

## *Actio libera in causa* and Intoxication

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### 1.A Relation between free and unfree action

The *actio libera in causa* doctrine is often described as applying to cases in which a person D acts at  $T_1$  in such a way as to initiate a causal sequence of events with the intention or purpose that he commit criminal offence  $O$  at  $T_2$ , though the causal mechanisms chosen to cause  $O$  will also cause it to be the case that D satisfies the conditions of some criminal defense at  $T_2$ . D creates the conditions of his own defense, and does so as part of an overall plan which has as its purpose the commission of the criminal offence  $O$ . Moral intuitions and legal practice suggest that allowing D to rely upon his defense at  $T_2$  to escape liability for  $O$  is unacceptable; D remains liable for  $O$  even though he satisfied the conditions of some criminal defense that would normally have precluded the finding of liability (either on failure-of-proof grounds or for reasons of exculpation).

To focus our discussion, we must first get clear about the relation that holds between the subsequent unfree act and the agent in situations where we can or should impute the action to him even though it was unfree when performed. (We will later consider the sense in which it is unfree.) Hruschka, like many others discussing the *actio libera* doctrine, assumes a high level of fault (purpose) in cases of imputation for purposes of assigning merit or demerit. He says, “our every day moral intuitions postulate that the actor acts freely and not under duress or the influence of drugs, as prima facie conditions of merit or demerit. Consequently, ordinary imputation [which applies to free acts] of a supererogatory act as meritorious or ordinary imputation of an act contrary to duty as demeritorious are excluded when the agent acted under duress or when he was (heavily) intoxicated. One nevertheless can consider extraordinary imputation [which applies to

acts that are not free in themselves but free in their causes] to merit or demerit if the agent puts himself in the situation of duress *in order to be forced to commit the act* or if he took the drug *to gain the courage to do so.*"<sup>1</sup> We shall want to know if the doctrine is to apply only to cases in which the person creates the conditions under which he acts unfree *purposefully*, or it is to apply to cases in which the person creates the conditions of subsequent unfreedom knowingly, recklessness, or negligently as well. It seems our intuitions about the propriety of imputation extend further than just to cases of intentional or purposeful creation of the conditions making the subsequent act unfree.

Joe falls asleep in a public location with a loaded gun on his lap, knowing that he is prone to react violently when he is awakened suddenly. Sally has a long history of reacting violently when she drinks alcohol, and specifically knows that she becomes short tempered and even physically abusive to her children when she drinks, and that the likelihood and severity of the violence increases proportionately with consumption. Shakira wants to rid herself of a spouse of whom she has tired, and she sees a hypnotist to have a hypnotic suggestion implanted which will compel her a week later to poison his dinner. Jim knows that he goes in to an uncontrollable rage every time he is exposed to violence, and he joins the police force, hoping he might thereby have an opportunity to inflict serious harm or death on those he deems most responsible for violence in his community. Sandhu knows he is prone to lose consciousness due to epilepsy or some other well-understood medical condition, which he can control with medication, but he forgets to take the medication and drives his car. Farzad is a Muslim who wants to participate in the war against the West in defense of Islam, but who knows he is currently too timid and law-abiding to be a useful warrior to the cause, so he joins a group of radical Islamic fundamentalists so that they will subject him to the complete indoctrination he will need to be able to inflict violence on the infidels. Suppose that in each case the outcome of these decisions satisfies the *actus reus* of the obvious crime(s) suggested. In some cases the person seems to contrive the commission of the resulting crime, intending it or having it as their purpose; others might not intend the criminal outcome, but they foresee it or anticipate it; still others seem merely aware that they risk

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<sup>1</sup> Joachim Hruschka, "Imputation," *Brigham Young University Law Review* (1986): 669 p. 694, emphasis added.

bringing about such untoward outcomes, and are thus reckless with respect to their occurrence; perhaps Sandhu is only negligent about the risk he creates, having forgotten that he forgot to take his anti-seizure medication. Such cases illustrate what is quite an intractable problem: on the one hand, the subsequent conduct of each of these persons seems to fit at least one or more offence definition (both result and conduct crimes), but on the other, when those crimes are committed they seem to lack the voluntariness necessary for any criminal act at all.

The highest form of culpability here is contrivance, in which a person acts purposefully at  $T_1$  to cause the conditions resulting in the loss of voluntariness at  $T_2$  for the purpose of acting in contravention of the criminal prohibition that would clearly have been breached had the person done what he did voluntarily. Only slightly less culpable seems the person who creates the involuntary condition anticipating that it will result in a prohibited result, or knowing that in doing so she risks the prohibited conduct. Reckless and negligent variations are also easily imagined, with culpability declining in the predictable way between them. We seem quite willing to hold persons criminally responsible for conduct they commit involuntarily if they were at fault for creating the involuntary condition itself, and what we are willing to hold them responsible for seems to vary according to their degree of culpability in creating that condition. Justifying this intuition has been extraordinarily difficult.

