'voluntary', provides instead four exemplars of acts that are not 'voluntary': (i) 'a reflex or convulsion'; (2) 'a bodily movement during unconsciousness or sleep'; (3) 'conduct during hypnosis or resulting from hypnotic suggestion'; and (iv) 'a bodily movement that is otherwise not a product of the effort or determination of the actor either conscious or habitual'.⁵⁰ The illustrations are detailed in the Commentaries as conduct that is not within the control of the actor,⁵¹ but otherwise the template declines to offer a canonical formulation of the 'act' requirement, nor perform the determinative alchemy needed in terms of specificity for automatism vis à vis *mens rea* or *actus reus* elements of a crime.⁵²

In exceptional circumstances, the automatism rules may have an alternative role within the law beyond a simple denial of offence elements; although, again, this is not as a defence. Rather, much like the intoxication rules, the automatism rules may function as the opposite of a defence, as a method of *inculpation*.⁵³ This arises where D's automatic state results from her own prior fault. In such cases, even though D does not satisfy the elements of the offence at the time it is committed (at T2), her earlier fault (at T1) substitutes for the missing elements at T2 to complete the offence as a form of constructive liability.⁵⁴ In the case of *Marison*,⁵⁵ for example, D was convicted of causing death by dangerous driving despite the fact that at the point of collision he was unconscious as a result of a hypoglycaemic episode. D had suffered such episodes before and so his prior fault in still deciding to drive (at T1) substituted for his lack of voluntariness when completing the other offence elements (at T2):

47 Gardner (n 35) 149.

48 See, generally, Deborah W Denno, 'A Mind to Blame: New Views on Involuntary Acts' (2003) 21 Behavioral Sciences and the Law 601; Kevin W Saunders, 'Voluntary Acts and the Criminal Law: Justifying Culpability Based on the Existence of Volition' (1998) 49 University of Pittsburgh Law Review 443; and Grant (n 46).

49 MPC, s 2.01(1). The philosophical theory behind the rule is explained further in the Commentaries in terms of free will and volition: 'That penal sanctions cannot be employed with justice unless these requirements are satisfied seems wholly clear. It is fundamental that a civilized society does not punish for thoughts alone. Beyond this, the law cannot hope to deter involuntary movement or to stimulate action that cannot physically be performed; the sense of personal security would be undermined in a society where such movement or inactivity could lead to formal social condemnation of the sort that a conviction necessarily entails. People whose involuntary movements threaten harm to others may present a public health or safety problem, calling for therapy or even custodial commitment; they do not present a problem of correction.'; see MPC and Commentaries, s. 2.01 cmt, at 214–15 (1985).

50 MPC and Commentaries s 2.01 (1985) 215; and see, generally, Grant (n 46).

51 MPC and Commentaries s 2.01 (1985) 215.

52 See, generally, Douglas Husak, 'Rethinking the Act Requirement' (2007) 28 Cardozo Law Journal 2437; and see Joshua Dressler, *Understanding Criminal Law* 4th edn (Lexis Nexis 2006) 101, formulating the act requirement in the following terms: 'A person is not guilty of an offense unless her conduct, which must include a voluntary act, and which must be accompanied by a culpable state of mind (the *mens rea* of the offense) is the actual and proximate cause of the social harm, as proscribed by the offense.'

53 Ronnie Mackay, 'Intoxication as a Factor in Automatism' [1982] Criminal Law Review 146, 146–48.

54 This should be distinguished from so-called grand-schemer cases, where D loses voluntary control in order to commit the offence. In such cases, it is contended, liability can be found simply through the appropriate use of the rules of causation: see Child (n 2).

55 [1997] RTR 457.

It was argued before this court . . . that [D] was driving as an automaton and therefore cannot be guilty of the offence. In our judgment, automatism does not come into this case at all . . . Even if the appellant was in an automatic state for the last few seconds, he had already committed the offence by driving to that point, in circumstances which he knew were such that he might have a hypoglycaemic attack at any moment.⁵⁶

In line with the judicial comments quoted in the first part of this article, the court in *Marison* presents the facts (D's prior fault) as blocking the defence of automatism: D cannot make use of the defence because he was at fault for creating the conditions that led to it.⁵⁷ As previously stated, this is to present the law in reverse. The correct analysis is that D did not complete the elements of the offence at T2 when death was caused; D was not acting voluntarily and so an essential element of his offence was missing. D's prior fault (choosing to drive and knowing of the possibility of losing consciousness in this manner) was used to substitute for that missing element in order for the offence to be completed. Referring to the 'defence of automatism', the court was right to say that it was irrelevant to this case. The rules of automatism as a constructor of liability, however, through the rules governing prior fault, played a crucial role.

The automatism rules, then, can operate in two ways. First, automatism can be a simple explanation (a shorthand) for D who does not commit an offence because her conduct is not voluntary. Secondly, where D lacks voluntary conduct as a result of prior fault, the automatism rules can be used to substitute for that lack of voluntariness to find liability. Automatism is never, even exceptionally, a defence.

Problems with the automatism rules

Having set out our central contention, that the automatism rules are inculpatory as opposed to exculpatory in function, it is useful to question what effect this might have on the application of those rules. To do so, we will explore two areas of debate that have been central to the automatism rules for some time, and then two further areas of debate that arise as a result of our analysis in this article. In this manner, we hope to demonstrate how the classification of automatism as a constructor of liability has important implications for the substance of those rules.

