

## AUTOMATISM: THE UNCONSCIOUSNESS DEFENSE TO A CRIMINAL ACTION

*This Comment explores the development and significance of recognizing automatism as a defense to a criminal charge. Both the medical concept and the various causes of automatism are discussed. In addition, this Comment describes the historical development of the defense in England and the United States. Finally, an analysis of the traditional concepts of guilt and the constitutional proscription of cruel and unusual punishment lead the author to conclude that automatism must be recognized as a defense.*

On December 13, 1974, Seth Grant witnessed a fight between a patron and the owner of the bar in which he was drinking. The police arrived and escorted the patron outside. They were followed by an angry mob which included Grant. As he stood watching, Grant suddenly leaped into the air and struck one of the officers in the face. Grant was arrested and taken to jail. In jail he suffered a *grand mal* seizure which was so severe that hospitalization was necessary. In the hospital he had several seizures, during which he attacked those around him. The diagnosis was psychomotor epilepsy.

Grant was convicted of aggravated battery and obstructing a police officer. At the trial, defense counsel presented evidence that Grant was an epileptic and requested an instruction on the automatism defense.<sup>1</sup> The trial court refused. On appeal, the conviction was reversed. The Illinois court of appeal held that the defendant was entitled to a jury instruction on the defense of automatism.<sup>2</sup> The court stated that if the act were committed in the state of automatism, the defendant could not be convicted of the offense.<sup>3</sup>

The significance of *People v. Grant* lies in its recognition of a new defense to criminal responsibility. The Illinois court announced that automatism is a defense to a criminal charge, thus validating a defense mentioned in a few cases since 1897, but only recently ac-

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1. The words automatism, automatistic and automatic are synonymous and will be used interchangeably.

2. *People v. Grant*, 46 Ill. App. 3d 125, 131, 360 N.E.2d 809, 815 (1977). The court actually used the phrase "involuntary conduct," but it was used interchangeably with automatism.

3. *Id.* at 133, 360 N.E.2d at 816.

cepted.<sup>4</sup> The *Grant* case represents a trend toward a much-needed defense in an area inadequately covered by the insanity doctrine.

#### THE MEDICAL CONCEPT OF AUTOMATISM

The *Grant* court defined automatism as "the state of a person who, though capable of action, is not conscious of what he is doing."<sup>5</sup> While in an automatistic state, an individual performs complex actions without an exercise of will.<sup>6</sup> Because these actions are performed in a state of unconsciousness, they are involuntary. Automatistic behavior may be followed by complete or partial inability to recall the actions performed while unconscious.<sup>7</sup> Thus, a person who acts automatically does so without intent, exercise of free will, or knowledge of the act.

#### *Possible Causes of Automatism*

Automatism is a clouded state of consciousness induced by a variety of causes. The *Grant* court noted that automatism is manifested in such physical conditions as epilepsy, organic brain disease, concussional states following head injuries, drug abuse, hypoglycemia, some types of schizophrenia, and acute emotional disturbances.<sup>8</sup> In addition, automatism may occur as a result of metabolic disorders such as axoria, hypnogogic states, and somnambulism.<sup>9</sup>

Automatic behavior most commonly occurs during an epileptic seizure, while sleepwalking, or after a blow to the head. Epilepsy is a brain disorder and not a mental illness.<sup>10</sup> Epilepsy is a "disturbance in the electrophysiochemical activity of the discharging cells of the brain, a disturbance that may be produced by a variety of irritative stimuli impinging upon them."<sup>11</sup> These attacks are usually associated with temporal lobe lesions and are accompanied by convul-

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4. Elliott, *Automatism and Trial by Jury*, 6 MELB. U.L. REV. 53 (1967).

5. 46 Ill. App. 3d at 130, 360 N.E.2d at 814.

6. 3B R. GRAY, ATTORNEYS' TEXTBOOK OF MEDICINE ¶ 92.41 (3d ed. 1977); 7 C.J.S. *Automatism* 1297 (1937); Knox, *Epileptic Automatism and Violence*, 8 MED. SCI. & L. 96 (1968).

7. Knox, *Epileptic Automatism and Violence*, 8 MED. SCI. & L. 96 (1968). Automatism is "a temporary eclipse of consciousness that nevertheless leaves the person so affected able to exercise bodily movements." Keene, *The Problem of Automatism*, 1 AUCKLAND U.L. REV. 15, 22 (1968).

8. 46 Ill. App. 3d at 130, 360 N.E.2d at 814.

9. W. LAFAVE & A. SCOTT, CRIMINAL LAW § 44, at 337 (1972).

10. Knox, *Epileptic Automatism and Violence*, 8 MED. SCI. & L. 96 (1968).

11. A. NOYES & L. KOLB, MODERN CLINICAL PSYCHIATRY 226 (6th ed. 1963). See generally Note, *The Epilepsies: Their Effect on the Biological Family, the State-Decreed Family, and Civil Liability in California*, 13 SAN DIEGO L. REV. 978 (1976).

sions.<sup>12</sup> Not all causes of epilepsy are known. However, it can be induced by brain disease or injury.

Second, automatic behavior may occur during states of somnambulism. While sleepwalking, an individual may appear to be fully awake and may perform complex actions while actually asleep.<sup>13</sup> Actions performed during this period are unconscious, and the normal personality has no control over somnambulistic behavior.<sup>14</sup>

Finally, a blow to the head often results in automatic behavior. If caused by the injury, such behavior is generally recognized as unconscious action and, therefore, excusable.<sup>15</sup> To invoke automatism, defense counsel must prove two facts. First, he must prove that the defendant was actually hit on the head. Second, he must prove that the defendant committed the crime shortly after he received the blow and while still in the automatic state.

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12. J. MACDONALD, *PSYCHIATRY AND THE CRIMINAL* 209-10 (3d ed. 1976); Collings, *Medical Aspects of the Defence of Automatism*, 1 AUCKLAND U.L. REV. 16, 19 (1969); Knox, *Epileptic Automatism and Violence*, 8 MED. SCI. & L. 96, 96 (1968). See generally Fox, *Physical Disorder, Consciousness and Criminal Liability*, 63 COLUM. L. REV. 645 (1963). Many organic changes in body chemistry produce behavior which should be labeled automatism. For example, mental disturbances can result from metabolic and endocrine disturbances involving the liver, kidneys, and lungs. Automatism can arise from overdoses of insulin, porphyria, hormonal changes, infections, and senility. In addition, insane-like behavior may occur in cases of hysterical fugues, brain tumors, and arteriosclerosis. A. BROOKS, *LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM* 237-42 (1974); Prevezer, *Automatism and Involuntary Conduct*, 1958 CRIM. L. REV. 361.

Two authors suggest that organic premenstrual changes can affect mental health in women and thus cause abnormal behavior. Wallach & Rubin, *The Premenstrual Syndrome and Criminal Responsibility*, 19 U.C.L.A. L. REV. 210 (1971).

The presence of an extra Y chromosome in men can induce abnormal, uncontrollable behavior. Rosenberg & Dunn, *Genetics and Criminal Responsibility*, 56 MASS. L.Q. 413, 415 (1971).