### 1.B Unfree in what way?

Hruschka's description of the problem illustrates another ambiguity in the problem that must be clarified before we can make headway discussing it. He considers two conditions that are necessary for free action: freedom from duress and freedom from the influence of drugs. This suggests that there are at least two ways an act can be unfree: because it is caused by threat or intoxication. But these two conditions render conduct unfree in importantly different ways, and operate as very different kinds of defenses in law. Thus we must ask what kinds of unfreedom, or what causes of unfreedom, can defeat normal imputation, before we can ask whether we should invoke the *actio libera in causa* doctrine to ground criminal responsibility for them. There are multiple ambiguities here,

as is reflected in the various approaches to the problem in the literature. The broadest approach to the issue has been taken by Paul Robinson, in his treatment of the problem as one of a person 'creating the conditions of his own defense'. On this broad reading, the doctrine means that one should not be allowed to create the conditions of one's own criminal defense and then succeed in relying on that defense to block liability for the criminal offense committed. This reading of the doctrine requires that we see all excusing, justifying and defeating or negating conditions as rendering a person unfree with respect to the criminal act. Given the very wide range of defenses, and the various bases for them, if the *actio libera* doctrine covers all such cases, it is a very broad doctrine and the likelihood of developing a single rationale for all its applications is not high. Hruschka may have in mind something comparably broad, given that he talks about both duress (which functions as a general exculpatory defense) and intoxication (which may be a failure-of-proof defense negating the *mens rea* or the *actus reus* of the offense, or a general defense based on failure of a more basic requirement of liability such as consciousness, or it may cause a general defense such as automatism).

It seems to me that Hutcheson and Pufendorf did not mean the doctrine to apply so broadly as to cover all possible defense conditions. They spoke only about cases in which we want to impute conduct to an agent that is physically involuntary; even if that does not help very much, it seems to rule out the general exculpatory defenses (the excuses and justifications, including duress, legal authorization, necessity, and self-defense) as falling within the *actio libera* doctrine. Using George Fletcher's language, the latter might be thought of as producing conditions of 'moral involuntariness' or 'moral impossibility': the persons in such situations have 'no real choice' but to commit the offense, but they are not literally unfree, in any meaningful sense of that term. Regardless of what our Enlightenment forbears thought, I will confine myself to a narrower understanding of the doctrine in what follows. I am interested in cases in which a person's voluntary conduct at time *T1* causes that person to lack voluntariness at *T2*, and at *T2* the person commits what would normally constitute a criminal offence. We typically think that voluntariness is necessary for both moral and criminal responsibility, and so such persons should not be held criminally responsible for what they do at *T2*, even if what they do on the surface seems to satisfy the offence definitions of a crime.

Lots of proposals have been offered to explain this basic intuition: criminal liability requires an act, and persons whose bodies move involuntarily do not perform any act; criminal liability requires a particular kind of causation, and though the person acting involuntarily is the in-fact cause of the criminal result she is not the proximate cause of such results; criminal liability can be imposed only for conduct that is chosen, and what a person does while acting involuntarily is not chosen; criminal liability requires that the person have control over the conduct for which he is held criminally liable, and those who act involuntarily lack the necessary control, etc. But whatever explanation one gives for the general intuition that criminal responsibility requires voluntary conduct, that intuition seems to be weakened and even completely eroded if the person has culpably created the conditions causing the loss of voluntariness itself. The willingness to impute the act to the person even if it was involuntary, provided she caused her own involuntariness with some level of culpability, is what I shall take the *actio libera in causa* doctrine to legitimate, and the justification of such a doctrine is my topic.

### 1.C Hybrid descriptive-evaluative doctrine

As I conceive it, the *actio libera in causa* doctrine has both normative and descriptive elements. As a normative doctrine, it means that persons should not be permitted to create the conditions of their own criminal defense or their own state of involuntariness and then rely on that defense or the fact that their conduct was not voluntary to escape liability for what would be a criminal offense in the absence of the defense or involuntariness. No injustice is done to persons if they are denied a defense the conditions of which they culpably created. Insofar as our criminal law practices track morality, moreover, the doctrine is also descriptive: defendants are not permitted to rely upon defenses the conditions of which they have culpably created.<sup>2</sup>

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<sup>2</sup> This understanding of hybrid descriptive-evaluative doctrines comes from Douglas Husak, "Does Criminal Liability Require an Act?" originally published in R.A. Duff, ed., *Philosophy and the Criminal Law* (Cambridge University Press, 1998): 60-100; reprinted as Chapter 1 in Husak, *The Philosophy of the Criminal Law* (Oxford University Press, 2010), p. 25. Page references to latter collection. Paul Robinson has provided detailed studies of the extent to which the doctrine is followed in the Model Penal Code and federal and state law in the United States. [refs to Robinson 1982 and 1985]

## 1.D Voluntary or self-induced intoxication

In this paper I shall be most concerned with the application of the *actio libera* doctrine to cases in which the resulting defense or involuntariness is caused by voluntary intoxication. This will complicate matters considerably, because the treatment of intoxication in criminal law is rather a mess, and it is considered relevant to liability in at least the following ways:

1. it may negate the *mens rea* for a class of crimes having subjective *mens rea* conditions greater than recklessness;
2. it may be so extreme or pathological as to negate the *actus reus* of the offence;
3. it may either cause or constitute a state of involuntariness or automatism;
4. it may be an exculpatory defense, an excuse or justification, or it may give rise to such a (putative) defense (e.g., leading a person to believe he faces a situation requiring lethal self-defense when he does not).

Matters are even more complicated when we also note that intoxication may suffice for proof of *mens rea* for crimes having recklessness or negligence as their *mens rea* conditions; common law jurisdictions and the Model Penal Code take it that proof of culpability for a wide range of crimes can be established by proof of self-induced intoxication alone. And involuntary intoxication is treated as a general defense to all crimes.

I begin by examining the debate between those who treat intoxication as defeating proof of either *mens rea* or *actus reus*.