The first longstanding area of debate, relevant to all cases of potential involuntariness, concerns the threshold of capacity required for D's acts or omissions to be considered voluntary.⁵⁸ Discussed in the context of a 'defence' of automatism, the question is whether automatism requires D to lack all physical control of her conduct (for example, through unconsciousness or physical spasm), or whether it is sufficient that she lacks effective or rational control (for example, through dissociation short of full unconsciousness).⁵⁹ The debate has been a problematic one: lacking a medical consensus for the law to take reference

⁵⁶ *Marison* [1997] RTR 457, 461 (McCowan LJ).

⁵⁷ See John Rumbold and Martin Wasik, 'Diabetic Drivers, Hypoglycaemic Unawareness and Automatism' [2011] Criminal Law Review 863, 866: 'Usually the diabetic driver has been at fault in the management of their condition, and so any defence of automatism fails . . . [T]he condition of hypoglycaemic unawareness is highly relevant to this issue of fault, and is a factor to which lawyers involved in such cases should be alert.'

⁵⁸ See A P Simester, J R Spencer, G R Sullivan and G J Virgo, *Criminal Law: Theory and Doctrine* 5th edn (Hart 2013) 112, delineating road traffic cases from others: 'It is noteworthy that the cases in which the most stringent demands are made all concern driving offences.'; and see further on the effective control requirement, Douglas Husak, 'The Alleged Act Requirement in Criminal Law' in *The Oxford Handbook of Philosophy of Criminal Law* (Oxford University Press 2011) 107.

⁵⁹ A useful overview is provided in Law Commission (n 3) para. 5.22–32.

from⁶⁰ and prone to policy-based inconsistencies.⁶¹ However, what is most interesting for present purposes, has been the presentation of this uncertainty within the courts; particularly in the last few years where they have shown a consistent preference for the narrower interpretation of automatism. For example, in the case of *C*,⁶² Lord Justice Hughes comments:

Automatism, if it occurs, results in a complete acquittal on the grounds that the act was not that of the defendant at all . . . *'Involuntary' is not the same as 'irrational'; indeed it needs sharply to be distinguished from it.*⁶³

In contrast, commentators who favour a wider view of automatism have tended to focus on the related issue of moral responsibility. For example, Horder contends:

The all-embracing explanatory claims of the voluntary conduct model . . . [is] where one finds an assumption about non-insane automatism that all that matters is physical capacity to engage in voluntary conduct, and that the question of whether one has control over conduct is the same thing as whether one is engaged in voluntary conduct at all.⁶⁴

Whether we classify automatism as a defence does not determine the outcome of this debate, but it can play an important role. This is because, if automatism is (accurately) presented as a simple shorthand for an incomplete offence, then we are forced to consider what is required in order to form a complete offence. This focuses on questions of sufficient moral responsibility and the required nexus of agency between D's conduct and surrounding offence elements: exactly the focus that leads Horder and others to advocate a narrower view of voluntariness (i.e. a broader 'defence' of automatism). In contrast, the dominant view of automatism as a defence encourages the courts to begin from the opposing premise; asking whether D's lack of control was sufficient to excuse her from liability for an existing criminal wrong. This approach encourages the courts, as we have seen, to think in terms of maintaining sensible limits on a *defence* that can lead to a complete acquittal: a focus that inevitably leads one to a narrower conception of the 'defence' (i.e. a broader notion of voluntariness).⁶⁵ Demonstrating that automatism is never a defence, we hope that this debate can be set on the appropriate foundations: questioning whether impaired or dissociative mental control should be considered sufficient to construct and tie together criminal wrongs.

The second longstanding debate affected by our classification discussion relates specifically to prior fault⁶⁶ and the inculpatory role of the automatism rules: questioning

60 McLeod et al, 'Automatism and Dissociation: Disturbances of Consciousness and Volition from a Psychological Perspective' (2004) *International Journal of Law and Psychiatry* 471; ??INITIAL?? Bell, 'Judgements Revisited: Falconer' (2011) *Aus JFS* 313; and Irshaad Ibrahim et al, 'Violence, Sleepwalking and the Criminal Law: Part 1: The Medical Aspects' [2005] *Criminal Law Review* 601.

61 For example, the developments in case law that seem to apply different standards to different categories of cases, particularly driving cases and post-traumatic stress disorders: and see, Kormos (n 14)

62 [2013] *EWCA Crim* 223.

63 *Ibid* [22] (emphasis added).

64 Jeremy Horder, 'Pleading Involuntary Lack of Capacity' (1993) *Cambridge Law Journal* 298, 312; and see G R Sullivan, 'Making Excuses' in A P Simester and A T H Smith (eds), *Harm and Culpability* (Oxford University Press 1996) 131.

65 A similar dynamic can be seen in the discussion of consent in the House of Lords case of *Brown* [1994] 1 AC 212, where the majority advocated for a narrow 'defence' of consent and the minority for a narrow 'offence element' of non-consent.

