WHILE YOU WERE SLEEPING OR ADDICTED: A SUGGESTED EXPANSION OF THE AUTOMATISM DOCTRINE TO INCLUDE AN ADDICTION DEFENSE

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The automatism doctrine stems from the basic principle that a criminal act must be voluntary. Because an act is considered involuntary if it occurs while the actor is in a state of unconsciousness, the automatism doctrine provides a defense to crimes committed while sleepwalking. This note takes the position that drug and alcohol addictions result in what should be recognized as a similar lack of voluntary control.

After discussing general theories behind the automatism doctrine and its relevance to crimes committed while sleepwalking, the author of this note considers current medical theories regarding drug and alcohol addiction. Because both the medical profession and the Supreme Court recognize drug and alcohol addiction as a disease, the author argues that addicts should not be punished for committing acts inherently associated with their addictions. She provides several policy justifications for her proposal and concludes that courts should extend the automatism doctrine to include an addiction defense.

I. INTRODUCTION

GENTLEWOMAN. Since his Majesty went into the field, I have seen [Lady Macbeth] rise from her bed, throw her night-gown upon her, unlock her closet, take forth paper, fold it, write upon't, read it, afterwards seal it, and again return to bed; yet all this while in a most fast sleep.

DOCTOR. A great perturbation in nature, to receive at once the benefit of sleep, and do the effects of watching. . . .

GENTLEWOMAN. Lo you, here she comes: this is her very guise, and, upon my life, fast asleep. . . .

DOCTOR. You see her eyes are open.

GENTLEWOMAN. Ay, but their sense are shut.[1]

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1. WILLIAM SHAKESPEARE, MACBETH, act 5, sc. 1 (Ronald Watkins & Jeremy Lemmon eds., Oxford Univ. Press 1964).

Lady Macbeth's infamous quote "Out, damned spot: out, I say"[2] was spoken while she was in a state of "slumbery agitation"[3]—that is, while she was sleepwalking. Unfortunately, the Shakespearean character also confessed to a murder and feverishly tried to clean the blood from her hands during the same sleepwalking episode.[4]

Since Shakespeare wrote *Macbeth*, sleepwalking has become a part of criminal law jurisprudence as a defense for various crimes. It is commonly regarded as a subset of the automatism defense based on the theory that a sleepwalker performs the criminal act involuntarily and, therefore, cannot be held liable.[5]

Likewise, the Supreme Court and the medical profession have characterized addictions to drugs and alcohol as diseases over which addicts lack voluntary control.[6] It is difficult to reconcile, then, the contrasting approaches courts have taken with respect to sleepwalking and addictions. This note will analyze the disparity and recommend that courts apply consistent legal doctrines in these two situations.

Part II of this note begins with the well-established principles of criminal law that require a voluntary act to establish guilt. Part III first discusses the general theories of the automatism defense, with particular attention given to the nuances of sleepwalking. Next, the discussion on addictions analyzes relevant Supreme Court decisions and lower courts' interpretations giving rise to an addiction defense. Current medical notions about the nature of addiction are presented along with the implications that arise from classifying addiction as a disease.

Finally, in part IV, this note recommends that an addiction defense be considered a subset of the automatism theories. The inevitable policy concerns are addressed, and the exact boundaries of such a defense are delineated.

II. THE VOLUNTARY ACT REQUIREMENT

"One basic premise of Anglo-American criminal law is that no crime can be committed by bad thoughts alone. Something in the way of an act, or of an omission to act where there is a legal duty to act, is required too."[7] In other words, an actor is only responsible for outcomes that result from that person's own action (or inaction).[8] Justifications for

2. *Id.*

3. *Id.*

4. *See id.* ("Yet who would have thought the old man to have had so much blood in him. . . . What, will these hands ne'er be clean?").

5. *See infra* notes 86–92 and accompanying text.

6. *See infra* notes 146–84 and accompanying text.

7. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 3.2(b), at 196 (2d ed. 1986). For a discussion of alternate definitions of "act" for purposes of criminal law, including the Model Penal Code approach, see *id.* § 3.2, at 195.

8. *See* A.P. Simester, *On the So-Called Requirement for Voluntary Action*, 1 BUFF. CRIM. L. REV. 403, 406 (1998).

the act requirement in criminal law include ease of proving bad actions in comparison with proving bad thoughts,[9] difficulty in determining whether a thought is a fixed intent or a mere daydream,[10] and the proposition that bad thoughts do not necessarily control behavior and thus should not come within the purview of criminal law.[11]

Further, a criminal act must be a voluntary one.[12] The criminal justice system does not punish an actor who "is not a free agent, or is unable to choose or to act voluntarily, or to avoid the conduct which constitutes the crime."[13] These concepts of free will and volition are fundamental.[14] Comments to the Model Penal Code (MPC) voluntary action requirement provide insight into the theory behind the rule:

> 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.[15]

An act is not considered involuntary merely because the actor does not remember doing it.[16] Nor is an act involuntary simply because the actor could not control an impulse to perform it.[17] Furthermore, an act is not involuntary because it or the consequences arising from it are unintentional or unforeseen.[18] An act may be considered involuntary, how-

9. *See* LAFAVE & SCOTT, *supra* note 7, § 3.2, at 197.

10. *See id.*

11. *See id.*

12. *See id.* "Just what is meant by the term 'voluntary' has caused the theorists considerable difficulty." *Id.* § 3.2, at 198. For a discussion of varying definitions of "voluntary," see *id*.

13. United States v. Moore, 486 F.2d 1139, 1241 (D.C. Cir. 1973).

14. *See* Major Michael J. Davidson & Captain Steve Walters, United States v. Berri*: The Automatism Defense Rears Its Ugly Little Head*, ARMY LAW., Oct. 1993, at 17, 17.

15. MODEL PENAL CODE AND COMMENTARIES § 2.01 cmt. at 214–15 (1985); *see also* LAFAVE & SCOTT, *supra* note 7, § 7.3, at 197–98 (noting that the deterrent and retributive functions of criminal law are not furthered by punishing involuntary actions and arguing that although the rehabilitative goal might be met, such actions may be best dealt with outside the auspices of criminal law).

16. *See* State v. Caddell, 215 S.E.2d 348, 360 (N.C. 1975) ("It is generally said that amnesia, in and of itself, is not a defense to a criminal charge."); Bratty v. Attorney-General for N. Ir., 46 Crim. App. 1, 16 (1961) (appeal taken from Northern Ireland) ("Loss of memory afterwards is never a defence in itself, so long as he was conscious at the time."); Davidson & Walters, *supra* note 14, at 24 ("[A]mnesia by itself generally is not considered a defense.").

17. *See* State v. Cumberworth, 43 N.E.2d 510, 512–13 (Ohio Ct. App. 1942) (discussing the irresistible impulse doctrine); *Bratty*, 46 Crim. App. at 16–17 ("When a man is charged with murder, and it appears that he knew what he was doing, but that he could not resist it, then his assertion 'I couldn't help myself' is no defence in itself.").

18. *See Bratty*, 46 Crim. App. at 17 ("When a man is charged with dangerous driving, it is no defence for him to say, however truly, 'I did not mean to drive dangerously.'"); Davidson & Walters, *su-*

ever, if it occurs while the actor is in a state of unconsciousness.[19] This proposition forms the foundation for the automatism defense.

III. AUTOMATISM, SLEEPWALKING, AND ADDICTIONS

A. The Automatism Defense

1. General Principles

Automatism is defined as the "state of a person who, though capable of action, is not conscious of what he is doing."[20] A person in a state of automatism performs complex actions without the exercise of will, purpose, or intent.[21] "[A] person who is unconscious[22] at the time he or she commits an act which would otherwise be criminal cannot be held responsible for that act."[23] A defendant asserting the automatism defense accepts that the act has been committed and the harm done but denies any intent to act voluntarily.[24]

Where it is recognized, automatism generally acts as a complete defense to a crime.[25] A few recognized circumstances, however, create ex-

pra note 14, at 24 ("[T]he accused may be held responsible for resulting harm if such harm were foreseeable.").

19. *See* Davidson & Walters, *supra* note 14, at 18; Michael Corrado, *Automatism and the Theory of Action*, 39 EMORY L.J. 1191, 1191–92 (1990) ("A person who commits what would otherwise be a criminal act, while unconscious, is not guilty of a crime. . . . The action is not voluntary because . . . the act of will is itself caused by something beyond the actor's control . . . ."); *see also* LAFAVE & SCOTT, *supra* note 7, § 4.9, at 382 ("[O]ne who engages in what would otherwise be criminal conduct is not guilty of a crime if he does so in a state of unconsciousness or semi-consciousness."); ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 993 (3d ed. 1982) ("The explanation is that such a person is acting automatically rather than voluntary.").

20. People v. Grant, 360 N.E.2d 809, 814 (Ill. App. Ct. 1977); *see also* Fulcher v. State, 633 P.2d 142, 145 (Wyo. 1981).

21. *See Fulcher*, 633 P.2d at 145 ("While in an automatistic state, an individual performs complex actions without an exercise of will."); BLACK'S LAW DICTIONARY 134 (6th ed. 1990) ("[Automatism] is applied to actions or conduct of an individual apparently occurring without will, purpose, or reasoned intention on his part.").

22. "Unconscious is a state of mind of persons of sound mind suffering from some voluntary or involuntary agency rendering them unaware of their acts." Greenfield v. Commonwealth, 204 S.E.2d 414, 417 (Va. 1974). The defense of automatism differs from the excuse of impaired consciousness in that the former does not require an "objective, physiologically confirmable disease or defect." 2 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES 275 (1984).

23. 21 AM. JUR. 2D *Criminal Law* § 44 (1998); *see also supra* note 19. Unconsciousness, however, is not required for conduct to fall under the definition of automatism. *See* Simester, *supra* note 8, at 416 ("Whether she was conscious or unconscious, what is essential to the denial of responsibility for a defendant's involuntary behavior is that she was unable deliberately to control that behavior and to prevent it from occurring.").