## 2. Intoxication and *Mens rea*

The intuitions of jurists, legislators, legal theorists and the public all seem united in thinking that intoxicated offenders should not be permitted to rely upon their self-induced intoxication to relieve themselves of liability for wrongs they commit while intoxicated.

Yet intoxication appears to be relevant to criminal responsibility because it can affect persons' mental states in such a way as to deprive them of some necessary element of *mens rea*. To allow their conviction even if they lack the *mens rea* necessary for the crime would, it seems, run afoul of the 'culpability principle'. And the culpability principle, it seems, requires that we assess D's "culpability *as to committing the offence*".<sup>3</sup> If he lacks the *mens rea* required for the offence, he lacks culpability *as to committing the offence*, even if he had culpability for becoming intoxicated. All that is important about Robinson's treatment of intoxication for my purposes is that he treats it as negating culpability conditions, i.e., *mens rea*.

## 2.A Intoxication negating *mens rea*

Self-induced intoxication has been allowed in many common law and American jurisdictions to function as a denial defense for a limited range of crimes known as specific intent crimes. That is, a defendant can raise the issue of intoxication as evidence that he lacked a necessary element of the offence charged, typically some form of *mens rea* greater than recklessness, and which is specified distinctly as an element of the crime in its statutory definition (or common law equivalent). If murder requires intention to kill or knowledge that death will result from one's actions, for example, then D may be able to raise the issue of intoxication to support his denial that he had the necessary *mens rea*: that he intended to kill or knew that his actions would result in the death of his victim. Likewise, in the crime of breaking and entering a dwelling place with the intent to commit an indictable offence therein, D must have not only whatever *mens rea* is necessary for breaking and entering, but the additional specific intention of committing a further indictable offence to be guilty of this offence, and D may be able to raise a reasonable doubt as to that matter on the grounds that he was too intoxicated to have formed that specific intent.

This seems, then, to be a direct counter-example to the *actio libera* doctrine, understood descriptively, and we should have to say that it is a normative mistake in law to allow D

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<sup>3</sup> Paul H. Robinson, "Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine," *Virginia Law Review* 71:1 (1985), § 1B, p. 13)

to raise his intoxication as a defense.<sup>4</sup> But to disallow an intoxicated defendant to provide evidence supporting his claim that he lacked *mens rea* would be to impose strict liability on him; it would allow his conviction even if he in fact lacked the culpability necessary to have committed the crime. Justice requires that the prosecution prove all the elements of the offense, and if it cannot meet its burden because D's intoxication at the time of the offence raises a reasonable doubt as to whether he had the *mens rea* conditions necessary for the crime, then he must be acquitted.

Doug Husak questions whether intoxication generally negates any of the standard elements of *mens rea*. When those *mens rea* elements are cognitive—intention, knowledge, foresight or the advertent awareness of risk necessary for recklessness—he suggests that intoxication does not typically remove such factors. Intoxication does not typically alter our belief states; more often, intoxication affects our conative and emotional states rather than our cognition, and so unless the offence definition requires a particular purpose, ulterior motive or similarly conative or emotive state for guilt, intoxication will not likely negate *mens rea*, even if the intoxication is quite advanced. Husak's point is well taken. Under common law rules, defendants are permitted to introduce evidence of their intoxication to raise a reasonable doubt as to their *mens rea* for crimes that have been designated 'specific intent' offences. I and others have written enough questioning the basis for the distinction between specific intent and basic intent crimes; I won't belabor those points again here.<sup>5</sup> The point relevant here is that such arguments rarely work, as we would expect if Husak is right. Defendants are rarely able to use their intoxication to raise a reasonable doubt about what they intended, or knew, or

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<sup>4</sup> Of course, this quick judgment presupposes a number of things that might be contentious. First, it supposes that denial defenses, defenses that raise a reasonable doubt as to the satisfaction of a necessary element of the offence, are defenses in the sense meant when we say that people should not be allowed to create the conditions of their own defense. Perhaps the doctrine should be understood more narrowly, to apply to exculpatory defenses only. If it were so restricted then our treatment of intoxication in cases of specific intent crimes would not be a counterexample to the doctrine after all. But it would then be a different doctrine than the one I am examining.

<sup>5</sup> Susan Dimock, "Please Drink Responsibly: can the responsibility of intoxicated offenders be justified by the tracing principle?" in Nicole A Vincent, Ibo van de Poel and Jeroen van den Hoven, eds., *Compatibilist Responsibility: beyond free will and determinism* (Netherlands: Springer, 2011): 83-100; "What Are Intoxicated Offenders Responsible For? The 'Intoxication Defense' Re-examined," *Criminal Law and Philosophy* 5:1 (January 2011): 1-20; and "The Responsibility of Intoxicated Offenders" *The Journal of Value Inquiry* 43:3 (October 2009): 339-368.



foresaw at the time they committed their crimes, because intoxication does not typically alter the content of one's beliefs, and all these *mens rea* states are about beliefs.

The case seems stronger when *mens rea* involves subjective awareness of risk, since intoxication may interfere with a person's attention to the possible consequences of their conduct and the extent to which they consider the risks their conduct might create. The impulsivity often associated with intoxication suggests that persons might not attend to risks that they would have attended to while sober. Here I think we have to distinguish between cases in which the risk was foreseeable prior to intoxication and those in which the risk materialized only after the person became intoxicated.