66 See Ashworth and Horder (n 13) 93: 'The aim of the doctrine of prior fault is to prevent D taking advantage of a condition if it arose through D's own fault.' Automatism is conceived as a denial of 'authorship' on the part of D (*ibid*).

whether the notion of prior fault requires subjective or objective foresight, and foresight of what? Case law engaging these questions has moved inconsistently between various options, with cases such as *Quick*⁶⁷ suggesting that the automatism 'defence' would be defeated where D 'could have *reasonably* foreseen [the criminal harms] as a result of either doing, or omitting to do, something',⁶⁸ whereas others, such as *Bailey*,⁶⁹ have suggested that it would only be defeated where D subjectively foresaw the possibility of future harms.⁷⁰ As above, we do not believe that the classification of automatism as a defence is determinative of this debate, but again, it must have a role. This is because, if our argument is accepted that the automatism rules (as they relate to prior fault) are inculpatory in function, that they are replacing missing elements of an offence, then the debate must hinge on what construction of prior fault is required for culpability equivalence with the offence elements they are seeking to replace (the lack of voluntariness at T2). With this in mind, it becomes very difficult to maintain that negligently⁷¹ failing to foresee the potential for future dangerousness or simple future involuntariness (i.e. objective prior fault at T1) is equivalent to voluntary movement and awareness of circumstances at T2. In fact, it is even difficult to accept an equivalence between voluntariness and awareness at T2 with some manner of subjective foresight of involuntariness or a possible future risk (i.e. subjective foresight at T1), but this will be discussed further below. Again, we have a longstanding debate of vital importance, but one that is currently being conducted on faulty terms.

The debate has been enervated in recent times by a number of US and Canadian commentators, who have suggested that a recategorisation of *actio libera in causa* principles should broadly apply to formulate an appropriate prior fault and intoxication doctrine.⁷² By parity of reason, a similar reformulation is propounded within the purview of automatism. The *actio libera* doctrine, as previously constructed, operates to disallow D relying on exculpation (defence) at T2, the conditions for which she has culpably created at T1.⁷³ As stated, when properly deconstructed, a reverse nexus may apply, not in terms of defence nomenclature, but rather as a predicate of liability for the morally culpable automatic individual. Dimock categorises the principle, however, in another distinctive hue, as a derivative of 'imputation' not of inculpation: '[I]f . . . we think such conduct can, despite being voluntary, reveal the relevant attitudes of the agent, it seems we must be looking to the prior conduct of the agent in creating the conditions of involuntariness to make the connection.'⁷⁴ The practical reality, viewed either through a kaleidoscope of imputation or inculpation, is that the criminal responsibility and fault of the actor at T1 must be traced through in a causal sense to harm commission at T2: a requirement Robinson has stated of

67 [1973] QB 910.

68 *Ibid* (Lawton LJ) (emphasis added).

69 [1983] 2 All ER 503.

70 See Rumbold and Wasik (n 57); and Law Commission (n 3) para 6.12–28.

71 See, by way of comparison, the definition of negligence in MPC s. 2.02 (4)(d): 'A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the model's situation.'

72 Dimock (n 35); Leo Katz, 'Entrapment through the Lens, of the *Actio Libera in Causa*' (2013) 7 *Criminal Law and Philosophy* 587; Larry Alexander, 'Causing the Conditions of One's Defence: A Theoretical Non-Problem' (2013) 7 *Criminal Law and Philosophy* 623; and Douglas Husak, 'Intoxication and Culpability' (2012) 6 *Criminal Law and Philosophy* 363.

73 Dimock (n 35) 551.

74 *Ibid* 560.

‘a strong causal connection with the imputed objective element, culpability as to the causal connection itself, and the culpability required by the substantive offence’.⁷⁵

In constitutive effect, prior fault automatic ‘conduct’ engages a conflagration of criminal responsibility, blameworthiness and tracing principles, aligned together to focus potentiate culpability at the temporal individuation point where D may questionably have had ‘guidance-control’ over voluntary action, as Fischer and Ravizza have cogently articulated:

When one acts from reasons—responsiveness mechanism at T1, and one can reasonably be expected to know that so acting will (or may) lead to acting from an unresponsive mechanism at some later time T2, one can be held responsible for so acting at T2.⁷⁶

The responsibility-tracing-fault nexus, as propounded for prior fault automatic individuation, was vividly exemplified in a straightforward categorisation by the High Court of Australia in *Ryan v R*.⁷⁷ D, in the course of a robbery, had threatened a service station cashier with a sawn-off rifle; the rifle was loaded and the safety-catch had been deliberately removed at T1 time-frame. Ryan attempted to tie up the cashier with one hand while pointing the rifle at him with the other. Unfortunately, the cashier made a sudden movement and D shot him dead. D asserted that, ‘startled’ by V at whom his gun was pointed, his finger depressed the trigger as a truly involuntary ‘reflex action’. The majority in the High Court of Australia, in contradistinction, adopted the perspective that Ryan had voluntarily (culpably at T1) placed himself in a situation where he might need to make a split-second decision and the fact that he so responded by pulling the trigger did not make that act an involuntary act in the nature of an act done in a convulsion or epileptic seizure. Chief Justice Barwick, in the minority, but legitimately on the facts, determined that D’s account of the events engaged in pulling the trigger, if true, did embody a reflex action in the sense of being unwilling: Ryan’s squeezing of the trigger was more akin to an act done in a convulsion or epileptic seizure than it is to that of a tennis player retrieving a difficult shot where the action is a willed muscular movement albeit that the decision to make it is made in a split second.⁷⁸ Literal involuntariness may standardise Ryan’s pressing of the trigger, but prior fault applied in releasing the safety-catch of the weapon and, similarly in *Commonwealth v Fain*,⁷⁹ where D, a sleep-pattern disordered individual (that made him violent when aroused from sleep) was criminally responsible at T1 for going to sleep in a public room of a hotel with a deadly weapon on his person. Inculpation is derived from prior fault at T1 temporal individuation for which the individual is criminally responsible and not automatic ‘involuntariness’ at T2. Pithy realism should apply to our consideration of prior fault and the *actio libera* doctrine attached to automatism as well as intoxication, arguably standardising the criminalisation of behaviour in this sphere derivatively from harmful moral agency.⁸⁰

75 Paul H Robinson, ‘Imputed Criminal Liability’ (1984) 93 Yale Law Journal 609, 638–39.

76 John Martin Fischer and Mark Ravizza, *Responsibility and Control* (Cambridge University Press 1988) 50.

77 (1967) 121 CLR 205, High Court of Australia.