24. *See* State v. Caddell, 215 S.E.2d 348, 363 (N.C. 1975) (noting that "an affirmative defense is one in which the defendant says, 'I did the act charged in the indictment, but I should not be found guilty of the crime charged'" and holding that automatism is an affirmative defense); Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. U. L. REV. 857, 897 (1994) ("When an actor assaults another during a seizure, our conclusion is not that the assault is not harmful and regrettable (indeed, civil liability may be permitted), but rather that the assault is undesirable but that condemnation is not appropriate in light of the involuntariness of the conduct.").

25. *See Caddell*, 215 S.E.2d at 363; *see also* 21 AM. JUR. 2D *Criminal Law* § 44 (1998).

ceptions to that general rule.[26] Most importantly, a defendant may be held criminally liable for harm that is foreseeable.[27] This exception of foreseeability arises in several situations.

Harm is considered foreseeable where the circumstances surrounding the actor's automatism were self-induced.[28] Many courts have determined that unconsciousness due to voluntary intoxication is not a defense for criminal acts committed while intoxicated.[29] Also, automatism is considered self-induced if a person participates in a "fracas," is hit in the head, and is consequently rendered unconscious.[30] A defendant, however, can use self-induced unconsciousness when arguing for a lesser offense.[31]

Further, harm is foreseeable, and thus the automatism defense precluded, if the defendant has knowledge of a predisposition to unconsciousness.[32] This issue arises when, for example, a defendant charged with vehicular homicide was aware before the accident that he was prone to blackouts.[33] Similarly, one who falls asleep while driving may be crimi-

26. *See* Virgin Islands v. Smith, 278 F.2d 169, 175 (3d Cir. 1960) ("[T]he defendant is wrong in his contention that the mere fact of unconsciousness . . . entitled him, without more, to an acquittal."); *Fulcher*, 633 P.2d at 145 n.5; Bratty v. Attorney-General for N. Ir., 46 Crim. App. 1, 17 (1961) (appeal taken from Northern Ireland) ("Another thing to be observed is that it is not every involuntary act [that] leads to a complete acquittal."); PERKINS & BOYCE, *supra* note 19, at 993; Davidson & Walters, *supra* note 14, at 24 ("Authorities uniformly agree that automatism is not a complete defense.").

27. *See* Davidson & Walters, *supra* note 14, at 24; Corrado, *supra* note 19, at 1201 n.36 ("The actor may . . . be responsible for the resulting harm, if he could have foreseen the appearance of the volition in question, even though he is not responsible for the volition himself.").

28. *See* Greenfield v. Commonwealth, 204 S.E.2d 414, 417 (Va. 1974) ("Where not self-induced, unconsciousness is a complete defense to a criminal homicide.").

29. *See* People v. Cox, 153 P.2d 362, 365 (Cal. Dist. Ct. App. 1944) ("[U]nconsciousness produced by voluntary intoxication does not render a defendant incapable of committing a crime."); Lewis v. State, 27 S.E.2d 659, 665 (Ga. 1943) ("[If a man] voluntarily deprives himself of reason by intoxication, and commits an offense while in that condition, he is criminally responsible for it." (citation omitted)); Eunice A. Eichelberger, Annotation, *Automatism or Unconsciousness as Defense to Criminal Charge*, 27 A.L.R.4th 1067, § 5b (1984).

30. *Fulcher*, 633 P.2d at 145 n.5; *see also* United States v. Olvera, 15 C.M.R. 134, 139 (C.M.A. 1954) (noting that to form the basis for an acquittal due to the defendant's defense of amnesia resulting from a head injury, the injury must have been caused through no fault of the defendant); Watkins v. People, 408 P.2d 425, 428 (Colo. 1965); Davidson & Walters, *supra* note 14, at 24.

31. *See Greenfield*, 204 S.E.2d at 417; Davidson & Walters, *supra* note 14, at 25.

32. *See* State v. Hinkle, 489 S.E.2d 257, 264 (W. Va. 1996) ("Even if the trier of fact believes the defendant was unconscious at the time of the act, there is another consideration which occasionally arises. If the defendant was sufficiently apprised and aware of the condition and experienced recurring episodes of loss of consciousness . . . then [he may well be liable]."); Bratty v. Attorney-General for N. Ir., 46 Crim. App. 1, 17–18 (1961) (appeal taken from Northern Ireland) ("Suppose a crime is committed by a man in a state of automatism or clouded consciousness due to a *recurrent* disease of the mind. Such an act is no doubt involuntary, but it does not give rise to an unqualified acquittal, for that would mean that he would be let at large to do it again." (emphasis added)); Eichelberger, *supra* note 29, § 5a.

33. *See* State v. Gooze, 81 A.2d 811, 815–16 (N.J. Super. Ct. App. Div. 1951) (rejecting defendant's argument that he should not be liable since he had not experienced blackouts for several years); Carter v. State, 376 P.2d 351, 358 (Okla. Crim. App. 1962) ("[W]here a motorist drives an automobile, knowing he is subject to frequent blackouts, such operation of the automobile . . . would amount to culpable or criminal negligence."); *Fulcher*, 633 P.2d at 145 n.5; PERKINS & BOYCE, *supra* note 19, at 994; Davidson & Walters, *supra* note 14, at 24–25.

nally liable if he is aware of his lack of sleep and yet continues to drive,[34] just as one who has an epileptic seizure while driving may be liable.[35] Also, if a defendant has knowledge of a prior susceptibility to violence while intoxicated, the automatism defense is not available.[36]

Courts disagree somewhat concerning the burden of proof the defendant must meet in cases where the automatism defense is raised.[37] The majority viewpoint requires the defendant only to produce evidence that would raise a doubt about his consciousness at the time he committed the act.[38] The rationale is that the automatism defense negates an essential element of the crime, the commission of a voluntary act, and so the ultimate burden of proving that element—and, therefore, disproving automatism—rests with the prosecution.[39] Other courts, however, treat automatism as an affirmative defense and place the burden of proving that defense on the defendant.[40] One justification for this position is that "the defendant is the only person who knows his actual state of consciousness."[41]

Some question exists whether the automatism defense is raised to negate the mens rea or the actus reus of a particular crime.[42] Theoretically, the defense may be viewed from either standpoint, and "thus it

34. *See Gooze*, 81 A.2d at 816.

35. *See* Virgin Islands v. Smith, 278 F.2d 169, 175 (3d Cir. 1960); People v. Decina, 138 N.E.2d 799, 803–04 (N.Y. 1956).

36. *See* People v. Grant, 360 N.E.2d 809, 815 (Ill. App. Ct. 1977) ("[H]e is criminally responsible if he had prior notice of his susceptibility to engage in violent involuntary conduct brought on by drinking alcoholic beverages or by some other conscious casual behavior.").

37. *See* Eichelberger, *supra* note 29, § 4.

38. *See Smith*, 278 F.2d at 173 ("The prosecution is required to prove the offense beyond a reasonable doubt . . . . The defendant, on the other hand, is not required to prove his innocence by a preponderance of the evidence, but only to produce sufficient evidence to raise a reasonable doubt in the minds of the jury."); LAFAVE & SCOTT, *supra* note 7, § 4.9, at 384.

39. *See* LAFAVE & SCOTT, *supra* note 7, § 4.9, at 384; ROBINSON, *supra* note 22, at 263 ("Current statutory formulations rarely treat an involuntary act as a matter of defense. It is instead almost universally treated as a required element of every offense.").

40. *See* State v. Caddell, 215 S.E.2d 348, 363 (N.C. 1975) (holding that unconsciousness is an affirmative defense and the burden of proving it rests with the defendant); Fulcher v. State, 633 P.2d 142, 147 (Wyo. 1981) (adopting the rule set forth in *State v. Caddell*).

> Treating involuntariness as a defense rather than voluntariness as an offense element, is also of practical significance under recent Supreme Court decisions outlining the matters for which the state is constitutionally obliged to carry the burdens of production and persuasion. The Court permits the burdens of production and persuasion to be shifted to the defendant for excuses, while demanding that they be allocated to the state for all offense elements.

ROBINSON, *supra* note 22, at 265.

41. *Fulcher*, 633 P.2d at 147 (citation omitted).

42. For a discussion of the ambivalence in Anglo-American jurisprudence, see ROBERT F. SCHOPP, AUTOMATISM, INSANITY, AND THE PSYCHOLOGY OF CRIMINAL RESPONSIBILITY: A PHILOSOPHICAL INQUIRY 71–85 (1991).

Another commentator has written:

> Because everyone agrees that severely dissociated agents should be exempted from responsibility on one of the two theories, allegedly "practical" lawyers may wonder why it makes a difference. Here are three reasons: it is theoretically important and interesting; the allocation of the burden of persuasion is affected; there may be substantial differences in the post-acquittal treatment of the agent.

Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1641 n.145 (1994).

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, in a voluntary bodily movement."[43] *Black's Law Dictionary* defines the automatism defense as a "defense to the mens rea of a voluntary action."[44] The prevailing view, however, is that automatism relates to the actus reus of a crime because the defendant has not acted voluntarily.[45]

2. Automatism Compared to the Insanity Defense

In determining that automatism is an affirmative defense, many courts compare and contrast it to the insanity defense.[46] The law is unsettled as to whether automatism constitutes a form of insanity.