Consider again, then, the various culpability states one might have, not to one's intoxication itself, but to the resulting crime. If one becomes impaired in order to commit the crime, or with the purpose of committing the crime, or while intending to commit the crime, then one has the required culpability for the crime. Robinson seems to deny this; he thinks we cannot know from the fact that a person created the conditions of his own defense *in order to commit the crime* that he has "culpability *as to committing the crime*."<sup>6</sup> But how can one be more culpable as to committing the offense than to have taken effective steps to make it the case that one commits it, and one does commit it? Likewise, if one anticipates or foresees that one's impairment will product the prohibited states of affairs, then one has the culpability of knowledge or foresight or recklessness with respect to that very outcome. The only difficulty, it seems to me, is if the criminal result that is brought about after one has caused the defense condition is entirely unforeseen (perhaps unforeseeable), or an entirely different kind than that which one intended or foresaw, etc. In such cases, we might have to ask whether the criminal result was within the risk that the defendant intentionally or knowingly created. If the result is entirely unforeseen and the defendant had no intention to bring it about when creating the conditions of his own defense, and he lacked the *mens rea* with respect to it at the time he brings it about, then he should have a defense.

Treating intoxication as defeating *mens rea* is not my main concern, however, because I am primarily interested in examining those cases in which the agent has created the conditions that make her subsequent conduct unfree because involuntary. Defenses

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<sup>6</sup> Robinson 1985, p. 13.

negating *mens rea* only make sense once it has been established that the defendant has committed an act that can be imputed to her; we only ask whether the defendant was culpable for a given act once we have determined that the act can be ascribed to her. And most articulations of the *actio libera in causa* doctrine place that issue very much in question. Thus I will turn almost immediately to the possibility that intoxication is a defense because it defeats the *actus reus* of the crime charged. Before proceeding to that central task, however, we should note that *mens rea* is typically permitted to negate the *mens rea* of only a small subset of crimes: those identified as ‘specific intent’ offences or having a *mens rea* requirement greater than recklessness. For the bulk of crimes, defendants cannot rely on intoxication to negate *mens rea*, and indeed, proof of intoxication will suffice as (proof of) *mens rea* for such crimes.

## 2.B Intoxication as sufficient for *mens rea*

Intoxication figures very differently in cases of basic or general intent crimes. The same line of precedents that established the permissibility of allowing evidence of intoxication to raise a reasonable doubt as to some specific *mens rea* component of a specific intent crime also established that intoxication could not be used to raise a reasonable doubt as to the *mens rea* of general intent crimes.<sup>7</sup> The division of offenses into general and specific intent itself has been criticized as ad hoc, unprincipled, unclear and arbitrary. Its use in disallowing defendants from raising intoxication to provide an evidentiary ground for a denial-of-*mens rea* defense for general intent crimes has been widely criticized. We should expect, however, that the rationale for this restriction on the use of intoxication as a defense would reflect the *actio libera* doctrine; such a restriction is just what we would expect to find in legal systems committed to *actio libera*.

Reasoning in support of this restriction of the intoxication defense as a denial of *mens rea* defense remains murky, at best, and a number of different rationales have been given for it. Some theorists and jurists support the rule disallowing intoxication to deny *mens rea* for basic intent crimes on the grounds that the kind of mental state required in general

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<sup>7</sup> In common law countries the line of cases begins with the House of Lords decision *D.P.P. v Beard* (1920), and extends through ....

intent crimes is so minimal that it cannot be undermined by intoxication. The *mens rea* for general intent crimes is just a basic awareness of one's conduct and intent to so act; the basic intent required for assault, for example, is just the awareness that one is applying force and intent to do so, and that awareness and intent cannot be eliminated by intoxication. This is an empirical claim, though surprisingly little empirical evidence is actually adduced by those who rely on it to support our intoxication rules. What is important for our purposes, however, is that this is not an instance of the *actio libera* doctrine in application. If intoxication cannot defeat the *mens rea* of basic intent crimes, and the other elements of the offence are proved, then D is guilty and there is no further room for intoxication to function as a defense. The reasoning here seems to be that intoxication cannot be an exculpatory defense, an excuse or justification, and so it can only function as a denial defense, if at all. Since in crimes of basic intent, intoxication cannot be relied upon to deny the *mens rea* of the offence, there is no role for it to play as a limit to a defense that could otherwise be relied upon but for its being created by D himself. So what seemed to be an instance in which our treatment of intoxication fit the *actio libera* doctrine turns out not to be such an instance at all.

But the treatment of intoxication in general intent crimes has been rationalized in other ways that might seem more promising for shedding light on the doctrine. Many other theorists and jurists have insisted that intoxication cannot be used as a denial defense against conviction for a general intent crime because intoxication itself supplies sufficient *mens rea* for such crimes. There are many variants to this strategy to prevent defendants from relying on their intoxication to claim that they lacked the *mens rea* necessary for conviction for basic intent crimes. Some claim that intoxication itself is sufficiently faulty to constitute the necessary moral fault for crimes of basic intent; conviction of such persons does not constitute punishing the 'morally innocent' and so is not unjust. Others argue that intoxication can be formally substituted for the *mens rea* of general intent crimes, according to some principle(s) of substitution. This strategy is often supported by another, which is to claim that proof of intoxication suffices for proof of recklessness or negligence, and recklessness or negligence is the normal minimal *mens rea* required for general intent crimes. All of these strategies to justify disallowing intoxication to raise a reasonable doubt as to *mens rea* for general intent crimes share in common the conviction

that being voluntarily intoxicated is sufficiently culpable that intoxicated offenders are not convicted without fault or punished beyond their just deserts when they are convicted of a general intent crime upon proof of the *actus reus* and intoxication itself. None are, then, instances of the *actio libera* doctrine in practice. It is not that defendants are disallowed from relying on a defense they would otherwise have, because they created the conditions of that defense, because intoxication is not a defense to, but a basis for finding, sufficient culpability for conviction and punishment.