Some authors argue that hypnosis can induce one to perform criminal acts for which the individual should not be held responsible. *E.g.*, Comment, *Hypnotism as a Criminal Defense*, 6 CAL. W.L. REV. 303 (1970). However, other commentators maintain that it is impossible to induce one to commit a crime through hypnosis unless the individual was already prepared to commit the crime. *E.g.*, W. BRYAN, *LEGAL ASPECTS OF HYPNOSIS* (1962).

13. A. NOYES & L. KOLB, *MODERN CLINICAL PSYCHIATRY* 54 (6th ed. 1963).

14. Podolsky, *Somnambulistic Homicide*, 1 MED. SCI. & L. 260 (1960).

15. Howard, *Automatism and Insanity*, 4 SYDNEY L. REV. 36, 36 (1962).

*English Law of Automatism*

The automatism theory first developed in England, New Zealand, and Australia.<sup>16</sup> These countries have long recognized the defense, and a brief overview of some of the leading cases illustrates how the doctrine has been applied.

In 1955, the nightmare defense was successfully invoked by a defendant who stabbed a stranger. The defendant claimed that the victim approached him while he was dreaming that he was being attacked. Being only half awake, the defendant killed him. Although the court did not use the term "automatism," it found the defendant not guilty. The court reasoned that because the defendant acted mechanically and without volition, he could not be held legally responsible for actions performed in such an unconscious state.<sup>17</sup>

In *Regina v. Charlson*,<sup>18</sup> the automatism defense was successfully invoked when it was shown that the defendant suffered from a brain tumor. The defendant, who had no prior history of violence, struck his ten-year-old son with a mallet and threw him out of a window. The court instructed the jury that if the father acted as an automaton, he must be acquitted.<sup>19</sup>

In contrast to *Charlson* is *Regina v. Kemp*.<sup>20</sup> In *Kemp*, the defendant, again having no prior history of violence, struck his wife with a hammer. Tests revealed that he was suffering from arteriosclerosis.<sup>21</sup>

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16. These countries often categorize this concept in terms of sane automatism and insane automatism. Insane automatism, which is comparable to the American concept of insanity, encompasses unconscious acts as a result of a "defect of reason from disease of the mind." Elliott, *Automatism and Trial by Jury*, 6 MELB. U.L. REV. 53, 77 (1967). See also Williams, *Automatism*, in *ESSAYS IN CRIMINAL SCIENCE* 345 (G. Mueller ed. 1961); Comment, *Automatism: Sane and Insane*, 1965 N.Z. L.J. 113, 128. Sane automatism includes unconscious and involuntary acts which are not caused by disease but result from some external force such as a blow to the head. *Id.* at 119. See also Keene, *The Problem of Automatism*, 1 AUCKLAND U.L. REV. 15 (1968); Comment, *Automatism and Strict Liability*, 5 VICT. U. WELLINGTON L. REV. 12 (1968).

17. *Regina v. Dhlamini*, 1955 (1) S.A. 120 (T). See Burchell, *Nightmare as a Defense to a Criminal Charge*, 72 S. AFR. L.J. 128 (1955).

18. [1955] 1 All E.R. 859.

19. *Id.* at 862. See W. LAFAVE & A. SCOTT, *CRIMINAL LAW* § 44, at 339 (1972); M. PAULSEN & S. KADISH, *CRIMINAL LAW AND ITS PROCESSES* 214 (1962).

20. [1956] 3 All E.R. 249.

21. Arteriosclerosis is "a condition of the arteries characterized by a hardening and thickening of their walls, accompanied by a loss of elasticity." 1 J. SCHMIDT, *ATTORNEY'S DICTIONARY OF MEDICINE AND WORD FINDER* at A-239 (1972).

The court instructed the jury only on the insanity defense, holding that hardening of the arteries was a disease of the mind.<sup>22</sup>

The automatism defense suffered another setback in *Bratty v. Attorney General for Northern Ireland*.<sup>23</sup> Bratty, who strangled his victim, pleaded both insanity and automatism. The court refused to instruct the jury on the automatism defense on the premise that the defendant's evidence failed to provide a basis for an automatism instruction. The evidence established that Bratty had psychomotor epilepsy, but the court held this to be a disease of the mind.<sup>24</sup> Lord Denning declared that "any mental disorder which has manifested itself in violence and is prone to recur is a disease of the mind. At any rate it is the sort of disease for which a person should be detained in hospital rather than be given an unqualified acquittal."<sup>25</sup>

The automatism defense received slightly better treatment in *Watmore v. Jenkins*.<sup>26</sup> A diabetic defendant was allowed to invoke the automatism defense to a charge of reckless driving. The evidence showed that Watmore gave himself an insulin injection daily. On the day the accident occurred, Watmore had been feeling fine. However, shortly after he started driving, he lost control; the car swerved and eventually hit another car. The defendant was found in a dazed, confused, inarticulate state. He was taken to a hospital where he was given a glucose injection, after which he returned to full consciousness. Watmore convinced the trial court that he was in a state of automatism when the car crashed. However, the court of appeal

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22. [1956] 3 All E.R. at 254. See W. LAFAVE & A. SCOTT, CRIMINAL LAW § 44, at 340 (1972). The *Charlson* and *Kemp* cases appear irreconcilable. There seems to be little difference between a tumor which grows on the brain and affects its functioning and the hardening of arteries which affects the supply of blood to the brain and heart and affects their functioning. It would seem that if arteriosclerosis is a disease of the mind, then a brain tumor must also be a disease of the mind. However, the language of the *Kemp* opinion offers a possible explanation. The court emphasized that people who commit violent crimes should not be allowed to go free. [1956] 3 All E.R. at 251. See W. LAFAVE & A. SCOTT, CRIMINAL LAW § 44, at 340 (1972). Thus, the overriding concern in *Kemp* was the protection of society, while in *Charlson* the primary focus was on the guilt or innocence of the defendant and the ends of justice.

23. [1961] 3 All E.R. 523.

24. *Id.* at 528. See W. LAFAVE & A. SCOTT, CRIMINAL LAW § 44, at 340 (1972); Elliott, *Automatism and Trial by Jury*, 6 MELB. U.L. REV. 53, 61 (1967).

25. [1961] 3 All E.R. 523, 534; Leigh, *Automatism and Insanity*, 5 CRIM. L.Q. 160, 171 (1962). This language echoes the rationale expressed in *Kemp*, and perhaps the result of the case may be explained on the same basis.

26. [1962] 2 All E.R. 868.

reversed the lower court decision, declaring there was insufficient evidence of automatism.<sup>27</sup>

In *Regina v. Quick*<sup>28</sup> the automatism defense was allowed. Quick was a diabetic nurse. On the day of the assault he ate breakfast, and later in the day he consumed a large quantity of whiskey and rum. Shortly thereafter he assaulted a patient. He was unable to recall the event, and the medical evidence presented at trial showed that he had been suffering from hypoglycemia, a deficiency of blood sugar after an insulin injection. The court reasoned that it was the insulin, not the diabetes itself, which caused the automatic behavior. The insulin was an external factor causing the behavior and not a disease disturbing the working of the mind.<sup>29</sup>

Finally, *Ryan v. The Queen*<sup>30</sup> acknowledged that the defendant would not be guilty if the robbery and murder were a result of an involuntary act. However, Ryan failed to plead automatism and was convicted.<sup>31</sup>

These cases indicate that although foreign courts have given the automatism defense more recognition than have American courts, the law concerning it is neither clear nor consistent.