78 David Ormerod, *Smith and Hogan: Criminal Law* 12th edn (Oxford University Press 2008) 56, referring to I D Elliott, ‘Responsibility for Involuntary Acts: *Ryan v the Queen*’ (1968) 41 Australian Law Journal 497.

79 79 Ky 183 (1879); and see further Paul H Robinson, ‘Causing the Conditions of One’s Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine’ (1985) 71 Virginia Law Review 1, 33, asserting that: ‘[B]ecause he no doubt [knew] his propensity to do acts of violence when aroused from sleep, he could probably have been held liable for reckless homicide based on his earlier conduct of going to sleep in a public place with a gun in his lap.’

80 See, generally, Alan Reed and Nicola Wake, ‘Potentiate Liability and Preventing Fault Attribution: The Intoxicated “Offender” and Anglo-American Dépeçage Standardisations’ (2014) John Marshall Law Review, Chicago.

Automatism and intoxication: the construction of liability

The next two areas of debate, although not entirely foreign to the discussion of automatism, are more commonly associated with the intoxication rules. However, once it is accepted that, like the intoxication rules, automatism is never a defence (and may act as a constructor of liability), then they become central to this area as well. These debates both relate to the role of prior fault and the construction of liability, first, to the specific/basic intent distinction and, secondly, to the appropriate labelling of offenders.

The distinction between basic and specific intent offences is crucial to the operation of the *intoxication* rules. The distinction relates to the *mens rea* required as to any circumstance or result elements within the offence charged. As well as substituting for a lack of voluntary conduct at T2,⁸¹ D's intoxication will substitute for a lack of *mens rea* as to these elements where the offence is one of basic intent (constructing liability), but not for offences of specific intent (failing to construct liability).⁸² For example, if D attacks V causing grievous bodily harm (GBH), but lacks all *mens rea* and even acts involuntarily as a result of voluntary intoxication, she cannot be liable for an offence of causing GBH with intent⁸³ (specific intent offence), but will be liable for a recklessness-based GBH offence (basic intent offence).⁸⁴ Following our interpretation of prior fault automatism in line with the intoxication rules, the question now is whether the same distinction applies to automatism? It is clear that prior fault automatism is capable of substituting for more than solely a lack of voluntariness because otherwise it could only operate to construct liability for strict liability offences: where D lacks control of her body, she is very unlikely to be acting with any subjective *mens rea* as to associated circumstances or results.⁸⁵ But in what manner (if at all) is the potential for constructing liability in this context restricted?

The early case law on prior fault and automatism did not recognise a basic/specific intent distinction; implying a very broad potential for the substitution of missing *mens rea* elements. In *Quick*,⁸⁶ for example, Lawton LJ states:

A self-induced incapacity will not excuse . . . nor will one which could have been reasonably foreseen as a result of either doing, or omitting to do something, as, for example, taking alcohol against medical advice after using certain prescribed drugs, or failing to have regular meals while taking insulin.⁸⁷

Although the offence in *Quick* was one of basic intent, the broad language of this statement (potentially embracing both basic and specific intent offences) led Mackay to highlight the potential for an indefensible inconsistency between the intoxication rules and automatism.

. . . a defendant like *Quick*, had he been prosecuted for a crime of 'specific intent,' would have been convicted of that offence had he been found not to have followed his doctor's instructions, whereas his intoxicated counterpart would only have been convicted of a crime of 'basic intent.'⁸⁸

81 *Lipman* [1970] 1 QB.

82 *DPP v Majewski* [1977] AC 443.

83 Non-Fatal Offences Against the Person Act 1861, s. 18.

84 *Ibid* s. 20

85 It should be remembered, however, that unlike the intoxication rules, automatism will only come into play where there has *also* been a lack of voluntary movement: where D's non-intoxicated prior fault results in a lack of *mens rea*, but not a lack of voluntary movement, the automatism rules will play no part. This is discussed further below.

86 [1972] QB 910.

87 *Ibid* 922.

88 Mackay (n 53) 155.

The potential for this inconsistency, and the role for a basic/specific intent distinction in automatism cases, finally arose in the case of *Bailey*.⁸⁹ a case involving the specific intent offence of wounding or causing GBH with intent. However, this case does more to confuse the law than to clarify it. The court highlighted (in line with Mackay) that *Quick* should *not* be interpreted to allow non-intoxicated prior fault automatism to substitute for missing *mens rea* elements in crimes of specific intent.⁹⁰ The court then goes further to cast doubt on its ability to substitute for similar elements in crimes of *basic* intent as well:

In our judgment, self-induced automatism, other than that due to intoxication from alcohol or drugs, may provide a defence to crimes of basic intent. The question in each case will be whether the prosecution have proved the necessary element of recklessness. In cases of assault, if the accused knows that his actions or inaction are likely to make him aggressive, unpredictable or uncontrolled with the result that he may cause some injury to others and he persists in the action or takes no remedial action when he knows it is required, it will be open to the jury to find that he was reckless.⁹¹

In this statement, Griffiths LJ is essentially undermining any role that prior fault could play in the construction of liability, regardless of the offence charged. This is because he would restrict the automatism prior fault rules to cases where D foresees not only that her conduct might lead to involuntariness, but also that that involuntariness might lead to relevant harms or be performed in relevant circumstances. As discussed elsewhere, these cases do not require a substitution of missing *mens rea* elements and are better dealt with through the rules of causation.⁹² Where a substitution *is* required to construct liability, where D foresees possible involuntariness (is at fault) but does not foresee risks of harm, the court in *Bailey* would not find liability.