All attempts to treat intoxication as substitutable for the *mens rea* of general intent crimes or as constituting *mens rea* for such crimes depend upon the claim that becoming intoxicated is sufficiently culpable that it can justly be substituted for or constitute criminal fault. That is why they apply only to voluntary or self-induced intoxication. And they are all problematic insofar as our legal systems do not actually require proof of culpability with respect to intoxication itself. In most Anglo-American jurisdictions, a person can be voluntarily intoxicated having done nothing more than ingested something he knew or ought to have known was an intoxicant, and regardless of whether intoxication or impairment was intended, foreseen or even foreseeable. In other words, a person can be merely negligent with respect to the resulting intoxication, and yet intoxication can then be substituted for or constitute *mens rea* of recklessness with respect to the criminal result. I have criticized the injustice caused by our legal definitions of voluntary intoxication, and the very narrow definition of involuntary intoxication elsewhere.<sup>8</sup>

Even if we grant that intoxication cannot negate *mens rea* for general intent crimes and will rarely negate *mens rea* even for specific intent crimes, or even if we grant that intoxicated offenders generally display the kind of lack of concern for the interests of others and the values protected by criminal law that suffices to establish their criminal culpability (ala Husak and Westin), there is a limiting case where these conclusions are not decisive about liability. The limiting case is known as extreme intoxication in Canadian law, pathological intoxication in the Model Penal (perhaps), and is analogous to states of automatism or involuntariness. All treatments of intoxication that make its relevance depend upon its effects on *mens rea* will face this limiting case, because all

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<sup>8</sup> Especially in Dimock 2009.

such treatments concern culpability of an act satisfying the offense definition of the *actus reus* of a crime; they all presuppose that an *actus reus* has been committed, and are focused on determining whether the agent who caused that state of affairs to obtain had the required *mens rea* or fault for doing so. But if intoxication is extreme then we must confront the more fundamental issue of whether a person can use his resulting incapacity, lack of voluntariness, automatism, or lack of control, to block liability. The *actio libera* doctrine suggests he should not be permitted to.

Intoxication only seems relevant to the *actio libera* doctrine when intoxication is extreme. Some jurists have thought that extreme intoxication must be treated differently than non-extreme intoxication, as a matter of justice. Canada was a jurisdiction that followed the common law rules outlined above: intoxication could be used as a denial defense for specific intent crimes but itself sufficed for proof of *mens rea* in general intent crimes. In 1994 the Supreme Court of Canada heard an appeal of a case involving a chronic alcoholic defendant who was extremely intoxicated and who, while in that state, sexually assaulted a woman in whose apartment he had been drinking: Daviault.<sup>9</sup> All forms of assault have been deemed crimes of basic intent, so the outcome should have been clear: Daviault should not have been able to raise his intoxication to argue that he lacked the *mens rea* for the crime charged. Yet he argued exactly that and more, on the grounds that his intoxication was so extreme that he lacked any *mens rea* and even the voluntariness required for the *actus reus* of assault or any other crime. He claimed he was in a state akin to automatism, in which he lacked conscious awareness of his own conduct, and was not exercising voluntary control over his own bodily motions; he was not just incapable of intentional action, but any action at all.<sup>10</sup> Now extreme intoxication does seem to pose problems not yet encountered in our discussion. Previously intoxication was relevant to the question of whether D had the required *mens rea* for the offence, but voluntariness seems an even more basic requirement, and reaches to both *mens rea* and *actus reus*. If

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<sup>9</sup> R. v. Daviault, [1994] 93 C.C.C. (3d) 21.

<sup>10</sup> Although I shall speak frequently of acts or actions in what follows, nothing hinges on this. More specifically, I am not claiming that criminal law requires an act, in the sense challenged by Doug Husak... Antony Duff... and defended by Michael Moore.... I think Husak is right that criminal does not and ought not to adopt an act requirement. I speak of acts and actions because it is typically through acts and actions that we exercise our practical agency in ways that impact interests protected by the criminal law. For a position closest to the one I hold, see Vincent Chiao, "Action and Agency in the Criminal Law," *Legal Theory* 15 (2009): 1-25.

intoxication can produce a state of automatism, and automatism is generally a complete defense, then Daviault should have been acquitted. To have followed the common law and denied Daviault his defense would have been to follow the *actio libera* doctrine; he would have been denied a defense he was otherwise entitled to on the grounds that he created the conditions of that defense. The majority of the Canadian Supreme Court ruled that such an outcome would be unjust, indeed would violate principles of fundamental justice, and they overturned his conviction. Thus their position was that following the *actio libera* doctrine would constitute a grave injustice (though they did not put it that way, since they did not consider the doctrine explicitly).

Perhaps we can better understand the proper meaning and scope of the doctrine, then, by examining this limiting case. Though the Canadian Supreme Court tends to favor the language of voluntariness in understanding the *actus reus*, there are a number of competing interpretations of what is missing when the *actus reus* is absent, though the bodily motions and results that would normally constitute a given crime are present: an act, control, voluntariness, volition, consciousness, choice, agency, attitudinal disrespect for the relevant protected interests, practical rationality, and more have been proposed as the unifying feature that is absent in cases that we ought not to punish. Once such an interpretation of the law has been given, a normative explanation of the significance of the missing element is then developed in an attempt to explicate the contours of the requirement and its proper limits, as well as the rationale for treating it as a requirement in the first place. To apply this approach here, then, we will have to determine what conditions are subsumed under the category of ‘involuntary’, or what conditions defeat the *actus reus* requirement.