#### *American Law: The General Rule Disallowing the Automatism Defense*

The law in the United States is not much clearer or more consistent than foreign law. The confusion is compounded by the variety of insanity tests and by the tendency of the courts to equate automatism with insanity.

The precise definition of insanity varies from jurisdiction to jurisdiction.<sup>32</sup> A majority of courts follows the *M'Naghten* rule, which exonerates the accused if

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27. *Id.* at 874. See Napley, *Drugs and Automatism*, 3 MED. SCI. & L. 247 (1963).

28. [1973] 3 All E.R. 347.

29. *Id.* at 356. See Comment, *Automatism*, 1973 CRIM. L. REV. 434.

30. [1967] 40 A.L.J.R. 488, discussed in Elliott, *Responsibility for involuntary Acts: Ryan v. The Queen*, 41 AUSTL. L.J. 497 (1968).

31. [1967] 40 A.L.J.R. 488. Another limit placed on the defense is found in *Regina v. O'Brien*, in which psychomotor epilepsy was held to be a disease of the mind. *Regina v. O'Brien*, [1966] 56 D.L.R.2d 65, discussed in Beck, *Voluntary Conduct: Automatism, Insanity and Drunkenness*, 9 CRIM. L.Q. 315 (1967). A further limitation was established in *Bullen v. Keay*, in which the court held that the automatism defense could not be allowed where the unconscious behavior arose as a result of voluntary drug intoxication. *Bullen v. Keay*, [1974] R.T.R. 559, DC, discussed in Comment, *Bullen v. Keay*, 1974 CRIM. L. REV. 371.

32. Every jurisdiction starts with the assumption that all people are presumed sane. *E.g.*, *People v. Redmond*, 59 Ill. 2d 328, 337, 320 N.E.2d 321, 326 (1974). Before any one of the insanity tests will be applied "the evidence must raise a reasonable doubt of [the defendant's] sanity at the time of the commission of the offense." *Id.* Once the defense presents enough evidence to raise the

at the time the act was committed the accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong.<sup>33</sup>

This rule is known as the right-wrong test because it assumes that the defendant is incapable of knowing or appreciating the wrongfulness of his conduct.<sup>34</sup>

Courts use a number of more liberal tests. The *Durham* rule, or product test, excuses an accused if his unlawful act was a product of a mental disease or defect.<sup>35</sup> Although at least two state courts adhere to the *Durham* rule,<sup>36</sup> the federal courts have rejected it. A majority of the federal courts adheres to the American Law Institute's diminished-capacity test.<sup>37</sup> According to this test, an individual is not responsible for criminal conduct if "at the time of such conduct as a result of a mental disease or defect he lacked substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law."<sup>38</sup> Twenty-five states, in-

issue of insanity, the burden is on the prosecution to prove sanity beyond a reasonable doubt. *People v. Taylor*, 1 Ill. App. 3d 1053, 1059, 275 N.E.2d 717, 723 (1971). However, the accused will not be completely exonerated unless he suffers from a form of insanity which leaves him "so bereft of mind as to render him incapable of . . . controlling his actions." *Sharp v. Commonwealth*, 308 Ky. 765, 768, 215 S.W.2d 983, 984 (1948).

33. *M'Naghten's Case*, 8 Eng. Rep. 718, 722 (H.L. 1843). See R. BARROW & H. FABING, *EPILEPSY AND THE LAW* 125 (1956).

34. J. MACDONALD, *PSYCHIATRY AND THE CRIMINAL* 65 (3d ed. 1976); Gerber, *Is the Insanity Test Insane?*, 20 AM. J. JURIS. 111, 119 (1975); Note, *Standards of Mental Illness in the Insanity Defense and Police Power Commitments: A Proposal for a Uniform Standard*, 60 MINN. L. REV. 1289, 1292 (1976). A disease of the mind generally means "any pathological condition, organic or otherwise, which effectively prevents an accused from knowing the nature and quality of his acts." Leigh, *Automatism and Insanity*, 5 CRIM. L.Q. 160, 171 (1962).

35. G. MORRIS, *THE INSANITY DEFENSE: A BLUEPRINT FOR LEGISLATIVE REFORM* 14 (1975); Gerber, *Is the Insanity Test Insane?*, 20 AM. J. JURIS. 111, 124 (1975).

36. The *Durham* rule has been adopted by Maine and Ohio. Note, *Modern Insanity Tests—Alternatives*, 15 WASHBURN L.J. 88, 104 (1976).

37. ALI MODEL PENAL CODE § 4.01 (proposed official draft 1962). Every federal circuit court of appeal except the first circuit applies the ALI test. *Id.* at 107.

38. J. MACDONALD, *PSYCHIATRY AND THE CRIMINAL* 71 (3d ed. 1976). See Gerber, *Is the Insanity Test Insane?*, 20 AM. J. JURIS. 111, 128 (1975). In *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972), the court first adopted the ALI test and defined disease or defect of the mind as "an abnormal condition of the mind, and a condition which substantially (a) affects mental or emotional processes and (b) impairs behavioral controls." *Id.* at 991. See Comment, *Criminal Law—Insanity Defense—District of Columbia Circuit Abandons the Durham "Product" Formulation in Favor of the ALI "Substantial Capacity" Standard*—*United States v. Brawner*, 47 N.Y.U. L. REV. 962, 963-65 (1972). See also *Sprague v. State*, 52 Wis. 2d 89, 187 N.W.2d 784 (1971); Comment, *Keeping Wolff*

cluding California and Illinois, have adopted this test with minor variations.<sup>39</sup>

Finally, a few courts employ the irresistible-impulse test, which states that if "by reason of disease of mind, defendant has been deprived of or has lost his will which would enable him to prevent himself from doing the act, he cannot be found guilty."<sup>40</sup> This test has two elements: The defendant must be unable to control his actions, and he must commit the act suddenly and impulsively.

These tests apply specifically to cases of insanity. However, automatism and insanity are distinct medical concepts,<sup>41</sup> and these insanity tests should not be applied to automatistic behavior.<sup>42</sup> Automatism occurs in sane people, arises from some physical cause, lasts only a very short time, and leaves its victim temporarily unable to control his behavior. To the observer, the automatistic individual looks perfectly normal; however, during automatic behavior the individual is totally unaware of his actions. If asked to determine whether the act committed during automatism was right or wrong, he would be able to do so. As soon as this state recedes, the individual is again aware of his actions<sup>43</sup> but may not be able to recall those performed while in the automatic state.

In contrast, insanity most often arises from a psychological cause and results in a distorted view of reality. Insanity usually is a prolonged condition, during which the individual is aware of his actions but is unable to determine whether they are socially acceptable. The actions of an insane person often appear abnormal to the observer. Thus, automatism should not be judged in the same manner as insan-

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*from the Door: California's Diminished Capacity Concept*, 60 CALIF. L. REV. 1641 (1972); Comment, *Criminal Law—Mental Disease or Defect Reducing the Degree of Crime—Missouri Changes the Rule*, 40 MO. L. REV. 361 (1975).