We are left with two areas of confusion. First, does the basic/specific intent distinction have a role in automatism cases? And, secondly, if prior fault automatism can construct liability for at least basic intent offences, what must D foresee at T1 to be considered at fault? These questions have been touched upon in a recent flurry of automatism cases in the Court of Appeal,⁹³ but received very little specific consideration. Importantly, however, the Law Commission (in its recent discussion paper)⁹⁴ has provided some analysis on these questions and has attempted to draw principles from the case law: principles that may well encourage greater consistency in future cases. For the Commission, despite its reservations as to the specific/basic intent distinction, there is a useful recognition that prior fault for automatism should be consistent with prior fault for intoxication. Thus, contrary to *Bailey*, prior fault automatism should be able to replace a lack of *mens rea* for basic intent offences, even where D merely foresees (at T1) a potential loss of voluntariness as opposed to future results or circumstances.⁹⁵ The Commission also concludes, with reference to our discussion above, that subjective (as opposed to objective) foresight should be required as to that loss of voluntariness.⁹⁶ Such conclusions are useful from the point of view of

89 [1983] 1 WLR 760.

90 Ibid 764.

91 *Bailey* [1983] 1 WLR 760, 765 (Griffiths LJ).

92 See Child (n 2).

93 *C; M; H* [2013] EWCA Crim 223.

94 Law Commission (n 3).

95 The Law Commission is not, perhaps, as clear on this point as it could have been in its discussion. However, it is a necessary conclusion from its very helpful flow chart: *ibid* 95 and para 6.77.

96 *Ibid* 6.12–28.

certainly, however, whether they are correctly made is likely to have been influenced by their categorisation of automatism as a defence (as discussed above).

The Law Commission has suggested a limited classificatory exception, to cover the scenario where a defendant becomes intoxicated through taking drugs in accordance with a medical prescription, or reasonably in the circumstances and, through no fault of his own, suffers a reaction which causes a loss of capacity.⁹⁷ The individual in this scenario, contrary to earlier perspectives, would not fit within involuntary intoxication provisions, but rather the newly articulated RMC defence.⁹⁸ This formulation is cognisant, to a degree, of the American Law Institute acceptance of pathological intoxication providing an affirmative defence:⁹⁹ pathological intoxication defined as the rapid onset of acute intoxication following consumption of intoxicants, which is insufficient to cause intoxication in most people.¹⁰⁰ The condition is standardised as 'involuntary' as the actor was unaware that the substance would intoxicate her to the extent it did, and, moreover, is distinguished from self-induced incapacity as contextually it takes the individual 'by surprise'.¹⁰¹

[A] provision was required because of a concern that bizarre behaviour caused in part by an abnormal bodily condition (in some cases, in others the atypical intoxication can be related to mental disturbance) . . . would not seem to fall under s. 4.01 [the insanity defence].¹⁰²

The final area of debate is one that has emerged in recent years as the defining issue for the intoxication rules, but is rarely discussed in the context of automatism. It asks, if D's prior fault results in liability for a basic intent offence, is D fairly labelled and criminalised for that offence? To answer this question, we must weigh the blameworthiness of D's prior fault (at T1) against the blameworthiness of the missing offence elements (at T2), looking for equivalence in order to justify the potential for substitution. In the context of the intoxication rules, the traditional interpretation of intoxication as a defence had supplied a useful mechanism for attempts to avoid the burden of establishing this equivalence: as a defence, you simply need to consider what should be required to excuse a (fictionally completed) criminal wrong. However, as more commentators have accepted (in line with Simester) that intoxication is never a defence, it is clear that such equivalence must be demonstrated to justify liability. That is, equivalence between voluntary intoxication at T1 and the missing basic intent elements such as recklessness as to specific circumstances and/or results at T2 (and, potentially, missing voluntary conduct).

Still focusing on the equivalence thesis in the context of intoxication, there have been several attempts to demonstrate such equivalence that are useful to our discussion of automatism. In each case, the argument is made that the effects of alcohol or other dangerous drugs are sufficiently well known within the population, that when becoming intoxicated at T1, we can assume that D (at least subconsciously) was aware of creating a danger at T2. As Horder states:

97 Law Commission (n 3) 6.51. The new defence presupposes that D suffers from an RMC.

98 Ibid.

99 See Lawrence P Tiffany, 'Pathological Intoxication and the Model Penal Code' (1990) 69 *Nebraska Law Review* 763; and Lawrence P Tiffany and Mary Tiffany, 'Nosologic Objections to the Criminal Defense of Pathological Intoxication: What do the Doubters Doubt?' (1990) 13 *International Journal of Law and Psychiatry* 49.