Among the most common conditions exemplifying lack of voluntariness, or representing movements that cannot fulfill the *actus reus* requirement, are the following: automatism, somnambulism, reflexes, spasms, irresistible physical compulsion, comas, and hypnotism. What do such states have in common that renders persons who act in any of these conditions not responsible for their actions?

It is true that in all such states defendants will not have whatever subjective *mens rea* is required for the complete crime, but they are not (just) *mens rea* defenses. This is demonstrated by the fact that they preclude conviction even for absolute liability offences

that require no *mens rea* to complete. They defeat the *actus reus* requirement, not (just) any subjective *mens rea* conditions that might be necessary for guilt.

## 2.C Intoxication defeating *actus reus*

I have argued elsewhere that our current intoxication rules cannot be justified.<sup>11</sup> I have considered whether voluntary intoxication can be substituted for the required *mens rea* of basic intent crimes, can itself be an alternative basis of criminal fault, is itself necessarily reckless or negligent, or can be justified under a tracing principle ala John Martin Fischer and Mark Ravizza; in all cases I argued that these attempts to justify our current treatment of intoxicated offenders fail. Doug Husak offers a different reason to justify holding intoxicated persons responsible for what they do, based on the attitude their actions express at the time they are done (and so eschewing any tracing strategy). Because he does not rely on a tracing strategy, he thinks his approach shows that the problem of intoxication can be treated independently of the *actio libera* doctrine; his approach, in other words, suggests that *actio libera* arises only in tracing cases. I will argue that even if he is right, there is a limit to both tracing and non-tracing approaches to grounding liability for intoxicated criminal conduct, namely the voluntariness requirement. I have been persuaded by Husak and others that there is no strict “act” requirement, as understood in the “voluntary act” requirement for the *actus reus* of crimes. But as far as I know, virtually all such skepticism is aimed at the *act* portion of the requirement, not the ‘voluntariness’ requirement itself. Whether we hold people liable for acts, omissions, actions, conduct, choices, realizations of agency or whatever, I assume that most people think there must still be some voluntariness requirement that applies to such actions, conduct, etc. This is independent of whether we cash voluntariness causally via volitions or will or intentions, as parts of plans, as events of which the agent has a certain conscious awareness, as states of affairs over which the

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<sup>11</sup> “Please Drink Responsibly: can the responsibility of intoxicated offenders be justified by the tracing principle?”, in Nicole A Vincent, Ibo van de Poel and Jeroen van den Hoven, eds., *Compatibilist Responsibility: beyond free will and determinism* (Netherlands: Springer Library of Ethics and Applied Philosophy, 2011): 83-100; “What Are Intoxicated Offenders Responsible For? The ‘Intoxication Defense’ Re-examined,” *Criminal Law and Philosophy* 5:1 (January 2011): 1-20; and “The Responsibility of Intoxicated Offenders” *The Journal of Value Inquiry* 43:3 (October 2009): 339-368.

agents has control, as expressions of practical attitudes or so on. All that is necessary is that there is some voluntariness requirement that rules out the propriety of punishing persons who perform the action or bring about the result corresponding to the *actus reus* of a criminal offence under the kinds of conditions that have become the staple of criminal law textbooks: while in an epileptic or diabetic seizure, while being attacked by a swarm of bees, while being physically compelled by another, while sleepwalking, or while in a disassociative state such automatism caused by a blow to the head or a severe emotional trauma, or while acting in a hypnosis-induced trance. So long as there is a voluntariness requirement in criminal law, then at least some persons will fail to be acting voluntarily at the time of the commission of the alleged criminal offence. The *actio libera* doctrine should apply to such cases so that such defendants are unable to rely upon their own involuntariness to escape liability.

And yet, imposition of liability in the absence of voluntariness seems a violation of basic principles of penal justice. On some understandings, voluntariness is a requirement of action (broadly construed), and so a requirement of the *actus reus* of every crime. We shall have to ask, what is the relationship between voluntariness, action and *actus rei*? It is not just tracing approaches that face the challenges considered in this section, moreover; even a view like Husak's depends upon the conduct of the accused being imputable to him in such a way that we can determine whether that conduct demonstrates or exemplifies sufficient concern for the interests of others or not, if such attitudes as expressed in action are to ground liability. One might think that only voluntary conduct can reveal attitudes, good or bad, and so even Husak's view seems to be limited to cases in which we have the fulfillment of the *actus reus*. If we are going to impose liability on persons for involuntary conduct, unless such involuntary conduct can be revelatory of the agent's attitudes, we cannot rely on Husak's view. Those who think it would be unjust to hold people liable for conduct committed involuntarily would insist that it is surely only human acts (actions, conduct, exercises of practical agency...) that can display or fail to display sufficient concern for the interests protected by the criminal law. Only if the person is acting can his actions reveal character flaws that are relevant to blame. Thus extreme intoxication seems to pose a problem even on views that are not predicated on a narrow view of what an 'act' is, but rather that assign liability on the



basis of conduct that displays inadequate concern for the interests of others. A person who is sleep-walking or in a state of automatism does not show insufficient concern for others, even when he kills them, unless he knew that there was a risk that he would walk in his sleep and pose a dangers to others while doing so. The person who, while alone at home, takes an overdose of prescription pain pills in order to kill himself but who leaves his house after being rendered insensible, seems not to display insufficient concern for others when he assaults the people who are trying to confine him because he is wandering down the middle of a busy city street. If, by contrast, we think such conduct can, despite being involuntary, reveal the relevant attitudes of the agent, it seems to me we must be looking to the prior conduct of the agent in creating the conditions of involuntariness to make the connection. Thus cases of involuntariness seem to raise squarely and unavoidably the issue of *actio libera in causa*, quite independently of whether one has a narrow understanding of culpability or action.