39. Illinois exonerates the defendant who lacks substantial capacity to appreciate (rather than "know") the criminality of his conduct. ILL. ANN. STAT. ch. 38, § 6-2 (Smith-Hurd Supp. 1977); Fisherman, *The Law of Criminal Responsibility*, 56 ILL. B.J. 914 (1968); Lewin, *Psychiatric Evidence in Criminal Cases for Purposes Other than the Defense of Insanity*, 26 SYRACUSE L. REV. 1051 (1975). "In California, a defendant may plead diminished capacity when, by reason of mental disease or defect not amounting to insanity, or because of intoxication, he was unable to form any of the mental states essential to the crime charged." Comment, *Keeping Wolff from the Door: California's Diminished Capacity Concept*, 60 CALIF. L. REV. 1641, 1641 (1972). See also *People v. Conley*, 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966).

40. *State v. White*, 58 N.M. 324, 329, 270 P.2d 727, 731 (1954). See also Gerber, *Is the Insanity Defense Insane?*, 20 AM. J. JURIS. 111, 122 (1975).

41. *People v. Lim Dum Dong*, 26 Cal. App. 2d 135, 78 P.2d 1026 (1938).

42. *People v. Freeman*, 61 Cal. App. 2d 110, 142 P.2d 435 (1943); *People v. Caddell*, 287 N.C. 266, 215 S.E.2d 348 (1975).

43. *People v. Freeman*, 61 Cal. App. 2d 110, 142 P.2d 435 (1943).



ity. However, many American courts have treated automatism as insanity.<sup>44</sup>

*American Law: The Minority View Recognizing the Automatism Defense*

A few exceptional cases recognize that automatism is distinct from insanity. One of the oldest cases is *Fain v. Commonwealth*,<sup>45</sup> which equated somnambulism with automatism rather than insanity. The defendant, Fain, had fallen asleep in a chair in a hotel lobby. The victim tried to wake Fain to persuade him to leave the lobby. As he did so, Fain shot him. Fain successfully relied on the defense of sleepwalking. The court explained that "if the prisoner, when he shot the deceased, was unconscious, or so nearly so that he did not comprehend his own situation . . . , he should be acquitted . . . because he was not legally responsible for any act done while in that condition."<sup>46</sup>

Despite *Fain*, some courts still categorize somnambulism as insanity.<sup>47</sup> This same confusion exists in cases dealing with automatic behavior resulting from a blow to the head. Some courts equate the resulting unconsciousness with insanity<sup>48</sup> while other courts maintain that this behavior is not within the realm of insanity.<sup>49</sup> In cases of epilepsy American courts tend to recognize the existence of the defense. However, the courts circumvent the defense by finding it inapplicable to the particular case before them.<sup>50</sup> Thus, the law on

44. *E.g.*, *Tibbs v. Commonwealth*, 138 Ky. 558, 128 S.W. 871 (1910); *State v. Lewis*, 136 Mo. 84, 37 S.W. 806 (1896), *overruled on other grounds*, *State v. Murphy*, 338 Mo. 291, 90 S.W.2d 103 (1936); *People v. Codarre*, 10 N.Y.2d 361, 179 N.E.2d 475, 223 N.Y.S.2d 457 (1961); *People v. Higgins*, 5 N.Y.2d 607, 159 N.E.2d 179, 186 N.Y.S.2d 623 (1959); *People v. Furlong*, 187 N.Y. 198, 79 N.E. 978 (1907).

45. 78 Ky. (1 Bush) 183, 39 Am. Rep. 213 (1879).

46. *Id.* at 191, 39 Am. Rep. at 218.

47. *E.g.*, *Lewis v. State*, 196 Ga. 755, 27 S.E.2d 659 (1943); *Tibbs v. Commonwealth*, 138 Ky. 558, 128 S.W. 871 (1910). *See* W. LAFAYE & A. SCOTT, *CRIMINAL LAW* § 44, at 339 (1972).

48. *E.g.*, *State v. Lewis*, 136 Mo. 84, 37 S.W. 806 (1896), *overruled on other grounds*, *State v. Murphy*, 338 Mo. 291, 90 S.W.2d 103 (1936).

49. *E.g.*, *Corder v. Commonwealth*, 278 S.W.2d 77 (Ky. 1955); *State v. Gooze*, 14 N.J. Super. 277, 81 A.2d 811 (1951); *Carter v. State*, 376 P.2d 351 (Okla. Crim. App. 1962).

50. Courts use many excuses for refusing the automatism defense. One excuse is that the accused knew he had epilepsy, recognized the dangers involved, and recklessly disregarded them. *People v. Eckert*, 2 N.Y.2d 126, 138 N.E.2d 794, 152 N.Y.S.2d 551 (1956).

automatism is uncertain. In most jurisdictions today, the defendant relying on the automatism defense has little assurance of success.<sup>51</sup>

However, the automatism defense has been accepted in at least two jurisdictions, California and Illinois.<sup>52</sup> California has been most prolific in this area, allowing the defense in numerous cases<sup>53</sup> and codifying it in California Penal Code section 26.<sup>54</sup> Section 26 an-

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Another method of denying the defense is to increase the defendant's burden of proof by requiring that he do more than raise a reasonable doubt about his consciousness. While it makes the automatism defense more difficult to prove, it makes possible a reversal on appeal. *Virgin Islands v. Smith*, 278 F.2d 169 (3d Cir. 1960).

Much confusion exists in cases where the defendant claims to have committed the crime during an epileptic seizure. Defense counsel are partially responsible for the confusion because they often assert that evidence of epilepsy proves their client was not guilty by reason of insanity. *Allen v. State*, 230 Md. 533, 188 A.2d 159 (1963); *Armstead v. State*, 227 Md. 73, 175 A.2d 24 (1961). The courts are also responsible for the confusion. Some courts equate epilepsy with insanity. *E.g.*, *Tibbs v. Commonwealth*, 138 Ky. 558, 128 S.W. 871 (1910); *Busch v. Gruber*, 98 N.J. Eq. 1, 131 A. 101 (1925); *People v. Higgins*, 5 N.Y.2d 607, 159 N.E.2d 179, 186 N.Y.S.2d 623 (1959); *Stevens v. State*, 94 Okla. Crim. 216, 232 P.2d 949 (1951); *Zimmerman v. State*, 85 Tex. Crim. 630, 215 S.W. 101 (1919); *Oborn v. State*, 143 Wis. 249, 126 N.W. 737 (1910). Other courts find the defendant sane but imply that had there been sufficient evidence of epilepsy, the defendant would have been found insane. *E.g.*, *Allen v. State*, 230 Md. 533, 188 A.2d 159 (1963). Finally, there are courts which hold that epilepsy does not constitute insanity. *E.g.*, *People v. Syjut*, 310 Mich. 409, 17 N.W.2d 232 (1945).