100 MPC s 2.08(5); and see Reed and Wake (n 80).

101 Tiffany (n 99) 768.

102 MPC and Commentaries ss 2.08, 7, 12 (Tentative Draft No 9 1959).

... my blundering into harm can hardly be said to be spontaneous or unexpected if I have knowingly done that which is—as is taken to be common knowledge—liable to make me blunder.¹⁰³

Such logic is often repeated in the courts, for example:

... there is nothing unreasonable or illogical in the law holding that a mind rendered self-inducedly insensible ... through drink or drugs, to the nature of a prohibited act or to its probable consequences is as wrongful a mind as one which consciously contemplates the prohibited act and foresees its probable consequences (or is reckless as to whether they ensue).¹⁰⁴

And, recently, by the Law Commission:

Given the culpability associated with knowingly and voluntarily becoming intoxicated, and the associated increase in the known risk of aggressive behaviour, there is a compelling argument for imposing criminal liability to the extent reflected by that culpability.¹⁰⁵

The problem with this logic, as highlighted by Simester and others, is that demonstrating some general fault in becoming intoxicated (at T1) is not the same as a specific foresight of a specific risk at the point that the *actus reus* of the offence is committed (at T2).¹⁰⁶ Thus, the question of *equivalence* between the two types of fault remains open.

If we are correct that the structure of prior fault automatism mirrors that of intoxication as a potentially inculpatory tool, then we would expect a similar debate to arise here as well. This has not been the case. It is our contention that this debate is missing from automatism chiefly because of the three areas of uncertainty discussed above. How can we measure the equivalent blameworthiness of D's prior fault automatism if we do not know the required degree of D's involuntariness, whether that prior fault is subjective or objective, and what exactly D must foresee? And what can this fault be balanced against if we do not know whether the prior fault rules apply to basic and/or specific intent offences? However, our criticism here is not only that legal uncertainties have beguiled the debate, but that, as soon as these uncertainties are resolved, the incoherence of the automatism rules within the current law becomes fully apparent.

The Law Commission's search for consistent interpretations of the current law (introduced above) allow us to set out a similar equivalence debate for prior fault automatism as exists for the intoxication rules. Thus, for the Commission, consistently with intoxication, prior fault automatism will apply (constructing liability) where D subjectively foresees the possibility of becoming automatic at T1, and this is *equivalent* to missing basic intent *mens rea* (recklessness, negligence etc) and voluntariness at T2. Although this logic is essential to the justifiable operation of the current law, it is an equivalence that few commentators would be willing to accept. Indeed, even those advocating equivalence between missing basic intent *mens rea* and intoxication are likely to have a problem here. The court in *Bailey*, for example, has stated that:

103 Jeremy Horder, 'Sobering Up? The Law Commission on Criminal Intoxication' (1995) *Modern Law Review* 534, 537.

104 *DPP v Majewski* [1977] AC 433, 479.

105 Law Commission, *Intoxication and Criminal Liability* (Law Com No 314 2008) para 1.55. It should be noted that the Commission rejected this approach as it applied to offences, but endorsed it in relation to individual offence elements; and see, John Child, 'Drink, Drugs and Law Reform: A Review of Law Commission Report No 314' [2009] *Criminal Law Review* 488.

106 See Simester (n 1); and Williams (n 2).

. . . it seems to us that there may be material distinctions between a man who consumes alcohol or takes dangerous drugs [prior fault intoxication] and one who fails to take sufficient food after insulin to avert hypoglycaemia [prior fault automatism]. It is common knowledge that those who take alcohol to excess or certain sorts of drugs may become aggressive or do dangerous or unpredictable things, they may be able to foresee the risks of causing harm to others but nevertheless persist in their conduct. But the same cannot be said without more of a man who fails to take food after an insulin injection.¹⁰⁷

Even if one is persuaded by the (we believe, unconvincing) case for equivalence between intoxication and basic intent *mens rea*, such equivalence is even more difficult to demonstrate in the context of prior fault automatism. It is clear that the current law relating to prior fault automatism must be relying on such equivalence in order to justify the use of prior fault to replace missing offence elements and construct liability. Therefore, if no such equivalence is present, any defendant convicted and labelled as an offender under this doctrine has been unfairly treated.

Looking forward

As with the inculpatory rules on intoxication, there are three main options for automatism moving forward: attempting to justify something similar to the status quo; abolishing the prior fault rules and acquitting D whenever there is evidence of involuntariness; or creating a bespoke prior fault-based offence. As with intoxication, it is the last of these options that seems most attractive.

The first option, then, is to seek equivalence between prior fault automatism (at T1) and missing basic intent *mens rea* and voluntariness (at T2). This route, of course, has been the one employed by the Law Commission for the intoxication rules.¹⁰⁸ It is contended that this option (and thus any thought of maintaining the current law) lacks viability. Even within the courts and those advocating the equivalence thesis in the context of intoxication, there is very little support for its automatism equivalent: there is simply no public consensus (as is claimed for intoxication) that foresight of involuntariness equates to a general foresight of danger to others or property. The law could require more of D at T1 to create something closer to comparable fault, and this was what we meant above when we suggested that old debates relating to degrees of involuntariness and subjective versus objective foresight were recast by the recognition of prior fault automatism as an inculpatory tool. Without additional foresight of future circumstances or results at T1, as per *Bailey*, any prospect of equivalence seems unlikely. But following *Bailey* is also unattractive: where D satisfies the *mens rea* of the offence at T1 (is reckless as to future results, for example) then there is no need for rules of prior fault, it is enough to apply the general rules of causation. We could require some non-specific foresight of danger (as well as involuntariness) at T1 as a middle ground between *Bailey* and mere foresight of involuntariness. Even with this additional fault at T1, it would be difficult to demonstrate equivalence with missing *mens rea* as to specific offence elements and as to voluntariness at T2. In short, the current law, and even adjustments based on the current structure of the law, appear undesirable.

The second option moving forward concedes that the current law is operating on the basis of an unjustifiable equivalence, and in the absence of such equivalence no liability (at all) should be found. This option is exemplified in the quotation from *Bailey* above, maintaining that D should only be liable where she acts at T1 with (essentially) the full *mens*

¹⁰⁷ *Bailey* [1983] 1 WLR 760, 764–65 (Griffiths J.). For academic support of this position, see Horder (n 103) 544–45.