Cases in which what is absent is the *actus reus*, rather than *mens rea*, generally required by the offence definition, seem to cause more problem for the theorist. These difficulties have been ably described by others, including others in this very room. Does the person whose body crosses the threshold of a jewelry store ‘enter’ the store for the purposes of a robbery statute, if it did so while she in a state of intoxication? Generally, no doubt, the answer will be yes, but there seem to be cases that raise reasonable doubts. Let’s call such cases those of ‘extreme’ intoxication (perhaps this is what the MPC means by ‘pathological’ intoxication, but I don’t know enough about the case law under that condition to say). Cases of extreme intoxication seem problematic because persons in such a state seem to lack the conscious and voluntary control necessary to say that they are acting at all. Extreme intoxication seems to defeat the possibility of action, and so the possibility that the defendant has committed the *actus reus* of any crime. (This is why extreme intoxication has been thought to defeat responsibility for even strict liability crimes involving no *mens rea* requirement.) Such cases seem analogous to cases of sleep-walking or automatism. And they require that one revert to a ‘tracing’ strategy if one wants to hold persons responsible for their involuntary conduct.

### 3 Actions, *Actus rei*, Voluntariness and Related Concepts

Claire Finkelstein and Leo Katz assume from the outset that *actio libera* cases involve actions at *T1* that render the defendant irresponsible and incapable of voluntary action at *T2* (the time the offence is putatively committed). Such an understanding is incompatible with treating *actio libera* cases as ‘creating the conditions of one’s own defense’, if the defenses are exculpatory excuses or justifications like necessity, duress or self-defense, because such defenses only apply to conduct that was responsibly and voluntarily committed, that is, they only apply to conduct that satisfies all the elements of the *actus reus* and *mens rea* for the offence. Thus the view of Finkelstein and Katz should be taken to apply to the narrower understanding of the *actio libera in causa* doctrine I identified above and that is of interest to me here

One result of this is that Finkelstein’s understanding of the *actio libera* problem is untouched by Robinson’s 1985 analysis of causing-the-conditions of one’s own defense, because she is primarily interested in cases involving the intentional loss of voluntariness. These are harder cases. Why? Because, first, voluntariness seems a very basic condition of responsibility. As she says, “What distinguishes involuntary movement from human action is that actions are chosen, and as such they are more or less under the control of the agent”<sup>12</sup> and it is precisely this kind of (generic) choice and control that are absent in involuntary ‘acts’. Second, we can seemingly intentionally or purposefully, as well as recklessly and negligently, create the conditions of our own involuntariness. And, third, even if we think that we can hold defendants liable for defeating the culpability requirements of the offence on the grounds of their earlier culpability for creating the conditions of their defense (because we can substitute the earlier fault for the required fault, or the earlier fault is at least as great as the required fault, or because the earlier fault can constitute the required fault), none of these strategies work in the cases where the defendant has rendered himself incapable of voluntary action. Even if we can use a tracing strategy to ground culpability for the offence at *T2* in the culpability the offender had at *T1*, we cannot do the same with respect to voluntariness. In the genuine cases of causing the conditions of one’s own exculpatory defense, it is assumed that the capacity

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<sup>12</sup> (Claire Finkelstein, “Involuntary Crimes, Voluntarily Committed,” CRIMINAL LAW THEORY: DOCTRINES OF THE GENERAL PART (Stephen Shute & A.P. Simester eds., Oxford Univ. Press 2002): 143-169, p. 143.

for voluntary action extends across the relevant time frames; obviously this assumption fails in *actio libera* cases, since by hypothesis the agent does not act voluntarily at *T2*. While Finkelstein thinks we can see how culpability can track from *T1* (the time at which the person has the culpability necessary for the offence) to *T2* (the time at which the offence is committed, though the agent lacks the culpability for it at that time), because the events uniting *T1* and *T2* are causally related in the right way, namely through a continuous intentional structure of the agent, this is not so with respect to loss of voluntariness. As Finkelstein says, it is hard to see how that fact that one was acting voluntarily at one time could affect the voluntariness of one's action at an entirely different time. She asks: "does the intention to perform an involuntary act, or the knowledge that one will perform such an act, make voluntary what would otherwise be involuntary? It is hard to see how this could be, any more than a person's prior intention to become intoxicated could make his subsequent drunken movements acts of sobriety."<sup>13</sup>

Finkelstein is considering, in other words, and rejecting, an attempt to draw an analogy between 'prior culpability doctrine' and 'prior act doctrine' to salvage responsibility in the absence of a voluntary act as we might salvage responsibility in the absence of fault. The prior culpability doctrine grounds liability for an act at *T2* that one had the culpability for at *T1*; this seems plausible, especially if one did not renounce that culpability between *T1* and *T2*, and indeed, it motivated the events between *T1* and *T2* directly. The person had culpability for the very act for which liability is imposed. But when we are talking about imposing liability for acts, the situation is different. The earlier voluntary acts simply are not the same as the later acts. Placing an axe beside your bed is not killing; ingesting intoxicants even to the point of intoxication is not raping, and so on. The voluntariness attaching to the one act does not transfer or extend or continue to the other. Voluntariness is a property of acts that is not dependent on the intentions of the agent or the causal history of the act. "If Y is not an action of the agent's, we cannot establish responsibility for it by showing that it was the product of something that *was* an action of the agent's. Action simply does not travel along causal lines, and ordinary morality does not accept responsibility without action."<sup>14</sup> Thus Finkelstein thinks existing

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<sup>13</sup> Finkelstein 2002, p. 144.