Similarities do exist between the insanity and automatism defenses.[47] The minority viewpoint capitalizes on these similarities and argues that automatism is a form of insanity.[48] A Kentucky court stated that it could not see "how [the facts proving sleepwalking] would constitute any defense other than that embraced in the plea of insanity."[49] An appellate court in Texas similarly characterized sleepwalking as "a species of insanity."[50]

One commentator noted that the differences between insanity and automatism do not "sound convincing in view of the fact that [the] defendant has caused death or serious injury in some of the cases in which the defense of automatism was recognized:"[51]

> If one acts with such violence as to cause death, or hits a ten-year-old with a mallet and throws him out the window, and is able to accomplish all of such harm while unconscious, the ultimate conclusion is bound to be that such behavior manifests mental disease or defect, and should be dealt with on that basis. In fact[,] there is rea-

43. Eichelberger, *supra* note 29, § 2; *see also* Morse, *supra* note 42, at 1641–42.

44. BLACK'S LAW DICTIONARY 134 (6th ed. 1990).

45. *See* LAFAVE & SCOTT, *supra* note 7, § 4.9, at 382; *see also* MICHAEL S. MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW 257–58 (1993) (arguing that dissociated movements are not voluntary actions for two reasons: (1) "Consciousness seems essential as part of our self-boundaries, so that if *we* (our conscious selves) are [unconscious], then *we* don't will anything," and (2) volitions cannot perform their "resolving" functions unless they are "responsive to all (or at least a fair sample) of what one desires, believes, and intends"); Corrado, *supra* note 19, at 1192 ("The action is not voluntary because, although it involves what used to be called an act of will (being purposive), the act of will is itself caused by something beyond the actor's control—a blow on the head, a sleep disorder, epilepsy, hypnotic suggestion."); Robinson, *supra* note 24, at 896 n.84 ("Voluntariness might be thought to be more akin to mens rea than to actus reus elements.").

46. *See* Eichelberger, *supra* note 29, § 3b–c.

47. *See* LAFAVE & SCOTT, *supra* note 7, § 4.9, at 384.

48. *See* Davidson & Walters, *supra* note 14, at 19. For a discussion of the difficulties in distinguishing the automatism defense from the insanity defense, see Sanford J. Fox, *Physical Disorder, Consciousness, and Criminal Liability*, 63 COLUM. L. REV. 645, 652–68 (1963).

49. Tibbs v. Commonwealth, 128 S.W. 871, 874 (Ky. 1910).

50. Bradley v. State, 277 S.W. 147, 149 (Tex. Crim. App. 1925).

51. PERKINS & BOYCE, *supra* note 19, at 994.

> son to question that ordinary sleepwalking is not a case of mental deficiency "under current advanced medical knowledge."[52]

Most authorities, however, distinguish the concepts of automatism and insanity for a variety of reasons.[53] First, the defense of automatism does not require a mental disease or defect.[54] Indeed, by definition, automatism is "a condition sometimes observed in persons who, without being actually insane, suffer from an obscuration of the mental faculties, loss of volition or of memory, or kindred affections."[55] More specifically:

> Insanity is incapacity from disease of the mind, to know the nature and quality of one's act or to distinguish between right and wrong in relation thereto. In contrast, a person who is completely unconscious when he commits an act otherwise punishable as a crime cannot know the nature and quality thereof or whether it is right or wrong.[56]

Second, insanity and automatism require proof of different elements. "The insanity defense consists of three elements: (1) presence of a mental disease or defect, (2) lack of cognition, and (3) lack of volition. In contrast, the involuntary action/automatism defense consists of a single element: lack of volition."[57] As such, it is feasible for a defendant to prove lack of volition (and thus qualify for the automatism defense) but be unable to prove the other two required elements for insanity.[58]

Third, the treatment of a defendant found guilty after asserting either of the defenses justifies a distinction between the two.[59] If automatism is codified under the insanity defense, anomalies in the effect of the verdict will result.[60] For example, if an automatistic defendant is judged by the court to be sane yet still convicted, he can be sentenced to prison.[61] The rehabilitative and deterrent value of the prison sentence is lacking—the act was caused by an uncontrollable, unconscious state, not a character flaw.[62] If, on the other hand, the court treats automatism as a form of insanity, the automatistic defendant will be judged not guilty but sentenced to a mental institution.[63] Mental hospitals do not provide appro-

52. *Id.* at 995 (citations omitted).

53. *See* Carter v. State, 376 P.2d 351, 358 (Okla. Crim. App. 1962) ("[I]t has been clearly pointed out that a defense of insanity and defense of unconsciousness are not the same, either by statutory definition or by interpretation of the courts."); State v. Hinkle, 489 S.E.2d 257, 262 (W. Va. 1996) ("[T]he weight of authority in this country suggests that unconsciousness, or automatism as it is sometimes called, is not part of the insanity defense for several reasons."); Davidson & Walters, *supra* note 14, at 18.

54. *See* State v. Caddell, 215 S.E.2d 348, 360 (N.C. 1975).

55. BLACK'S LAW DICTIONARY 134 (6th ed. 1990).

56. State v. Mercer, 165 S.E.2d 328, 335 (N.C. 1969).

57. People v. Grant, 360 N.E.2d 809, 816 (Ill. App. Ct. 1977).

58. *See id.*

59. *See Caddell*, 215 S.E.2d at 360.

60. *See* Fulcher v. State, 633 P.2d 142, 146 (Wyo. 1981).

61. *See id.*

62. *See id.*

63. *See id.*

priate treatment for someone with epilepsy, a bump on the head that caused unconsciousness, or a sleepwalking disorder.[64]

3. Examples

The automatism defense presents itself in many different forms. The Third Circuit accepted a defendant's argument that he had blacked out while driving as the result of an epileptic seizure.[65] A defendant in England argued successfully that his assault on the victim was perpetrated during a hypoglycemic episode of low blood sugar.[66] A man suffering from arteriosclerosis claimed his violent act was committed during a period of disease-induced unconsciousness.[67]

A prisoner in California asserted "that his escape was not [a] voluntary act but was caused by a hypnotic suggestion given him by a fellow inmate;" the court rejected the claim for lack of evidence.[68] A member of the military argued that his willful disobedience of an officer was not a voluntary action.[69] Rather, "his fear of confined areas caused him to experience panic attacks while riding in enclosed military vehicles, and that such attacks precipitated his misconduct."[70] A man involved in a head-on collision maintained that he lost consciousness while driving as a result of Meniere's Syndrome, a disturbance in equilibrium stemming from a malfunction in the inner ear.[71]

After being arrested following a bar fight, a defendant was charged with assaulting his cellmate.[72] The defendant claimed he had suffered a brain injury and was in a state of traumatic automatism.[73] An English court accepted an accused's argument that he had a cerebral tumor that resulted in an uncontrollable "outburst of impulsive violence."[74]

Automatism has also been raised when a defendant was suffering from delirium from fever or drugs,[75] carbon monoxide poisoning,[76] and various infections.[77] Some cases have recognized an automatistic state

64. *See id*. Further, treatment in mental hospitals for cases involving epilepsy, unconsciousness, or sleepwalking, for example, can encroach on the personal liberties of automatistic defendants. *See* McClain v. State, 678 N.E.2d 104, 109 (Ind. 1997).

65. *See* Virgin Islands v. Smith, 278 F.2d 169, 171–75 (3d Cir. 1960); Eichelberger, *supra* note 29, § 6, at 1094.

66. *See* Regina v. Quick, [1973] 3 W.L.R. 26, 35–36 (C.A.).

67. *See* Regina v. Kemp, [1956] 3 All E.R. 249, 252–53 (Bristol Assizes).

68. People v. Marsh, 338 P.2d 495, 496 (Cal. Ct. App. 1959); *see also* Eichelberger, *supra* note 29, § 12, at 1131.

69. *See* United States v. Campos, 37 M.J. 894, 901 (A.C.M.R. 1993).

70. Davidson & Walters, *supra* note 14, at 23.

71. *See* State v. Gooze, 81 A.2d 811, 814 (N.J. Super. Ct. App. Div. 1951).

72. *See* Fulcher v. State, 633 P.2d 142, 143 (Wyo. 1981).

73. *See id*. at 144; Eichelberger, *supra* note 29, § 10, at 1128.

74. Regina v. Charlson, [1955] 1 W.L.R. 317, 317 (Chester Assizes).

75. *See* State v. Caddell, 215 S.E.2d 348, 360 (N.C. 1975).

76. *See* ROBINSON, *supra* note 22, at 277.

77. *See id.*

caused by emotional trauma.[78] Intoxication due to drugs[79] or alcohol[80] has occasionally been classified as automatism.[81] Although case authority is lacking, some commentators have suggested the possibility of an automatism defense arising out of premenstrual syndrome[82] or post-traumatic stress disorder.[83] A person who is brainwashed, however, cannot claim an automatism defense.[84]

A court has also defined somnambulism—sleepwalking—as automatistic behavior.[85] This note will focus on the automatism defense of sleepwalking and ultimately analogize the defense's justifications to the underlying medical positions about drug and alcohol addiction.

B. Sleepwalking

1. General Principles

As noted above, an actor who commits a crime while sleepwalking is eligible to assert an automatism defense.[86] The theory, as with all automatism claims, is that the actor is not exercising his will and acting voluntarily and should not be held criminally liable:[87]

> Traditional sleepwalking doctrine . . . aims to protect the normal waking self from the consequences of the sleeping self's acts. It is not enough, for criminal liability, that a human being perform an act: we do not just grab bodies and put them in jail, even when they act in coordinated, directed ways. Rather, if the normal, waking self will suffer the punishment for the crime, it must itself have perpetrated the act: it cannot have been unconscious.[88]

The sleepwalker, who is "not acting with his normal conscious mind,"[89] may be expressing his unconscious desire.[90] It is unsound, however, to "impose liability for an unconscious desire which is manifested in this way."[91] More pointedly, "[a]s the somnambulist does not enjoy the free and rational exercise of his understandings, and is more or less un-

78. *See* LAFAVE & SCOTT, *supra* note 7, § 4.9, at 383; Eichelberger, *supra* note 29, § 13.
79. *See* State v. Alie, 96 S.E. 1011, 1013–14 (W.Va. 1918); Eichelberger, *supra* note 29, § 8.
80. *See* People v. Tidwell, 473 P.2d 762, 763 (Cal. 1970); Eichelberger, *supra* note 29, § 7.
81. For a discussion on defense attempts based on the combined effects of alcohol and drugs, see Eichelberger, *supra* note 29, § 9.
82. *See* LAFAVE & SCOTT, *supra* note 7, § 4.9, at 383.
83. *See id.*
84. *See id.*
85. *See* Fain v. Commonwealth, 78 Ky. 183, 188 (1879); Eichelberger, *supra* note 29, § 11.
86. *See supra* note 85 and accompanying text.
87. *See supra* notes 20–24 and accompanying text.
88. Elyn R. Saks, *Multiple Personality Disorder and Criminal Responsibility*, 25 U.C. DAVIS L. REV. 383, 435 (1992).
89. Simester, *supra* note 8, at 416.
90. *See* ROBINSON, *supra* note 22, at 276.
91. *Id.*

conscious of his outward relations, none of his acts during the paroxysms can rightfully be imputed to him as crimes."[92]