51. Unconsciousness resulting from epilepsy and other causes discussed above must be distinguished from that caused by voluntary alcohol and drug intoxication. Unconscious behavior caused by such intoxication has not been classified as automatic behavior in England, New Zealand, Australia, or the United States. *Lunter, The Effect of Drug-Induced Intoxication on the Issue of Criminal Responsibility*, 8 CRIM. L. BULL. 731 (1972). See also *People v. Graham*, 71 Cal. 2d 303, 455 P.2d 153, 78 Cal. Rptr. 217 (1969); *People v. Wyatt*, 22 Cal. App. 3d 671, 99 Cal. Rptr. 674 (1972); *People v. Alexander*, 182 Cal. App. 2d 281, 6 Cal. Rptr. 153 (1960); *People v. Arriola*, 164 Cal. App. 2d 430, 330 P.2d 683 (1958); *People v. Mead*, 126 Cal. App. 2d 164, 271 P.2d 619 (1954); *People v. Anderson*, 87 Cal. App. 2d 857, 197 P.2d 839 (1948); *People v. Taylor*, 31 Cal. App. 2d 723, 88 P.2d 942 (1939); *People v. Winters*, 29 Ill. 2d 74, 193 N.E.2d 809 (1963); *People v. Lion*, 10 Ill. 2d 208, 139 N.E.2d 757 (1957); *People v. Smith*, 26 Ill. App. 3d 1062, 325 N.E.2d 623 (1975); *People v. Fuller*, 17 Ill. App. 3d 1005, 309 N.E.2d 96 (1974); *People v. Hunter*, 14 Ill. App. 3d 879, 303 N.E.2d 482 (1973); *People v. Dolatowski*, 94 Ill. App. 2d 434, 237 N.E.2d 553 (1968); *Commonwealth v. Farrell*, 322 Mass. 606, 78 N.E.2d 697 (1948); CAL. PENAL CODE § 22 (West 1970); J. MACDONALD, *PSYCHIATRY AND THE CRIMINAL* 208 (3d ed. 1976); Keene, *The Problem of Automatism*, 1 AUCKLAND U.L. REV. 15, 22 (1968); Annot., 8 A.L.R.3d 1236 (1966).

52. North Carolina recently recognized that unconsciousness is a complete defense to a criminal charge separate and apart from insanity. However, as the *Caddell* court notes, only two or three cases discuss the automatism defense. *State v. Caddell*, 287 N.C. 266, 215 S.E.2d 348 (1975).

53. *People v. Baker*, 42 Cal. 2d 550, 268 P.2d 705 (1954); *People v. Hardy*, 33 Cal. 2d 52, 198 P.2d 865 (1948); *People v. Freeman*, 61 Cal. App. 2d 110, 142 P.2d 435 (1943). See also W. LAFAYE & A. SCOTT, *CRIMINAL LAW* § 44, at 348 (1972).

54. CAL. PENAL CODE § 26 (West Supp. 1977). It has been noted that there are very few cases dealing with automatism despite the fact that seven states have statutes similar to California's. These states include Arizona, Idaho, Montana,

nounces a general rule that "all persons are capable of committing crimes."<sup>55</sup> It then lists the exceptions to this rule. Automatic behavior, the fifth exception, is defined as "persons who committed the act charged without being conscious thereof."<sup>56</sup> Subsection 5 creates a defense distinct from insanity; it does not include the defenses of unsound mind such as claimed by lunatics, idiots and insane people.<sup>57</sup>

Thus, one of the primary requirements of the automatism defense is that the defendant be of sound mind. This defense will be invoked where the "conscious mind of the defendant has ceased to operate [and] his actions [are] solely controlled by his subconscious or subjective mind."<sup>58</sup> In California, if the accused relies on the automatism defense, he must present evidence of unconsciousness. This evidence is necessary because people are presumed conscious so long as they act as if they were conscious.<sup>59</sup> Once the defendant submits evidence sufficient to raise a reasonable doubt about consciousness, the burden shifts to the state to prove consciousness beyond a reasonable doubt.<sup>60</sup> If the prosecution fails to meet its burden, unconsciousness is a complete defense to the criminal charge, and the defendant must be acquitted.<sup>61</sup>

The California courts recognize several medical causes of automatic behavior. An unconscious act is one "committed by a person who because of somnambulism, a blow on the head, or a similar cause is not conscious of acting and whose act therefore cannot be deemed volitional."<sup>62</sup> Automatism may also be caused by an epileptic seizure.

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Nevada, Oklahoma, South Dakota, and Utah. *State v. Caddell*, 287 N.C. 266, 278, 215 S.E.2d 348, 360 (1975).

55. CAL. PENAL CODE § 26 (West Supp. 1977).

56. *Id.* § 26(5).

57. *Id.* Section 26(5) does include a person of sound mind, or one "free from flaw, defect or decay, perfect of the kind, undamaged or unimpaired; healthy." *People v. Baker*, 42 Cal. 2d 550, 568, 268 P.2d 705, 716 (1954).

58. *People v. Martin*, 87 Cal. App. 2d 581, 587, 197 P.2d 379, 382 (1948). *See also* *People v. Hardy*, 33 Cal. 2d 52, 198 P.2d 865 (1948).

59. *People v. Hardy*, 33 Cal. 2d 52, 198 P.2d 865 (1948); *People v. Nihell*, 144 Cal. 200, 77 P. 916 (1904).

60. *People v. Hardy*, 33 Cal. 2d 52, 198 P.2d 865 (1948).

61. *People v. Seden*, 10 Cal. 3d 703, 518 P.2d 913, 112 Cal. Rptr. 1 (1974); *People v. Coogler*, 71 Cal. 2d 153, 454 P.2d 686, 77 Cal. Rptr. 790 (1969); *People v. Wilson*, 66 Cal. 2d 749, 427 P.2d 820, 59 Cal. Rptr. 156 (1967); *People v. Baker*, 42 Cal. 2d 550, 268 P.2d 705 (1954).

62. *People v. Ray*, 14 Cal. 3d 20, 25, 533 P.2d 1017, 1019, 120 Cal. Rptr. 377, 379 (1975). *See also* *People v. Roerman*, 189 Cal. App. 2d 150, 10 Cal. Rptr. 870 (1961); *People v. Cox*, 67 Cal. App. 2d 166, 153 P.2d 362 (1944).

Epilepsy falls within section 26, and the automatism defense should be allowed where epilepsy is involved.<sup>63</sup>

The automatism defense has been unsuccessful in California where the defendants have claimed it as a result of hypnosis or voluntary intoxication. Only a few defendants have invoked the defense in the hypnosis context, and they have failed primarily because the majority of experts asserts that one cannot be forced to perform an act contrary to one's own nature.<sup>64</sup> Where unconsciousness results from voluntary drug or alcohol intoxication, the automatism defense is again unsuccessful. The California courts hold that voluntary intoxication is not a complete defense to a criminal charge, although it can negate the special mens rea element essential in some criminal acts.<sup>65</sup>

Illinois is the second jurisdiction recognizing the automatism defense. The Illinois appellate court in *Grant* noted the scarcity of cases dealing with this issue.<sup>66</sup> Nevertheless, the *Grant* court decided to allow the defense in the absence of common law or statutory support.