¹⁰⁸ Law Commission No 314 (n 105).

rea required for the principal offence. As stated, liability here does not require constructed liability through prior fault, but simply the standard rules of causation: D's acts at T1 become the conduct element of the *actus reus* (coinciding with her *mens rea*), and the question is then whether these acts caused the result at T2. Where D lacks *mens rea* at T1, even where she foresees future involuntariness (exhibits some prior fault), the court in *Bailey* and this option moving forward would find no liability. In this manner, missing basic intent offence elements could never be substituted for by evidence of non-intoxicated prior fault automatism. In our view, unlike the first option, this option has an obvious attraction.

The final option will be sketched here, but will require considerably more work before it becomes truly viable: a new prior fault automatism offence. In line with option two, the first premise of this approach is that prior fault automatism is not equivalent to missing offence elements and should never be able to reconstruct or substitute for such elements. Moving beyond the second option, a new offence would recognise that certain cases of prior fault automatism that lead to harms are deserving of criminalisation: not through a fiction that D has completed offence elements that are missing (as with the current law and option one), but by creating an offence that accurately labels and punishes that which D *has* done. This approach has been advocated in the context of intoxication for many years, seeking to criminalise and label D in line with her actual conduct: voluntarily becoming intoxicated and causing harm.¹⁰⁹

In this regard, Williams¹¹⁰ has recently advocated the creation of a new alternative intoxication offence, facilitating inculpation where a defendant 'commits [the *actus reus* of offence X] while intoxicated'.¹¹¹ The essence of this suggestion is that the combined simulacrum of intoxication and harm, despite absence of *mens rea*, is inculpatory in circumstances where the harm *per se* would not be criminalised without *mens rea* or intoxication. The bespoke offence template has also been identified by Loughnan¹¹² as the way forward for intoxication prior fault doctrine, arguing that this approach would 'make overt the connection between intoxication and criminal liability, sabotaging the myth that intoxication is some kind of "defence" to a criminal charge'.¹¹³ This mirrors the standardisation adopted in German criminal law, identifying a specific offence to detail the inculpatory nature of preventing fault for intoxication:

Whosoever intentionally or negligently puts himself into a drunken state by consuming alcoholic beverages or other intoxicants shall be liable to imprisonment of not more than five years or a fine if he commits an unlawful act while in this state . . . The penalty must not be more severe than the penalty provided for the offence which was committed while he was in the drunken state.¹¹⁴

When considering a new offence of prior fault automatism causing harm, one of the main advantages is that we can explicitly and accurately consider what is required for criminalisation in a manner that is hopelessly confused within the current law. Returning to

109 See Smith and Williams in the Criminal Law Revision Committee (n 2); and see Child (n 2).

110 Williams (n 2) 277.

111 Ibid 277.

112 Arlie Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law* (Oxford University Press 2012) 314–16.

113 Ibid 315; and see further, Arlie Loughnan, 'Mental Incapacity Doctrines in Criminal Law' (2012) 15 *New Criminal Law Review* 1; Douglas Husak, 'Intoxication and Culpability' (2012) 6 *Criminal Law and Philosophy* 363; Susan Dimock, 'What are Intoxicated Offenders Responsible for? The "Intoxication Defense" Re-examined' (2011) 5 *Criminal Law and Philosophy* 1; and Gideon Yaffe, 'Intoxication, Recklessness and Negligence' (2012) 9 *Ohio State Journal of Criminal Law* 545.

114 Die Übersetzung [German Criminal Code], 13 November 1998, BGB1 [Federal Law Gazette] s 323a, amended by Article 3 of the Law of 2 October 2009.

first principles, our task is to identify a public wrong (if there is one) deserving of criminalisation. The first question will be to consider and define the fault required of D at T1. Assuming that a new offence of this kind is not simply criminalising those who are likely to lose control and be a danger,¹¹⁵ but rather those who are at fault in some way for their future involuntariness, it is likely that we would require some subjective foresight of future involuntariness and also foresight of a non-specific danger to others associated with that involuntariness. The preference for *subjective* foresight, and foresight of *danger* as well as simple involuntariness, is designed to target only those who lose control at T1 with a similar level of blameworthiness as the voluntarily intoxicated (where such foresight is, perhaps, more easily assumed). Although often neglected in debates on a possible intoxication offence, we would also need to consider what types of harms would be required at T2.¹¹⁶ For example, although we may conclude that a criminal wrong is completed where D's prior fault automatism results in bodily harm to a victim or property damage (harms that may be linked to D's general foresight at T1 of future danger to people and property), it may be inappropriate to criminalise D where the same prior fault leads to an unpredicted harm (for example, to property rights). Indeed, even within the categories of bodily or property harm, we may conclude that D's wrong is only deserving of criminalisation where that harm is of a particularly serious degree.

Having established a potential offence of prior fault automatism to work alongside existing offences, it is then appropriate to discuss the degree of involuntariness required for D to be classed as automatic. The extremes are clear: complete voluntariness would be dealt with under existing offences, and total involuntariness (i.e. unconsciousness) would be considered under the new offence. The space between these extremes gives rise to an interesting debate. In view of our previous discussions above, we would broadly support the idea that D is not sufficiently competent to create the nexus of agency required for existing offences unless she acts with a high level of voluntariness. Therefore, if we cannot ascribe those later harms to D through traditional means, it only seems appropriate to blame D for those harms where she acted with prior fault. Our view is that the potential new offence should therefore operate across a considerably wider class of cases than the 'automatism defence' does under the current law. Under the current law, where D causes harm in a partially involuntary (or dissociative) state, she is likely to be convicted for existing offences: failing to meet the high threshold of the automatism 'defence'. Under the approach mooted, in contrast, D would either be liable for the new offence in circumstances of prior fault (accurately labelling what D has done), or D would be acquitted.