2. Medical Evidence

Statistics show more children than adults are sleepwalkers.[93] Of children ages five to twelve, between ten and fifteen percent have had sleepwalking experiences.[94] Overall, perhaps as many as forty percent of children experience sleepwalking episodes at some time during childhood.[95] Childhood sleepwalking is typically benign, and it may start as soon as the child is old enough to walk.[96] Children ages four through eight are most susceptible to sleepwalking, and the condition usually disappears by the time they reach adolescence.[97]

Among adults, only one to six percent sleepwalk.[98] Adults, however, sleepwalk more times per year, and their conditions last longer than those of children.[99] Men and women are equally affected.[100] Sleepwalking among the elderly is uncommon and is typically associated with some other disorder.[101]

Sleepwalking episodes typically begin approximately three hours after a person falls asleep and last only five to fifteen minutes.[102] Sleepwalkers are not acting out dreams while they are moving about because episodes occur during nondream sleep.[103] Mark Mahowald, director of the Minnesota Regional Sleep Disorders Center, explains sleepwalking as an atypical transition between the cycles of wakefulness, non-rapid-eye-movement sleep, and rapid-eye-movement sleep.[104] "[S]ometimes errors are going to be made in passing the baton from one state [of consciousness] to another."[105]

Sleepwalkers do not have a psychological problem; they have a physiological one.[106] "To sleepwalk, a person must first be neurologically vulnerable."[107] Stress, pressure, fatigue, and lack of sleep contribute to this state.[108] Further, external events that disturb sleep, such as a person

92. Bradley v. State, 277 S.W. 147, 148 (Tex. Crim. App. 1925) (citation omitted).
93. *See* Prakash Masand et al., *Sleepwalking*, 51 AM. FAM. PHYSICIAN 649, 649 (Feb. 1995).
94. *See id.*
95. *See* Edward Dolnick, *Midnight Rambler*, 5(5) IN HEALTH 50, 52 (Sept. 1991).
96. *See* Masand et al., *supra* note 93, at 649.
97. *See id.* at 649–50.
98. *See id.* at 649.
99. *See id.* at 650.
100. *See* Dolnick, *supra* note 95, at 52.
101. *See* Masand et al., *supra* note 93, at 650.
102. *See* Dolnick, *supra* note 95, at 52.
103. *See id.*; Tina Chang, *Eight Wonders of the Human Brain,* AM. HEALTH, June 1995, at 68, 69.
104. *See* Dolnick, *supra* note 95, at 54.
105. *Id.*
106. *See id.*
107. *Id.*
108. *See id.*; Chang, *supra* note 103, at 68.

making noise in the sleepwalker's room, can trigger a sleepwalking episode.[109] Genetic factors also play some role.[110]

Specialists who treat sleepwalking focus first on safety measures to protect the sleepwalker.[111] Various types of drugs—benzodiazepines or antidepressants—may be used in treating sleepwalking.[112] A therapeutic approach, one that helps people reduce stress and deal with frustrations, benefits some adults who sleepwalk by encouraging sound sleeping habits.[113]

During a sleepwalking episode,

> [n]ot only is the power of locomotion enjoyed, as the etymology of the term signifies, but the voluntary muscles are capable of executing motions of the most delicate kind. Thus, the somnambulist will walk securely on the edge of a precipice, saddle his horse, and ride off at a gallop; walk on stilts over a swollen torrent; practice airs on a musical instrument; in short, he may read, write, run, leap, climb, and swim, as well as, and sometimes even better than, when fully awake.[114]

Further, sleepwalkers are almost "impossible to awaken . . . and have no memory of their sleepwalking the next day."[115] The ability of the sleepwalker to control his actions is severely limited.[116]

Although sleepwalkers are rarely violent toward others,[117] men with high stress levels and substance abuse problems are most likely to be violent.[118] Scott Falater, a man from Phoenix, Arizona, brutally stabbed his wife, dragged her to the backyard pool, and held her head underwater.[119] Dr. Rosalind Cartwright, a sleep disorder expert who analyzed Falater, says it is possible that he was sleepwalking:[120] "[Sleepwalkers] think something terrible is happening, and they have to defend themselves, so often they will fight."[121] Kenneth Parks, a Canadian man, was acquitted for the murder of his mother-in-law after he explained that he had been asleep when he drove approximately fourteen miles, retrieved a tire iron from his trunk, unlocked the house, and assaulted his wife's

109. *See* Chang, *supra* note 103, at 68.
110. *See* Masand et al., *supra* note 93, at 650.
111. *See id*. at 652.
112. *See id.* at 653.
113. *See id.*
114. Bradley v. State, 277 S.W. 147, 148–49 (Tex. Crim. App. 1925) (citation omitted).
115. Judith E. Angerman, *Nightwalkers*, PEDIATRICS FOR PARENTS, Jan. 1992, at 2.
116. *See* Rosalind Cartwright & Lynne Lamberg, *Directing Your Dreams; Excerpt from Crisis Dreaming: Using Your Dreams to Solve Your Problems*, PSYCHOL. TODAY, Nov. 1992, at 32.
117. *See id.*
118. *See* Roger Highfield, *Murder, Your Honour? It Was Just a Bad Dream*, THE DAILY TELEGRAPH (London), Dec. 29, 1995, at 9.
119. *See* CNN Interactive, *Arizona Man Says He Was Sleepwalking When He Killed His Wife* (visited Sept. 18, 2000) <http://www.cnn.com/US/9805/08/sleepwalk.defense/>.
120. *See id.*
121. *Id.* For more discussion of the Scott Falater case, see *20/20 Wednesday* (ABC television broadcast, May 19, 1999).

parents.[122] Carlos Schenck, a Minneapolis psychiatrist who studied the trial transcripts, claimed that it would have been impossible for Parks to have faked sleepwalking.[123] The Canadian courts apparently agreed.[124]

3. Cases and Statutes

"Sleepwalkers are accused of crimes rarely, but regularly. In courts around the world, at one time or another, about 30 sleepwalkers have been charged with murder. . . . [M]ost have been acquitted."[125] Experts estimate that in England alone, approximately fifteen cases of violent crimes involving sleepwalking defendants come to trial every year.[126] An oft-discussed case from England is that of Mrs. Cogdon who killed her daughter with a blow to the head with an axe.[127]

Canada has been the source of several recently publicized cases of sleepwalking—the Kenneth Parks case, for example.[128] Additionally, William Wade claimed he was sleepwalking when he "viciously stabbed his wife and repeatedly smashed her head on the sidewalk."[129] Gary Cormier was sentenced to prison after he raped a seventy-five-year-old woman, purportedly while sleepwalking.[130]

Although the sleepwalking or unconsciousness defense is not entirely new, few American courts have discussed it.[131] In a limited number of successful cases, courts found that a jury instruction regarding sleepwalking should have been submitted.[132] Courts that have refused a sleepwalking instruction have done so because of insufficient evidence.[133] Defendants in the United States asserting the automatistic defenses, including sleepwalking, have marshaled them in various types of cases, including murder,[134] kidnapping,[135] assault,[136] and sexual assault.[137]

122. *See* Regina v. Parks, [1992] 95 D.L.R. 27, 31 (Can.).

123. *See* Dolnick, *supra* note 95, at 52.

124. *See Parks*, 95 D.C.R. at 39. After Parks's acquittal at trial, the Crown appealed to the Ontario Court of Appeal, arguing that the trial judge should have submitted the insanity defense to the jury. The appeal was dismissed, and the Crown appealed to the Supreme Court of Canada. The court agreed that the appeal was properly dismissed, affirming Parks's initial acquittal. *See id.*

125. Dolnick, *supra* note 95, at 56.

126. *See* Charlotte Parsons, *Somnambulists Cannot Be Held Responsible for Their Actions*, S. CHINA MORNING POST, May 23, 1995, at 17.

127. For a description of the facts surrounding the Cogdon case, see Norval Morris, *Somnambulistic Homicide: Ghosts, Spiders, and North Koreans*, 5 RES JUDICATAE 29, 29–30 (1951).

128. *See supra* notes 122–24 and accompanying text.

129. *Murder Verdict for Sleepwalker Reinstated*, THE TORONTO STAR, June 3, 1995, at A3.

130. *See* Gary Oakes, *Sleepwalking Defence Rejected, Man Gets 5 Years*, THE TORONTO STAR, Aug. 21, 1997, at A28.

131. *See* State v. Caddell, 215 S.E.2d 348, 360 (N.C. 1975).

132. *See* Fain v. Commonwealth, 78 Ky. 183, 192 (1879); Bradley v. State, 295 S.W. 606, 607 (Tex. Crim. App. 1927).

133. *See* Lewis v. State, 27 S.E.2d 659, 666 (Ga. 1943); Tibbs v. Commonwealth, 128 S.W. 871, 874 (Ky. 1910).

134. *See, e.g.*, *Bradley*, 277 S.W. at 147; *Lewis*, 27 S.E.2d at 659; *Tibbs*, 128 S.W. at 871.

135. *See Caddell*, 215 S.E.2d at 348.