In 1964, Illinois adopted the substantial-capacity test proposed in section 4.01 of the Model Penal Code.<sup>67</sup> The Model Penal Code also proposed a section encompassing the automatism defense, but Illinois failed to enact it.<sup>68</sup> Thus, the *Grant* court had no statute on

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63. Even though California has long recognized the automatism defense, many of the decisions, especially with regard to epilepsy, are confusing. In *People v. Baker*, 42 Cal. 2d 550, 268 P.2d 705 (1954), the defendant claimed that he was incapable of premeditation because of his morosity, psychological disorders, and the mental deterioration caused by his epilepsy. The court itself stated that epilepsy might indicate a lack of sound mind. However, the court held that there was sufficient evidence of epilepsy to warrant the unconsciousness defense. In *People v. Freeman*, 61 Cal. App. 2d 110, 142 P.2d 435 (1943), the court explicitly stated that epilepsy falls within the § 26(5) definition of unconsciousness.

64. *People v. Marsh*, 170 Cal. App. 2d 284, 338 P.2d 495 (1959).

65. *People v. Conley*, 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966); *People v. Heffington*, 32 Cal. App. 3d 1, 107 Cal. Rptr. 859 (1973); *People v. Alexander*, 182 Cal. App. 2d 281, 6 Cal. Rptr. 153 (1960); *People v. Gibson*, 92 Cal. App. 2d 55, 206 P.2d 375 (1949).

66. *People v. Grant*, 46 Ill. App. 3d 125, 129, 360 N.E.2d 809, 814 (1977).

67. ALI MODEL PENAL CODE § 4.01 (proposed official draft 1962). This model provides that one is not responsible for one's actions if as a result of a disease or defect there was a "deprivation of 'substantial capacity' to know or to control" actions. Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1443 (1968). This section is contained in what is now § 6-2 of the Illinois Criminal Code. ILL. ANN. STAT. ch. 38, § 6-2 (Smith-Hurd 1972). See also *People v. Ellis*, 39 Ill. App. 3d 373, 350 N.E.2d 326 (1976).

68. ALI MODEL PENAL CODE § 2.01 (proposed official draft 1962) provides:

(1) 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.

which to rely in making its decision. Assuming that the question was open, the court chose to recognize the defense.

A brief look at pertinent sections of the Illinois Criminal Code reveals that none of its provisions explicitly allows for the automatism defense. However, when these Code sections are read as a whole, the argument can be made that they implicitly provide for the defense. In Illinois, as in every other jurisdiction, all criminal offenses are composed of a voluntary act and the requisite mental state.<sup>69</sup> For example, section 4-3 of the Illinois Criminal Code provides that one is not guilty of an offense unless he has the requisite mental state defined by statute.<sup>70</sup> According to section 4-4, one has the requisite intent when "his conscious objective or purpose is to accomplish that result or engage in that conduct."<sup>71</sup> Finally, section 4-1 requires a voluntary act as a material element of every offense, and such act "includes an omission to perform a duty which the law imposes on the offender and which he is physically capable of performing."<sup>72</sup> If the act is involuntary, one is not responsible for its consequences.<sup>73</sup> Automatic behavior is neither voluntary nor intentional. The automatistic individual does not act with a conscious objective. The very term "automatistic" denotes unconscious behavior. Thus, it follows that the Illinois statutes support the *Grant* decision.

Because no other Illinois court has directly addressed this issue, supporting Illinois case law is difficult to find. The few cases which have dealt with unconsciousness are confusing because they fail to make a definite and clear distinction between unconscious action

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- (2) The following are not voluntary acts within the meaning of this Section:

- (a) a reflex or convulsion;
- (b) bodily movement during unconsciousness or sleep;
- (c) conduct during hypnosis or resulting from hypnotic suggestion;
- (d) a bodily movement that otherwise is not a product of the effort or determination of the act either conscious or habitual.

See also A. BROOKS, LAW, PSYCHIATRY AND THE MENTAL HEALTH SYSTEM 237 (1974); M. PAULSEN & S. KADISH, CRIMINAL LAW AND ITS PROCESSES 217 (1969).

69. *People v. Gray*, 36 Ill. App. 3d 720, 723, 344 N.E.2d 683, 686 (1976).

70. ILL. ANN. STAT. ch. 38, § 4-3 (Smith-Hurd 1972). Section 4-3(a) provides: "[A] person is not guilty of an offense, other than an offense which involves absolute liability, unless, with respect to each element described by the statute defining the offense, he acts while having one of the mental states described in sections 4-4 through 4-7."

71. *Id.* § 4-4.

72. *Id.* § 4-1.

73. *People v. Allen*, 117 Ill. App. 2d 20, 254 N.E.2d 103 (1969).

and insanity.<sup>74</sup> As the *Grant* court noted, the cases fail to decide whether "a person's actions during a psychomotor epileptic seizure are the actions of an insane person or merely the involuntary or automatic actions of a sane person."<sup>75</sup> *Grant* may help to clarify the law on this subject and make it more consistent. If the *Grant* decision is followed, an epileptic, somnambulistic, or concussion defendant will be considered sane and competent. The automatism defense, instead of the insanity plea, will be available to him. The defendant will have an opportunity to seek an acquittal without the threat of an accompanying commitment.

#### SHOULD A SEPARATE AUTOMATISM DEFENSE BE RECOGNIZED?

##### *Common Law Argument for Recognition of the Defense*

The automatism defense operates on the premise that the accused is not responsible for his actions. American jurisprudence has long recognized the concept of responsibility that "*actus non facit reum nisi mens sit rea*."<sup>76</sup> Society does not hold a person responsible for criminal conduct unless there is a "concurrence of *mens rea*, the awareness of the wrongfulness or unlawfulness of the conduct, and the *actus reus*, the physical manifestation of *mens rea*."<sup>77</sup>

Thus, the two essential components necessary to establish criminal responsibility are an act<sup>78</sup> and an intent.<sup>79</sup> If an automatistic state is

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74. See *Eschmann v. Cawl*, 357 Ill. 379, 192 N.E. 226 (1934); *People v. Chmilenko*, 14 Ill. App. 3d 270, 302 N.E.2d 455 (1973); *People v. Martin*, 69 Ill. App. 2d 12, 216 N.E.2d 170 (1966). These cases hold that evidence of epilepsy alone is insufficient to justify a presumption of permanent incapacity. Thus, the courts seem to imply that epilepsy does relate to insanity, yet they ultimately find the defendant sane.

75. 46 Ill. App. 3d at 130, 360 N.E.2d at 813-14.

76. Dubin, *Mens Rea Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322, 325 (1966) ("An Act does not make one guilty unless the mind is guilty.").

77. Silber, *Being and Doing: A Study of Status Responsibility and Voluntary Responsibility*, 35 U. CHI. L. REV. 47, 48 (1967). See also H. HART, *PUNISHMENT AND RESPONSIBILITY* (1968); Bleechmore, *The Denial of Responsibility as a General Defense*, 23 ALA. L. REV. 237 (1971); Fingarette, *Disabilities of Mind and Criminal Responsibility—A Unitary Doctrine*, 76 COLUM. L. REV. 236 (1976); Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1932); Tao, *Legal Problems of Alcoholism*, 37 FORDHAM L. REV. 405 (1969).