A presented danger, of course, in creating a new prior fault automatism offence, as with intoxication, is that it creates the potentiality of split juries across the bifurcatory offence particularisations.¹¹⁷ It is submitted, however, that this concern may be more apparent than real, as fact-finders have been commendably robust in ascription of liability for murder/manslaughter and respective gradations, contextualising gross negligence manslaughter, and substitute alternative verdicts for s 18, s 20 or s 47 Offences Against the Person Act 1861 thresholds of harm. Moreover, as Williams asserts in the province of a prior fault intoxication offence, difficulties may be abrogated by utilisation of majority verdict¹¹⁸ and the Law Commission, although reticent over creation of prior fault

115 For discussion of automatism and dangerousness (as opposed to fault), see Mackay and Mitchell (n 6) 905; and see Nicola Padfield, 'Exploring a Quagmire: Insanity and Automatism' (1989) Cambridge Law Journal 354, 357.

116 See Child (n 2).

117 Williams (n 2) 282.

118 Ibid.

inculpatory offences, nonetheless acknowledges that jurors may be 'as capable of handling the decision between the two offences [in this context] as they are of handling the many other cases where, at present, a defendant may be convicted of alternative offences'.¹¹⁹

A final point that should be considered as to the potential new offence relates to its consistency with intoxication where D lacks *mens rea* as a result of her prior fault, but is not automatic. It is an interesting point of comparison that, where D lacks *mens rea* as a result of prior fault but still acts voluntarily, if D is intoxicated, we may find liability, but if D is not intoxicated, we would not: even under the prior fault automatism offence discussed here, a lack of voluntariness at T2 is an essential part of the offence. For example, D1 and D2 both knock over V causing bodily harm, both are acting voluntarily but did not notice V in their way. D1 does not notice V because she is voluntarily intoxicated and will therefore be liable for an offence under the current law (constructing liability), or for a proposed intoxication offence. D2 does not notice V because she is in a daze having negligently not eaten after taking insulin for her diabetes and will therefore not be liable for any offence as she lacks *mens rea*. Some of this inconsistency may be corrected by our wider view of involuntariness within the new offence (leading to liability in cases that would not have done within the current law), but there will still be cases that do not fall within even our inflated definition of involuntariness. It may be that these cases do not warrant criminalisation and the inconsistency with intoxication is simply a reflection of the different wrongs involved in each route to liability. We are generally minded towards this conclusion. However, the debate is important and emerges most clearly with the recognition that both intoxication and automatism are playing inculpatory roles.

Conclusion

The central aim of this article has been to set out and justify the contention that automatism is never a defence. Where D is not at fault for her lack of voluntariness, the term 'automatism' is simply a shorthand explanation that D does not satisfy an essential element of every offence: voluntary conduct. Where D is at fault for her lack of voluntariness, the automatism rules (within the current law) become an inculpatory tool through which to substitute for missing offence elements and construct liability.

Having recognised that automatism plays an inculpatory role within the law, we have then analysed this role and concluded that it is defective: prior fault automatism lacks the equivalent blameworthiness necessary to fairly substitute for even missing basic intent offence elements. It is from here that we have discussed the possibility of a new automatism offence, to recognise the criminal blameworthiness of D's conduct in certain cases, but to do so in a coherent manner that appropriately criminalises and labels the defendant. Looking at the outline of the potential new offence, we are in a much better position to evaluate the future role of automatism in the criminal law. If we do *not* believe that such an offence is deserving of criminalisation, then the current law must be changed to prevent prior fault automatism constructing liability under any circumstances. If we *do* believe that such an offence has a place within the criminal law, then the current law should be changed to reflect this more clearly, and we must focus on exactly how it should be defined.

The obvious next step will involve a similar examination of insanity. In line with intoxication and automatism, prior fault insanity (recognised by the Law Commission)¹²⁰ may also have a role in the construction of offences, but the case law here is

¹¹⁹ Law Commission, *Intoxication and Criminal Liability* (Law Com No 127 1993) para 6.27.

¹²⁰ Law Commission (n 3) para 5.36–76 and 6.30–31.

undeveloped.¹²¹ If D negligently or recklessly *fails* to take medication resulting in involuntariness or dissociation and ultimately harm to the person or property, it would seem strange if they avoided liability where an intoxicated D, or D who actively medicated improperly, would not. Indeed, it may be that such liability is best served through a new or combined offence alongside voluntary intoxication and prior fault automatism causing harm. However, insanity will be a more difficult case. After all, unlike automatism and intoxication, where D satisfies both the *actus reus* and *mens rea* of an offence, insanity may still be a relevant consideration: it is, sometimes, a defence.

¹²¹ See discussion of *Harris* in Ronnie Mackay, 'Case Comment: *R v Coley*; *R v McGhee*; *R v Harris*: Insanity—Distinction between Voluntary Intoxication and Disease of the Mind Caused by Voluntary Intoxication' [2012] *Criminal Law Review* 923; and see also Edward W Mitchell, 'Culpability for Inducing Mental States: The Insanity Defence of Dr Jekyll' (2004) *Journal of the American Academy of Psychiatry Law* 63.