Almost all American jurisdictions explicitly recognize an involuntary conduct defense or at least require a voluntary act, thereby implicitly allowing for the defense.[138] One scholar describes the substance of the involuntariness defense as follows:

> Involuntary Act. An actor is excused for his conduct constituting an offense if, as a result of (1) any mental or physical disability, (2) the conduct is not a product of the actor's effort or determination.[139]

The MPC specifically provides that "bodily movement[s] during unconsciousness or sleep" are not voluntary acts.[140] The Illinois statute requiring a voluntary act[141] was derived from this portion of the MPC.[142]

136. *See, e.g.*, United States v. Olvera, 15 C.M.R. 134, 136–37 (C.M.A. 1954); Fulcher v. State, 633 P.2d 142, 143 (Wyo. 1981).

137. *See, e.g.*, United States v. Foster, No. ACM 29283, 1993 WL 76323, at *1 (A.F.C.M.R. 1993); Clifton v. State, 758 P.2d 1279, 1281 (Alaska Ct. App. 1988); Redd v. State, 502 S.E.2d 467, 470 (Ga. Ct. App. 1998); People v. Dunigan, 421 N.E.2d 1319, 1327 (Ill. App. Ct. 1981); State v. Perkins, 444 N.W.2d 34, 38 (S.D. 1989).

138. *See, e.g.*, ALASKA STAT. §§ 11.81.600, .900(b)(60) (Michie 1998); ARIZ. REV. STAT. ANN. §§ 13-105(34), -201 (West 1989); ARK. CODE ANN. § 5-2-204(a) (Michie 1997) (requiring but failing to define "voluntary act"); CAL. PENAL CODE § 26(16) (West 1999) (noting that persons who commit an act without being conscious thereof are incapable of the crime); COLO. REV. STAT. ANN. §§ 18-1-501(10), -502 (West 1999) (defining and requiring a voluntary act); DEL. CODE ANN. tit. 11, §§ 242–243 (1995); HAW. REV. STAT. ANN. §§ 702-200(1), -201 (Michie 1999); IDAHO CODE § 18-201(2) (1997); 720 ILL. COMP. STAT. ANN. 5/4-1, -2 (West 1993); IND. CODE ANN. § 35-41-2-1 (West 1998) (requiring but failing to define "voluntary act"); KY. REV. STAT. ANN. §§ 501.030(1), .010(3) (Michie 1990); LA. REV. STAT. ANN. § 14:8 & reporter's cmt. (West 1997) (requiring but failing to define "act"); ME. REV. STAT. ANN. tit. 17-A, § 31(1) (West 1964) (requiring but failing to define "voluntary act"); MO. ANN. STAT. § 562.011(1)(2)(1) (West 1999); MONT. CODE ANN. § 45-2-101(32) (1997); NEB. REV. STAT. § 28-109(1), (23) (1995) (defining "act" and "voluntary act"); NEV. REV. STAT. § 194.010(5) (1997); N.H. REV. STAT. ANN. § 626:1(I) (1996) (requiring but failing to define "voluntary conduct"); N.J. STAT. ANN. § 2C:2-1(a) (West 1995); N.Y. PENAL LAW § 15.00(1) (McKinney 1998); N.D. CENT. CODE § 12.1-02-01(1) (1976) (requiring an "act" but failing to include a voluntariness requirement); OHIO REV. CODE ANN. § 2901.21(A)(1), (C)(2) (Anderson 1999); OKLA. STAT. ANN. tit. 21, § 152(6) (West 1983) (noting that unconsciousness precludes liability); OR. REV. STAT. § 161.085(2) (1997) (defining but not requiring a "voluntary act"); 18 PA. CONS. STAT. ANN. § 301(1) (West 1998) (requiring but failing to define a "voluntary act"); S.D. CODIFIED LAWS § 22-3-1(5) (Michie 1998); TEX. PENAL CODE ANN. § 6.01(a) (West 1994); P.R. LAWS ANN. tit. 33, §§ 3022(27), 3153 (1981) (noting that voluntary means aim or will to commit the act or incur the commission and explaining that one who commits an act while unconscious is not liable); United States v. Bailey, 585 F.2d 1087, 1105–30 (D.C. Cir. 1978) (Wilkey, C.J., dissenting) (arguing that a voluntary act is a product of the will and distinguishing the voluntariness issue, which is essential for actus reus, from control impairment excuses); Virgin Islands v. Smith, 278 F.2d 169, 174 (3d Cir. 1960) (holding that unconsciousness is a defense to a criminal charge); Lewis v. State, 27 S.E.2d 659, 661 (Ga. 1943) (stating in dicta that somnambulism may be a defense in some cases); State v. Pettay, 532 P.2d 1289, 1290 (Kan. 1975) (holding that involuntary conduct is a defense to criminal prosecution); State v. Austin, 461 P.2d 230, 232 (N.M. Ct. App. 1969); State v. Caddell, 215 S.E.2d 348, 363 (N.C. 1975) (holding that unconsciousness or automatism is a complete defense to a criminal charge); Greenfield v. Commonwealth, 204 S.E.2d 414, 417–18 (Va. 1974) (holding that unconsciousness is a complete defense); State v. Utter, 479 P.2d 946, 948 (Wash. Ct. App. 1971) (holding that unconsciousness is a complete defense); *Fulcher*, 633 P.2d at 147 (Wyo. 1981) (holding that unconsciousness or automatism is a complete defense to crime where an uncontrollable physical disorder caused the act); Unless otherwise indicated, the listed jurisdictions provide an involuntariness defense or require voluntary conduct.

139. ROBINSON, *supra* note 22, at 260. "Most jurisdictions have adopted formulations of the involuntary act defense that modify in some way the [stated] principle." *Id.* at 268.

140. MODEL PENAL CODE § 2.01(2)(b) (1985).

141. *See* 720 ILL. COMP. STAT. ANN. 5/4-1 (West 1993).

142. *See Fulcher*, 633 P.2d at 156 n.7.

Wyoming, however, chose not to adopt the MPC insofar as it considers automatism as a separate defense.[143] A California statute, for example, states that "[p]ersons who committed the act charged without being conscious thereof" are incapable of committing crimes.[144]

C. Addictions

1. Generally

Addictions to chemical substances may create similar voluntary act questions as presented in the discussion of automatism. The American Medical Association[145] (AMA) considers drug addiction to be an illness;[146] "[c]hemical dependence is regarded as a biopsychosocial disease."[147] The most widely accepted and authoritative definition of drug addiction (in particular, addiction to heroin) is the one that the World Health Organization has promulgated, which lists the characteristics of the disease as follows:

> (1) an overpowering desire or need to continue taking the drug and to obtain it by any means; the need can be satisfied by the drug taken initially or by another with [similar] properties; (2) a tendency to increase the dose owing to the development of tolerance; (3) a psychic dependence on the effects of the drug related to a subjective and individual appreciation of those effects; and (4) a physical dependence on the effects of the drug requiring its presence for maintenance of homeostasis and resulting in a definite, characteristic, and self-limited abstinence syndrome when the drug is withdrawn.[148]

Congress has adopted a similar definition of addiction, agreeing that a "drug dependent person" is one

> who is using a controlled substance . . . and who is in a state of psychic or physical dependence, or both, arising from the use of that substance on a continuous basis. Drug dependence is characterized by behavioral and other responses which include a strong compulsion to take the substance on a continuous basis in order to experi-

143. *See id.* at 156.

144. CAL. PENAL CODE § 26 (West 1999).

145. "Since its founding in 1847 by a group of physicians concerned about advancing the quality of medical education, science, and medical practice, the American Medical Association's core purpose has been: To promote the science and art of medicine and the betterment of public health." American Medical Association, *What We Do: Core Purpose* (visited Sept. 18, 2000) <http://www.ama-assn.org/about/purpose.htm>.

146. For an extraordinarily thorough discussion of the history of drug addiction, see *United States v. Moore*, 486 F.2d 1139, 1215–29 (D.C. Cir. 1973) (Wright, J., dissenting).

147. Mary E. Roper, *Reaching the Babies Through the Mothers: The Effects of Prosecution on Pregnant Substance Abusers*, 16 L. & PSYCHOL. REV. 171, 176 (1992) (footnote omitted). "Biopsychosocial means that the disease is considered to involve an interplay of biological, psychological, and social factors." *Id.* at 176 n.52.

148. WORLD HEALTH ORGANIZATION, EXPERT COMMITTEE ON ADDICTION-PRODUCING DRUGS, THIRTEENTH REPORT, TECH. REP. SERIES NO. 273, at 13 (1964).

ence its psychic effects or to avoid the discomfort caused by its absence.[149]

In addition to drugs, alcohol can be addictive.[150] Alcoholism is a chronic disorder, described as "an uncontrolled intake of alcoholic beverages that interferes with physical and mental health, social and familial relationships, and occupational responsibilities."[151] Persons addicted to alcohol often exhibit the following characteristics: a strong craving or compulsion to drink, loss of control, inability to stop drinking, physical dependence manifesting itself in withdrawal symptoms, and increasing tolerance for alcohol.[152] "This addiction—chronic alcoholism—is now almost universally accepted medically as a disease."[153]

2. The Addiction Defense

In two Supreme Court decisions, *Robinson v. California*[154] and *Powell v. Texas*,[155] defendants argued that their addiction produced a lack of self-control—thus, a lack of criminal responsibility—and that they should not be punished.[156] In *Robinson*, the defendant was convicted for violating a California law that prohibited "us[ing], or be[ing] under the influence of, or be[ing] addicted to the use of narcotics."[157] This statute allowed a person to be "continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State."[158] Consequently, the Court invalidated this statute as repugnant to the Eighth Amendment prohibition against cruel and unusual punishment (as applied to the states via the Fourteenth Amendment).[159] In so doing, the Court recognized narcotic addiction as an illness for which a person may not be punished.[160]

149. 42 U.S.C. § 201(q) (1994). Other statutes define "addict" as "any individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction." 21 U.S.C. § 802(1); *see also* 28 U.S.C. § 2901(a); 42 U.S.C. § 3411(a).

150. *See* HANDBOOK OF DISEASES 28 (June Norris et al. eds., 1996) [hereinafter HANDBOOK].

151. *Id*.

152. *See* National Institutes of Health, *Alcoholism: Getting the Facts* (visited Apr. 10, 2000) <http://www.silk.nih.gov/silk/niaaa1/publication/booklet.htm>.