78. An act is a voluntary muscular movement which is consciously willed by the individual performing it. Lewin, *Psychiatric Evidence in Criminal Cases for Purposes Other than the Defense of Insanity*, 26 SYRACUSE L. REV. 1051 (1975). See also Edwards, *Automatism and Criminal Responsibility*, 21 MOD. L. REV. 375 (1958).

79. Lewin, *Psychiatric Evidence in Criminal Cases for Purposes Other than the Defense of Insanity*, 26 SYRACUSE L. REV. 1051 (1975). See also W. LAFAVE & A. SCOTT, *CRIMINAL LAW* § 44, at 338 (1972); Bleechmore, *The Denial of Respon-*

established, the essential criminal elements are missing and no responsibility can ensue.

There are two methods of analyzing criminal responsibility for automatistic action. Under an *intent* analysis the defendant's automatic actions are unconscious. Therefore, he is incapable of knowing their nature and cannot form the requisite intent.<sup>80</sup> Under an *act* analysis the automatistic individual has not committed a voluntary act because he exercises no control over his movements. No criminal act has occurred because no "act" was committed at all.<sup>81</sup>

Professor LaFave asserts that the better rationale for a defendant's irresponsibility during automatism is the *act* argument. He concludes that the accused should be exonerated on this basis.<sup>82</sup> However, this argument seems more tenuous than the *intent* analysis. When automatic behavior exists there is involuntary conduct; however, an act is committed in the literal sense. To rely exclusively on the *act* analysis weakens the case for recognizing the defense. A combination of both components provides a stronger theory. The argument would be simply that one who commits a crime in an automatistic state is not criminally responsible because the intent and the act are absent.

### *Constitutional Argument for Recognition of the Defense*

To punish the person who acts unconsciously is cruel and unusual in violation of the eighth amendment of the United States Constitution. Justice demands that the law excuse the person who is not responsible for his actions. The courts accomplish this result by resorting to the insanity defense, but the insanity plea does not adequately cover automatic behavior. The American judicial system must provide for defendants whose cases are inappropriate for the sane-guilty/insane-not guilty category.

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*sibility as a General Defense*, 23 ALA. L. REV. 237, 246 (1971); Silber, *Being and Doing: A Study of Status Responsibility and Voluntary Responsibility*, 35 U. CHI. L. REV. 47, 75 (1967); Tao, *Legal Problems of Alcoholism*, 37 FORDHAM L. REV. 405, 410 (1969).

80. M. PAULSEN & S. KADISH, CRIMINAL LAW AND ITS PROCESSES 217 (1969); Dixon, *A Legacy of Hadfield, M'Naghten and Maclean*, 31 AUSTL. L.J. 255 (1957); Elliott, *Automatism and Trial by Jury*, 6 MELB. U.L. REV. 53, 53 (1967).

81. W. LAFAVE & A. SCOTT, CRIMINAL LAW § 44, at 338 (1972).

82. *Id.*

## The Cruel and Unusual Punishment Doctrine

The constitutions of the United States, California, and Illinois prohibit cruel and unusual punishment.<sup>83</sup> Under this doctrine, punishment may be cruel and unusual because it is disproportionate to the crime,<sup>84</sup> because it fails to satisfy any legitimate penal aim<sup>85</sup> or because there was no culpability on the defendant's part.<sup>86</sup>

The case law based on the cruel and unusual punishment doctrine focuses primarily on drug addiction and alcoholism. The principal issue is whether the defendant was capable of acting rationally, and if not, whether he was responsible for inducing the inability to control his own behavior.<sup>87</sup> Recent cases recognize that alcoholism and drug addiction are diseases which operate to destroy the victim's volition.<sup>88</sup> One cannot be convicted for the mere status of drunkenness<sup>89</sup> or drug addiction.<sup>90</sup>

Two recent cases provide further explanation of the principles underlying the case law. In *Robinson v. California*,<sup>91</sup> the United States Supreme Court declared unconstitutional a California statute which made it a crime to be addicted to drugs. The Court reasoned that drug addiction was an illness which, once acquired, leaves the victim unable to control his actions. Once addicted, the victim is not free to change his status. In a concurring opinion Justice Douglas stated the issue succinctly: "We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and

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83. U.S. CONST. amend. VIII; CAL. CONST. art. 1, § 6; ILL. CONST. art. 1, § 11. See also Note, *California's Cruelty Criteria: Evaluating Sentences After In Re Lynch*, 25 HASTINGS L.J. 636 (1974).

84. *Weems v. United States*, 217 U.S. 349 (1910); *Faulkner v. State*, 445 P.2d 815 (Alas. 1968); *Dembowski v. Indiana*, 251 Ind. 250, 240 N.E.2d 815 (1968); *Workman v. Commonwealth*, 429 S.W.2d 374 (Ky. 1968); *People v. Lorentzen*, 387 Mich. 167, 194 N.W.2d 827 (1972); *Canon v. Gladden*, 203 Or. 629, 281 P.2d 233 (1955).

85. *Furman v. Georgia*, 408 U.S. 238 (1972); *Workman v. Commonwealth*, 429 S.W.2d (Ky. 1968).

86. *Robinson v. California*, 370 U.S. 660 (1962); Fingarette, *Disabilities of Mind and Criminal Responsibility—A Unitary Doctrine*, 76 COLUM. L. REV. 236 (1976); Tao, *Legal Problems of Alcoholism*, 37 FORDHAM L. REV. 405 (1969); Comment, *Cruel and Unusual Punishment and the Durham Rule*, 59 J. CRIM. L.C. & P.S. 227 (1968).

87. Fingarette, *Disabilities of Mind and Criminal Responsibility—A Unitary Doctrine*, 76 COLUM. L. REV. 236, 238 (1976).

88. E.g., *Robinson v. California*, 370 U.S. 660 (1962); *Watson v. United States*, 439 F.2d 442 (D.C. Cir. 1970); *Driver v. Hinnant*, 356 F.2d 761 (4th Cir. 1966).

89. *Powell v. Texas*, 392 U.S. 514 (1968); *Budd v. Madigan*, 418 F.2d 1032 (9th Cir. 1969).

90. *Robinson v. California*, 370 U.S. 660 (1962); *United States v. Ashton*, 317 F. Supp. 860 (D.D.C. 1970); *In re Foss*, 10 Cal. 3d 910, 519 P.2d 1073, 112 Cal. Rptr. 649 (1974); *People v. Davis*, 27 Ill. 2d 57, 188 N.E.2d 225 (1963).

91. 370 U.S. 660 (1962). See Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635 (1966).



permitted sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous actions."<sup>92</sup> One cannot be punished for a mere status because the necessary criminal intent is absent.<sup>93</sup>

The cruel and unusual punishment doctrine has been expanded in recent years. It has been amplified by the requirement that the punishment "be graduated in proportion to the offense."<sup>94</sup> To this requirement, the courts have added other criteria. The courts also consider the probability of rehabilitation, the need for deterrence, the necessity of protecting society, and the correlation between the punishment and the penal aim.<sup>95</sup> Justice requires that the protection of society be "limited and guided by a clear and unambiguous regard for the rights of the individual."<sup>96</sup>

The cruel and unusual punishment doctrine provides two powerful arguments for recognition of the automatism defense. First, it is cruel and unusual punishment to disallow the defense because punishment for automatic behavior is punishment of a mere status. This argument is premised on an analogy to alcoholism and drug addiction. An individual is not criminally responsible for the mere status of alcoholism or drug addiction. Similarly, an individual should not be responsible for the status of automatism. To punish those who act automatistically "indirectly punishes them for their abnormal condition."<sup>97</sup> Like alcoholism or addiction, automatism should not be punished because the victim is not free to relieve himself of such behavior. An epileptic cannot control or prevent a seizure with any certainty. A somnambulist cannot prevent sleepwalking. One cannot always avoid a blow to the head. No criminal responsibility should result

92. *Robinson v. California*, 370 U.S. at 678 (Douglas, J., concurring).