153. Driver v. Hinnant, 356 F.2d 761, 764 (4th Cir. 1966); *see also* RUSSELL L. CECIL & ROBERT F. LOEB, 2 A TEXTBOOK OF MEDICINE 1625 (10th ed. 1959); MANFRED S. GUTTMACHER & HENRY WEILHOFEN, PSYCHIATRY AND THE LAW 318–22 (1952); ELVIN M. JELLINEK, THE DISEASE CONCEPT OF ALCOHOLISM 41–44 (1960).

154. 370 U.S. 660 (1962).

155. 392 U.S. 514 (1968).

156. *See Robinson*, 370 U.S. at 666–67 & n.8; *Powell*, 392 U.S. at 521.

157. *Robinson*, 370 U.S. at 660 n.1.

158. *Id.* at 666.

159. *See id.* at 667.

160. *See id.* "It is worth noting that *Robinson* represented the first instance in which the Court relied upon the cruel and unusual punishment clause in order to limit the states' power to define crime." United States v. Moore, 486 F.2d 1139, 1236 n.162 (D.C. Cir. 1973) (Wright, J., dissenting); *see also* Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 646 (1966); Note, *The Supreme Court, 1961 Term*, 76 HARV. L. REV. 54, 143 (1962).

Unfortunately, the precise impetus of the *Robinson* decision was unclear.[161] A narrow interpretation bases the Court's holding on the fact that Robinson had committed no physical act within the jurisdiction; he was convicted simply for being an addict.[162] The Court, however, discussed the disease concept of addiction in some detail, suggesting a broader rationale for the decision:

> It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. . . . [I]n light of contemporary human knowledge, a law [that] made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.
>
> We cannot but consider the statute before us as of the same category. In this Court counsel for the State recognized that narcotic addiction is an illness. Indeed, it is apparently an illness [that] may be contracted innocently or involuntarily. We hold that a state law [that] imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment. . . . Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold.[163]

This language suggests that narcotics addiction, like mental illness, leprosy, and venereal disease, is an illness and constitutionally cannot be punished as a crime.

The *Robinson* decision's ambiguity created considerable confusion among lower courts interpreting the case.[164] In 1968, the Supreme Court offered some clarification in *Powell v. Texas*.[165] Powell, a defendant convicted of public drunkenness, asserted an Eighth Amendment argument under *Robinson*.[166]

The trial judge entered findings of fact that the defendant "[was] afflicted with the disease of chronic alcoholism" and that "his appearance in public [while drunk was] . . . not of his own volition."[167] Additionally, the trial judge found that chronic alcoholism "destroys the afflicted person's will power to resist the constant, excessive consumption of alco-

161. *See Moore*, 486 F.2d at 1236 (Wright, J., dissenting).

162. *See Robinson*, 370 U.S. at 667.

163. *Id.* at 666–67 (citations omitted).

164. *Compare* Easter v. District of Columbia, 361 F.2d 50, 54–55 (D.C. Cir. 1966) (en banc), Driver v. Hinnant, 356 F.2d 761, 764–65 (4th Cir. 1966), *and* Morales v. United States, 344 F.2d 846, 849 n.2 (9th Cir. 1965), *with* Bailey v. United States, 386 F.2d 1, 3–4 (5th Cir. 1967), United States v. Reincke, 344 F.2d 260, 263–64 (2d Cir. 1965), State v. Margo, 191 A.2d 43, 44–45 (N.J. 1963), *and* Salas v. State, 365 S.W.2d 174, 175 (Tex. Crim. App. 1963).

165. 392 U.S. 514 (1968).

166. *See id.* at 521.

167. *Id*.

hol."[168] Despite these findings, the judge ruled that "chronic alcoholism was not a defense to the charge."[169]

The *Powell* decision produced no majority opinion. Justice Marshall, writing for four members of the Court,[170] adopted the narrow interpretation of *Robinson*. In his view, "[t]he entire thrust of *Robinson*'s interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act."[171] Powell thus was correctly convicted for his act of appearing in public while intoxicated, rather than for merely being intoxicated.[172]

Justice Fortas, also writing for four members of the Court,[173] rejected the narrow view of *Robinson* and construed it as holding that "[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change."[174] In addition, Justice Fortas asserted that "a person may not be punished if the condition essential to constitute the defined crime is part of the pattern of his disease and is occasioned by a compulsion symptomatic of the disease."[175] He concluded that convicting Powell would violate the Eighth Amendment.[176] "This conclusion follows because appellant is a 'chronic alcoholic' who, according to the trier of fact, cannot resist the 'constant excessive consumption' of alcohol and does not appear in public by his own volition but under a 'compulsion' which is part of his condition."[177]

The case's ninth vote belonged to Justice White.[178] Although concurring in the result reached by Justice Marshall,[179] Justice White's discussion of the criminal responsibility issue more closely resembled that of Justice Fortas:

> If it cannot be a crime to have an irresistible compulsion to use narcotics, I do not see how it can constitutionally be a crime to yield to such a compulsion. Punishing an addict for using drugs convicts for addiction under a different name. Distinguishing between the two crimes is like forbidding criminal conviction for being sick with flu or epilepsy but permitting punishment for running a fever or having a convulsion. Unless *Robinson* is to be abandoned, the use of narcotics by an addict must be beyond the reach of the criminal law.

168. *Id.* at 521.
169. *Id.* at 517.
170. Chief Justice Warren, Justice Black, and Justice Harlan joined Justice Marshall's opinion. *See id.* at 516–17.
171. *Id.* at 533.
172. *See id*. at 533–34.
173. Justices Douglas, Brennan, and Stewart joined with Justice Fortas in a dissenting opinion. *See id.* at 554 (Fortas, J., dissenting).
174. *Id.* at 567 (Fortas, J., dissenting).
175. *Id.* at 569 (Fortas, J., dissenting).
176. *See id*. (Fortas, J., dissenting).
177. *Id.* at 570 (Fortas, J., dissenting).
178. *See id.* at 548 (White, J., concurring in the judgment).
179. *See id.* at 537.

> Similarly, the chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or for being drunk.[180]

Justice White voted to affirm the conviction, however, because Powell had failed to establish that his disease compelled him to be drunk in public.[181] Justice White made it clear that for those alcoholics who could show "that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. . . . [t]his statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk."[182]

Because of the absence of a majority opinion, "*Powell* has left this matter of criminal responsibility, as affected by the Eighth Amendment, in a posture which is, at best, obscure."[183] Moreover, "there exists a sharp split of opinion throughout the legal profession concerning the meaning of *Powell* and its effect upon laws penalizing the 'symptoms' of alcoholism and narcotic addiction."[184]

D. Legal Implications of Medical Characteristics of Addiction

1. History

Addiction is a Latin word made up of the prefix *ad*, meaning to or toward, and a form of *dicere*, meaning to say or pronounce.[185] In Roman law, *addiction* was a technical term, denoting a process "whereby one individual was given over to another by judicial pronouncement, often for

180. *Id.* at 548–49 (White, J., concurring in the judgment) (internal citation omitted). The D.C. Circuit explained Justice White's concurrence:

> This position, it should be noted, is by no means inconsistent with Justice White's dissent in *Robinson*. In voting to affirm the conviction in that case, he did not disagree with the basic proposition that infliction of punishment on an addict who has lost the power of self-control is violative of the Eighth Amendment. Rather, he was concerned primarily with the Court's failure to recognize different degrees of addiction. In his view, Robinson was simply an habitual user who had not lost the power of self-control. Thus, although noting that the Court's application of the cruel and unusual punishment clause was novel, he specifically stated that "if [Robinson] was convicted for being an addict who had lost the power of self-control, I would have other thoughts about this case."

United State v. Moore, 486 F.2d 1139, 1239 n.175 (D.C. Cir. 1973) (Wright, J., dissenting) (citations omitted).

181. *See Powell*, 392 U.S. at 554 (White, J., concurring in the judgment).

182. *Id.* at 551 (White, J., concurring in the judgment).

183. Watson v. United States, 439 F.2d 442, 451 (D.C. Cir. 1970).

184. *Moore*, 486 F.2d at 1240 n.178. *Compare, e.g.*, Smith v. Follette, 445 F.2d 955 (2d Cir. 1971), People v. Jones, 251 N.E.2d 195 (Ill. 1969), Nutter v. State, 262 A.2d 80 (Md. Ct. Spec. App. 1970), James D. McKevitt, *The "Untouchable" Acts of Addiction*, 55 A.B.A. J. 454 (1969), *and* Note, *Criminal Law: Demise of "Status"—"Act" Distinction in Symptomatic Crimes of Narcotic Addiction*, 1970 DUKE L.J. 1053, *with* State v. Fearon, 166 N.W.2d 720 (Minn. 1969), *In re* Jones, 246 A.2d 356 (Pa. 1968), George F. Bason, Jr., *Chronic Alcoholism and Public Drunkenness—Quo Vadimus Post* Powell, 19 AM. U. L. REV. 48 (1969), Kent Greenawalt, *"Uncontrollable" Actions and the Eighth Amendment: Implications of* Powell v. Texas, 69 COLUM. L. REV. 927 (1969), *and* Comment, *Emerging Recognition of Pharmacological Duress as a Defense to Possession of Narcotics:* Watson v. United States, 59 GEO. L.J. 761 (1971).