93. See generally cases cited note 84 *supra*.

94. *Faulkner v. State*, 445 P.2d 815, 818 (Alas. 1968). See generally cases cited note 84 *supra*. This concept was expanded in *In re Lynch*, where the court explained that punishment is cruel and unusual if it is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends the fundamental notions of human dignity." *In re Lynch*, 8 Cal. 3d 410, 424, 503 P.2d 921, 930, 105 Cal. Rptr. 217, 226 (1972).

95. *Furman v. Georgia*, 408 U.S. 238 (1972); *Workman v. Commonwealth*, 429 S.W.2d 374 (Ky. 1968); *People v. Lorentzen*, 387 Mich. 167, 194 N.W.2d 827 (1972).

96. Bleechmore, *The Denial of Responsibility as a General Defense*, 23 ALA. L. REV. 237, 285 (1971). See also Edwards, *Automatism and Social Defence*, 8 CRIM. L.Q. 258 (1966); Comment, *Eighth Amendment: Cruel and Unusual Punishment; A Vehicle for Reappraising the Application of the Criminal Law to the Individual*, 40 CONN. B.J. 521 (1966).

97. Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 652 (1966).

because "the conduct was neither actuated by an evil intent nor accompanied with a consciousness of wrongdoing, indispensable ingredients of a crime."<sup>98</sup> Hence, to punish someone who is not responsible is cruel and unusual.

Second, it is cruel and unusual to punish automatic behavior because the punishment does not serve any legitimate penal objective. One aim of the American penal system is rehabilitation of the offender. The traditional methods of rehabilitation are futile as applied to automatistic behavior. For example, if the court determines that the automatistic defendant is sane, but it refuses to recognize automatism, the defendant has no defense to the crime with which he is charged. If found guilty, he faces a prison term. The rehabilitative value of imprisonment for the usual offender is questionable,<sup>99</sup> but its value for the automatistic offender who has committed the offense unconsciously is nonexistent. The cause of the act is an uncontrollable physical disorder that may never recur, not a serious moral deficiency.

However, if the court treats automatism as insanity and then determines that the defendant is insane, he will be found not guilty. He will then be committed to a mental institution for an indefinite period. The effectiveness of commitment in the rehabilitation of the mentally ill has also been questioned.<sup>100</sup> The commitment of an automatistic individual to a mental institution for rehabilitation is even less likely to be successful because mental hospitals generally treat psychological problems. This form of treatment is not suited to unconscious behavior resulting from epilepsy, somnambulism, or concussion. Again, the penal goal of rehabilitation is not likely to be reached.

Another goal of the penal system is the deterrence of dangerous behavior.<sup>101</sup> An individual can be deterred in two ways. First, the threat of punishment alone may be enough to prevent the individual from ever committing the crime. Second, once the crime is committed, the defendant can be prevented from committing another crime while imprisoned. However, the punishment of one who acts unconsciously does not deter automatic behavior. The threat of imprison-

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98. *Driver v. Hinnant*, 356 F.2d 761, 764 (4th Cir. 1966). Although the court was referring to chronic alcoholism in *Driver*, the reasoning nevertheless seems applicable to automatism.

99. Allison, *Can Corrections Correct?*, 48 NAT'L LEGAL AID & DEFENDER A. BRIEFCASE 410 (1973); Pettigrew, *Corrections: Protecting Society or Recycling Criminals?*, 48 FLA. B.J. 260 (1974).

100. Schwitzgebel, *The Right to Effective Mental Treatment*, 62 CALIF. L. REV. 936 (1974).

101. *People v. Lorentzen*, 387 Mich. 167, 194 N.W.2d 827 (1972).

ment will not be sufficient because automatic behavior occurs despite the individual's desire to prevent it and despite his fear of imprisonment. Once in prison, automatic behavior can still occur, although the defendant is less likely to commit a crime. Therefore, imprisonment or the threat of imprisonment has little deterrent effect. While he is imprisoned, society is protected. However, because incarceration, either in prison or in a mental institution, cannot cure him, the defendant must remain there for life in order to guarantee public safety. Even if the defendant never suffers another automatic episode he must remain in prison because of the fear of recurrent violence. In order for this punishment to be constitutional, the courts must find that the protection of society outweighs the life imprisonment of a defendant for actions over which he had no control and which may never recur.

Because the penalties do not serve any penal goal, denial of the automatism defense constitutes cruel and unusual punishment. Neither imprisonment nor commitment helps to deter, to rehabilitate, or to protect society in the case of a defendant who acted unconsciously. The individual who acts automatically does so without a guilty mind or a guilty act. Punishment of such action is punishment of a status and is disproportionate to the offense. Thus, the eighth amendment prohibits the punishment of the automatistic defendant as cruel and unusual.<sup>102</sup>

#### CONCLUSION

The lack of criminal responsibility presents a compelling case for the automatism defense. When fault is absent, there is no responsibility for the criminal act, and the defendant should be exonerated.

The individual who acts automatistically falls outside both the sanity and the insanity tests. Finding him guilty and forcing him into either category constitutes cruel and unusual punishment and attains

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102. Where the defendant acts unconsciously, imprisonment and commitment exceed what is necessary to protect society and the individual. However, if the automatism defense is allowed, some form of noncriminal control over the individual may be needed. In some cases, acquittal might be accompanied by a requirement of medical treatment, therapy, probation or detention. Edwards, *Automatism and Social Defence*, 8 CRIM. L.Q. 258 (1966). A different result should obtain when the defendant knew or had reason to know of his dangerous condition and recklessly disregarded the potential risk. Such a defendant would be liable only if there was a foreseeable risk. *Smith v. Commonwealth*, 268 S.W.2d 937 (Ky. 1954); *State v. Gooze*, 14 N.J. Super. 277, 81 A.2d 811 (1951); *Smith, Drink, Drugs and Criminal Responsibility*, 124 NEW L.J. 129 (1974).

no legitimate penal goal. If the defendant is considered sane, he will be imprisoned for a crime over which he had no control. If the defendant is considered insane, he will be committed and treated for a psychological illness that is nonexistent. His incarceration may protect society but will neither cure nor rehabilitate the defendant.

The automatism defense encompasses and provides for this situation. It fills the void between insanity and sanity pleas and safeguards the rights of the defendant. The purpose of the defense is to ensure justice by relieving an automatistic defendant from criminal responsibility. If used cautiously by the courts, it will serve as a workable defense and provide an invaluable safeguard for the liberty of the defendant.

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