185. *See* FRANCIS F. SEEBURGER, ADDICTION AND RESPONSIBILITY: AN INQUIRY INTO THE ADDICTIVE MIND 39 (1996).

non-payment of debts."[186] Thus, the addict was one who, by an act of the court, had been "formally spoken over (that is, surrendered or obligated) to a master."[187] The term was also used in reference to sports or revels.[188] As one traditional scholar describes the traditional definition:

> The addict is . . . someone who has been delivered over to a master. Addicts are individuals who are no longer free for entering into new relationships, responsibilities, and encumbrances, since they have already been *spoken for*: they have already been claimed by the objects of their addictions.[189]

Not until 1928 did a dictionary connect addiction with the use of alcohol and drugs.[190]

By the end of the 1800s,[191] both alcoholism and drug dependency were considered diseases.[192] Alcohol and drug problems had undergone a "profound metamorphosis from bad habits . . . into diseases."[193] Although the disease concept has been modified over the years, it stands as "the dominant conceptual framework for alcohol and drug problems since the [late 1800s]."[194] Indeed, a recent edition of the *Handbook of Diseases* includes a discussion of both alcoholism[195] and drug abuse.[196]

The classification of addictions as diseases carries important implications.[197] In large part, the concept of a specific condition as a disease determines the behavior of the court system.[198] It is thus crucial to reach an understanding of what it means to label an addiction as a disease.

2. The Notion of Disease

As with many ideas in medicine and law, there is no universal concept used to describe the state of addiction as a disease.[199] From a biological perspective, a disease is a "medical concept whose meaning or intention involves an abnormality in function and/or structure of any part,

186. 1 THE OXFORD COMPANION TO MEDICINE 6 (John Walton et al. eds., 1986) [hereinafter OXFORD].

187. SEEBURGER, *supra* note 185, at 39.

188. *See* OXFORD, *supra* note 186, at 6.

189. SEEBURGER, *supra* note 185, at 39–40.

190. *See* OXFORD, *supra* note 186, at 7.

191. *See id.* at 8–12 (referring to the early nineteenth-century medical works of Benjamin Rush and Thomas Trotter); LAWRIE REZNEK, THE NATURE OF DISEASE 9–10 (1987) (same).

192. *See* OXFORD, *supra* note 186, at 12.

193. *Id.* at 13.

194. *Id.* at 14.

195. *See* HANDBOOK, *supra* note 150 (defining alcoholism as "[a] chronic disorder . . . usually described as an uncontrolled intake of alcoholic beverages that interferes with physical and mental health, social and familial relationships, and occupational responsibilities").

196. *See id.* at 293 (defining drug abuse and dependence, per the National Institute on Drug Abuse, as "the use of a legal or an illegal drug that causes physical, mental, emotional, or social harm").

197. *See* REZNEK, *supra* note 191, at 1.

198. *See id.*; *see also* OXFORD, *supra* note 186, at 16.

199. *See* SEEBURGER, *supra* note 185, at 66.

process, or system of the body."[200] Diseases are processes—with a beginning, a typical course, and an outcome—that cause harm to the person afflicted.[201]

In addition to purely biological aspects, the inquiry into addiction as a disease includes questions of voluntary actions. "[W]hen thinking about the question 'Is addiction a disease?' we also need to ask ourselves 'As opposed to what?' In terms of the history of attitudes toward addiction, the most important answer to that last questions is 'willful misconduct.'"[202]

When the concept of addiction was first applied to drugs and alcohol, a fundamental assumption was that "their use in an intemperate manner was obligatory, not voluntary; that it was beyond the control of the individual, who was essentially helpless before it. In other words, it was a *disease*."[203] In the late 1800s, the concept of addiction as disease became more widely accepted—individuals with drug or alcohol problems were not "capable of alternative behavior and hence [not] morally (and legally) culpable."[204] Instead, addictions rendered the afflicted "powerless to resist, and consequently blameless."[205] Further, "[a]lthough there are varying definitions of the disease, the most basic proposition . . . is that addiction is behavior by an individual that shows a 'loss of control' in the ability to avoid or regulate the use of narcotics."[206] In light of these medical developments, one court defined "addict" as "[one] who lacks the ability to abstain from taking or using narcotics or is utterly unable to control his actions in regard to the taking of narcotic drugs."[207]

The terms and phenomena associated with addiction are very similar to those of sleepwalking. Both are involuntary actions; arguably, drug addicts or alcoholics can no more control their need to use the substances to which they are addicted than sleepwalkers can control their actions while in a state of somnambulism. As noted in the discussion above, however, courts treat these defendants very differently.[208] The proposal that follows attempts to reconcile the medical evidence about these two conditions as well as the competing policy concerns.

200. Horacio Febrega, Jr., *Concepts of Disease: Logical Features and Social Implications, in* CONCEPTS OF HEALTH AND DISEASE: INTERDISCIPLINARY PERSPECTIVES 493, 494 (Arthur L. Caplan et al. eds., 1981).

201. *See* REZNEK, *supra* note 191, at 71, 161.

202. SEEBURGER, *supra* note 185, at 68.

203. OXFORD, *supra* note 186, at 7.

204. *Id.* at 13.

205. *Id.* at 13–14.

206. William D. McColl, *Baltimore City's Drug Treatment Court: Theory and Practice in an Emerging Field*, 55 MD. L. REV. 467, 487 (1996); *see also* Steven S. Nemerson, *Alcoholism, Intoxication, and the Criminal Law*, 10 CARDOZO L. REV. 393, 397–99 (1988).

207. United States v. Lindsey, 324 F. Supp. 55, 59 (D.D.C. 1971).

208. *See* Eichelberger, *supra* note 29, §§ 7–9 (discussing cases where defendants styled alcohol and/or drug use as automatism defenses and noting that most were unsuccessful).

IV. RESOLUTION

A. Proposal

In the same way that the doctrine of automatism encompasses the involuntary acts of a sleepwalker, the doctrine should also include a subset for an addiction defense. The automatism addiction defense would be available to drug or alcohol addicts charged with crimes of use or possession but would not extend to other crimes committed while addicted to a particular substance. Consistent with the theory of automatism, addicts would not benefit from criminal punishment. Other treatment methods such as drug or alcohol counseling or civil commitment would be utilized.

B. Delineation of Recommended Plan

Currently, abundant legal sanctions exist that make use and possession of illegal drugs a crime:[209]

> American public policy toward addiction . . . is almost exclusively concerned with the purely negative enterprise of resisting addiction. Throughout the history of American governmental concern with addiction, the focus has been upon the interdiction of substances for which American society shows significant rates of addiction. . . . [The current approaches] do nothing to address the underlying problem of addiction in general.[210]

Changing conceptions in criminal law jurisprudence are very often "closely related to advances in medical science [that] increase the courts' understanding of human conduct and relationships."[211] Consequently, a new plan is needed to effectively deal with those addicted to alcohol or drugs. Because knowledge is such that parallels can be drawn between addicts and sleepwalkers, the law of automatism is the place to begin formulating a proposal.

The medical profession—and the Supreme Court—recognize addiction as a disease.[212] The implication of that classification is that, once addicted, addicts are powerless to control use of the substance. As such, addicts should be afforded a defense similar to automatism for the activi-

209. *See* Roper, *supra* note 147, at 177–78. *See generally* A. Morgan Cloud III, *Cocaine, Demand, and Addiction: A Study of the Possible Convergence of Rational Theory and National Policy*, 42 VAND. L. REV. 725 (1989) (discussing the drug problem in America as well as the government's response via its "war on drugs").

210. SEEBURGER, *supra* note 185 at 145.

211. Gorham v. United States, 339 A.2d 401, 432 (D.C. 1975) (Fickling, J., dissenting). In *Robinson v. California*, 370 U.S. 660, the Court explained that:

> [I]t is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. . . . [I]n the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be . . . in violation of the Eighth and Fourteenth Amendments.

Id. at 666.

212. *See infra* notes 146–84 and accompanying text.

ties inherent to their diseases—use and possession of drugs or alcohol. These acts are inseparable from the disease itself;[213] punishing these activities is punishment of a disease over which addicts have no will.

The automatism defense applied to drugs and alcohol, like that applied to other diseases, would require the requisite proof of the underlying condition and the defendant's true lack of control—his addiction. In sleepwalking cases, for example, medical experts are often called to testify about the defendant's history of sleepwalking or about sleep experiments conducted in preparation for trial.[214] In other automatism cases, psychologists testify about the defendant's state of mind and possible lack of control at the time of the incident.[215] With the automatism addiction defense, medical evidence similarly would be needed to convince a judge or jury of an addict's lack of control.

Courts have expressed concern that the above logic can be applied to all other illegal acts an addict performs to obtain drugs or alcohol.[216] "It can hardly be doubted that, in at least some instances, an addict may in fact be 'compelled' to engage in other types of criminal activity in order to obtain sufficient funds to purchase his necessary supply of narcotics."[217] Indeed, some judges have argued for an extension of the addiction defense to other substantive crimes by addicts.[218]

It is unconvincing that logic requires the addiction defense to be construed so broadly. An addict has no control over his use of the addictive substance. He does, however, have control over acts committed while addicted. The manner in which he chooses to obtain the money necessary to support his addiction is a voluntary choice and thus falls outside the scope of an automatism defense.

Courts have suggested that this limit is not feasible.[219] Some argue that if free will exists for greater crimes committed by addicts, it must also exist for the lesser crimes of use and possession of the substance.[220]

213. *See* Watson v. United States, 439 F.2d 442, 470 (D.C. Cir. 1970) ("The use and incidental possession of narcotics are invariable symptoms of addiction."); *id.* at 472 ("Of course, anyone who possesses unstamped narcotics has almost certainly either bought or received them, and if he values his freedom he is undoubtedly also concealing them; these offenses are the necessary concomitants . . . [of] possession and use."); *id.* at 475 (McGowan, J., concurring) ("I have never been able to understand how . . . one can be a narcotics addict without periodically possessing narcotics."); *id.* at 475 n.1 (McGowan, J., concurring) ("The concept of an addict using narcotics without ever possessing, purchasing, receiving, or concealing them is surely beyond the bounds of practical logic.").

214. *See, e.g.*, United States v. Foster, No. ACM 29283, 1993 WL 76323 (A.F.C.M.R. 1993); *20/20 Wednesday* (ABC television broadcast, May 19, 1999).

215. *See, e.g.*, People v. Grant, 360 N.E.2d 809 (Ill. App. Ct. 1977); People v. Decina, 138 N.E.2d 799 (N.Y. 1956); Carter v. State, 376 P.2d 351 (Okla. Crim. App. 1962).

216. *See, e.g.*, United States v. Moore, 486 F.2d 1139, 1145 (D.C. Cir. 1973).

217. *Id.* at 1145 n.9.

218. *See id.* at 1260 (Bazelon, C.J., concurring in part and dissenting in part) ("I would also permit a jury to consider addiction as a defense to a charge of, for example, armed robbery . . . to determine whether the defendant was under such duress or compulsion, because of his addiction, that he was unable to conform his conduct to the requirements of the law.") .

219. *See, e.g.*, *id.* at 1146.

220. *See id.*

The addict is addicted to (and, therefore, loses control over) the use of the substance itself; it is not true, however, that the addict, once addicted, lacks free will over his other decisions and activities.[221] But a distinction can be made between an addict's use and possession and other crimes. Use and possession are activities inherent in the addiction disease itself.[222] The same cannot be said of other actions by an addict. Also, "mere possession of narcotics is not in itself a grave offense."[223] The crime's primary victim is the possessor, and it "inflict[s] no direct harm upon other members of society."[224]

It is also crucial for purposes of this proposal to note that there are alternative ways to deal with addicts brought before a court for use and possession charges. Civil commitment of addicts remains a viable option for courts[225] and legislatures.[226] Further, rehabilitative treatment also serves as an alternative to criminal incarceration.[227]

C. Policy Justifications

1. The Rationales for Punishing Addict's Use and Possession

Analysis of the "four traditional penal theories will serve to illustrate some of the problems encountered due to [the medical evidence of addiction as involuntary,] compulsive behavior."[228] The first, incapacitation of a defendant, is justified to prevent further harm to society. With the disease of addiction, however, "incapacitating a blameless individual will not stop that individual from behaving under the compulsion. After the period of incapacitation is over, the individual still has the compulsion, and thus the problem is not truly solved."[229] Further, isolation via civil commitment or in a rehabilitative treatment facility similarly removes the offender from society.[230]

Second, criminal sentences serve retribution purposes by punishing those who are morally blameworthy.[231] Yet an addict's use and possession are the products of an "overpowering compulsion, [and] the actor is

221. *See* Gormon v. United States, 339 A.2d 401, 446 (D.C. 1975) (Fickling, J., dissenting).
222. *See supra* note 213.
223. United States v. Watson, 439 F.2d 442, 470 (D.C. Cir. 1970).
224. *Moore*, 486 F.2d at 1147 (emphasis omitted); *see also Watson*, 439 F.2d at 470.
225. *See, e.g.*, *In re* De La O, 378 P.2d 793 (1963).
226. *See, e.g.*, D.C. CODE ANN. § 24-608 (1981); *see also Moore*, 486 F.2d at 1170–71 (discussing the civil commitment provisions of the Narcotic Addict Rehabilitation Act of 1966). *See generally* Dennis S. Aronowitz, *Civil Commitment of Narcotics Addicts*, 67 COLUM. L. REV. 405 (1967); John C. Kramer, *The State Versus the Addict: Uncivil Commitment*, 50 B.U. L. REV. 1 (1970).
227. *See, e.g.*, McColl, *supra* note 206 (discussing alternative drug treatment programs).
228. *Id.* at 487.
229. *Id.*
230. *See* Gorham v. United States, 339 A.2d 401, 439 (D.C. 1975) (Fickling, J., dissenting).
231. *See id.* at 440; McColl, *supra* note 206, at 487–88.

not morally blameworthy."[232] Since addicted defendants are not responsible in this way, punishment is not justified.[233]

Third, the deterrence theory argues that punishment will prevent others from committing crimes.[234] However, "the overwhelming majority of experts agree that the threat of criminal punishment has no deterrent value."[235] If addiction is a disease, the involuntary use of the drugs or alcohol cannot be deterred.[236]

Some have posited that the automatism addiction defense would create a situation where "there would no longer be governmental, that is to say, societal, restriction on possession or use of narcotics."[237] Facts do not support the general deterrence argument that other persons (nonaddicts) will be deterred from becoming drug dependent.[238] Indeed, "individuals who are most likely to become addicts are not deterred by the punishment of nontrafficking possessors because that punishment does not remove the causes of the new user's interest in and desire to experiment with drugs."[239] The threat of mandatory treatment or civil commitment would likely function as an equally effective deterrent.[240]

Finally, traditional criminal sanctions are justified upon a theory of rehabilitation—"an effort to change the behavior, character, and attitude of offenders through the penal system."[241] Incarceration offers no opportunity for an addict to rehabilitate other than requiring immediate cessation of drug use.[242] Imprisonment of an addict creates a "revolving door" scenario of arrest and conviction, imprisonment, release, and then arrest again.[243] The time of incarceration serves only as a temporary and futile postponement of continued drug abuse.[244] "In addition, imprisonment may be harmful since withdrawal without medical attention, a traumatic

232. *Gorham*, 339 A.2d at 440 (Fickling, J., dissenting).

233. *See* McColl, *supra* note 206, at 488.

234. *See id.*

235. *Gorham*, 339 A.2d at 437 (Fickling, J., dissenting).

236. *See* McColl, *supra* note 206, at 488; Roper, *supra* note 147, at 178–79. *But see* United States v. Moore, 486 F.2d 1139 (D.C. Cir. 1973). The court in Moore found that:

> [The] deterrence of addicts may be most effective for those who can best visualize options—like doctors and para-medical personnel who become medical addicts—but it is not limited to them. It would not be unreasonable to consider that a drug dependence defense would operate to undercut any prohibition of possession, and that this must be balanced against the evidence that a deterrent effect is wrought by the possibility of arrest followed by penalty.

Id. at 1192.

237. *Gorham*, 339 A.2d at 413; *see also id.* at 423 ("A . . . value of the use of the criminal process is that individuals are discouraged from becoming addicts by the very fact that to possess or administer heroin is illegal."); SEEBURGER, *supra* note 185, at 128 ("The availability of the given object of addiction . . . in a given society depends in large part on such things as the legal sanctions imposed upon the possession of it, how socially acceptable it is, and so forth.").

238. *See Gorham*, 339 A.2d at 438 (Fickling, J., dissenting).

239. *Id*.

240. *See id.* at 441.

241. McColl, *supra* note 206, at 488.

242. *See Gorham*, 339 A.2d at 439 (Fickling, J., dissenting).

243. United States v. Moore, 486 F.2d 1139, 1247 (D.C. Cir. 1973) (Wright, J., dissenting).

244. *See id.*

experience both psychologically and physiologically, may result in lasting damage to the personality of the addict."[245]

2. The Foreseeability Exception to Automatism Defenses

An exception to the automatism doctrine requires that a defendant be held criminally liable for foreseeable conduct.[246] Addiction arguably falls into this category because it begins with voluntary behavior that could likely lead to substance addiction.[247]

Addiction is distinguishable, however, from other foreseeability situations. Addicts typically do not intend to become addicted; they might be unaware that the disease is beginning.[248] Rather, they reach the state of addiction, they "enslave themselves . . . largely as the result of factors—genetic and environmental—beyond their control."[249] As such, the state of addiction is not a foreseeable event for which society should hold addicts criminally liable.

3. Different Treatment for Nonaddicts

Query whether the automatism addiction defense requires the criminal justice system to treat addicts differently from nonaddicted, experimental users. Indeed, the above proposal allows for that nonuniform treatment of defendants charged with use and possession offenses. The impetus for such a proposal, however, was the medical evidence that those who are addicted to a substance lack voluntary control over their actions—not true for nonaddicted users. In addition, because nonaddicts can control their substance use, the traditional rationales of punishment suggest that incarceration can be an effective method of dealing with those users.

4. Difficulty of Verification

One court expressed concern that an addiction defense would be difficult to establish.[250] The danger is that defendants will feign addiction.[251] Yet the possibility of fraud is not unique to this particular automatism defense. In most instances of automatism, as well as with the insanity defense, there is an issue of whether the defendant has presented

245. *Gorham*, 339 A.2d at 440 (Fickling, J., dissenting).
246. *See supra* notes 27–36 and accompanying text.
247. "There are, of course, a very small number of individuals who may have the disease by virtue of an illegal act committed by another, such as a child addicted to narcotics because of maternal addiction, and a few addicts whose disease is a result of a medical prescription." United States v. Moore, 486 F.2d 1139, 1151 n.37 (D.C. Cir. 1973).
248. *See* SEEBURGER, *supra* note 185, at 3, 8.
249. *Id.* at 41.
250. *See Moore*, 486 F.2d at 1182–85.
251. *See id*.

adequate proof in support of his claim. Courts often face this dilemma and will continue to develop evidentiary standards requiring a certain level of proof (for example, regarding the use of medical experts before entertaining any particular defense).[252] The addiction defense would present no unique difficulties with respect to the possibility of fraud.

Furthermore, a successfully feigned addiction defense does not pose great risks to society. A defendant who succeeds in convincing the court that he is an addict merely avoids the punishment for use or possession. He is still subject to other treatment forms or civil commitment. Verification of the automatism addiction defense does not warrant great concern.

V. CONCLUSION

Automatism defenses, including sleepwalking, are widely accepted where the defendant does not commit a voluntary act. Current medical evidence suggests that an addict similarly does not act voluntarily when using alcohol or drugs. This parallel of involuntary actions requires that courts and legislatures adopt a new policy to comport with the traditional criminal law notions requiring a voluntary action and the policy justifications underlying criminal sanctions.

As one court has explained, "[t]he genius of the common law has been its responsiveness to changing times, its ability to reflect developing moral and social values. Drawing upon the past, the law must serve—and traditionally has served—the needs of the present."[253] Once again, criminal law jurisprudence must adapt—this time to account for the medical understandings of addiction by expanding the automatism doctrine to include an addiction defense.

252. *See, e.g.*, Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1993) (establishing evidentiary standards for allowing expert testimony).

253. Gorham v. United States, 339 A.2d 401, 447 (D.C. 1975) (Fickling, J., dissenting) (citation omitted).