<sup>14</sup> Finkelstein 2002, p. 145.

attempts to defend the *actio libera* doctrine, which would allow us to impose liability even if the absence of a voluntary act, fail. Thus we must look elsewhere than to causal theories to find a defense of the *actio libera* doctrine if it applies to cases of intentionally or knowingly caused involuntariness.

But perhaps Finkelstein's rejection of causal theories is too fast. She wants to avoid debates about the metaphysics of action, relying just on a common sense notion of the kind, and means her comments to apply generically to any plausible theory of action. Earlier she had said action is constituted (more or less, and no doubt only in part) by its relation to choice and control. But do choice and control not extend across causal lines and temporal states? I want to suggest they can, and to provide a conception of action and voluntariness that allows us to retain the *actus reus* requirement while holding defendants responsible for contrived involuntariness, thus vindicating the *actio libera in causa* doctrine. The approach will vindicate the doctrine, and our intuitions, for both contrivance (grand schemer) cases, in which the defendant creates the condition of involuntariness intending to or for the purpose of committing the resulting crime, or anticipating or knowing that he has created a significant risk of the crime. Because Finkelstein puts her finger on exactly the right issues, and provides such a nuanced treatment of the subject, I shall make frequent reference to her views.

That intoxication can sometimes produce a state that would normally qualify for a 'involuntary act' defense, on the grounds that the conduct is 'not a product of the actor's determination' as the Model Penal Code puts it, is denied by Robinson. At least, he does not put voluntary intoxication in that category of excuses in his seminal taxonomy, though he does (curiously) include involuntary intoxication here (thereby assuming as almost everyone does that the *effects* of intoxication can vary depending on whether the person voluntarily became intoxicated or not). Instead, he thinks intoxication may produce an excusing condition when it (a) results in a defect of perception or knowledge of the physical nature of one's conduct (also included here are somnambulism and automatism); (b) produces ignorance of the criminality or wrongfulness of one's conduct, including mistakes as to justifications one might believe one has; and (c) when it causes

impairment of control (as might hypnotism).<sup>15</sup> It is cases (a) and (c) that are of interest to me, because they might be thought to negate the voluntary nature of one's actions, and so negate the *actus reus* of an offense.

The confusion surrounding which cases are included within the *actio libera* doctrine is reflected in Robinson's list, since presumably the putative defenses in (b) are either that, putative exculpatory defenses, or they go to the *mens rea* of the crime. The elements in (a) and (c), by contrast, seem relevant to assessing the *actus reus* (although I confess a lack of confidence here, since I think extreme intoxication, somnambulism and automatism all cause much more fundamental problems for agency than just misunderstandings of the nature of one's conduct). The same confusion can be seen in the description of the *actio libera* problem offered by Finkelstein and Katz. They presuppose in the very description of the *actio libera* doctrine that the agent is incapable of action at the time the *actus reus* seems to have been performed (would have been performed but for the fact that the agent has done something in order to or anticipating that he would thereby be in a 'state of irresponsibility' or 'rendering himself mentally irresponsible').<sup>16</sup> Agents might cause themselves to be in such states of contrived irresponsibility, they say, by drinking to the point of drunkenness, being hypnotized into a trance, placing themselves in a position where they will be coerced, being shot out of a cannon so as to be in a place to commit the desired crime, as well as provoking an attack that they will have to meet with deadly self-defensive force or creating a situation of necessity that will require the criminal act as the lesser evil.

The list suggests that something has gone awry in the description of the problem. The first problem with this expansive way of understanding the doctrine has already been mentioned. If it is literally true that the person 'acts' in a state of irresponsibility or while incapable of voluntary action, then there can be no *actus reus* (or *mens rea* either), and so there can be nothing that the exculpatory defenses of duress, provocation, self-defense or necessity will be needed to justify or excuse. These are situations of 'creating the conditions of one's own defense', and so are not properly dealt with under the *actio*

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<sup>15</sup> Pail H. Robinson, "Criminal Law Defenses: A Systematic Analysis," *Columbia Law Review* 82:2 (1982): 199.

<sup>16</sup> Claire Finkelstein and Leo Katz, "Contrived Defenses and Deterrent Threats: Two Facets of One Problem", p 480 and 482 respectively.

*libera* doctrine, as they themselves define it. Hereafter, therefore, I shall confine myself to their examples of genuine *actio libera* cases: drunkenness, hypnotism and physical compulsion (being shot out of a cannon).

The problem is not merely one of classification, however; it is crucial to assessing the criticisms Finkelstein and Katz raise to the ‘orthodox’ justification of the *actio libera* doctrine. The orthodox approach to justifying liability for those who contrive to commit crimes involuntarily, or while in a state of irresponsibility, is a causal approach. A brief digression to consider the orthodox defense of *actio libera* is in order, both because it is the account against which Finkelstein, and Finkelstein and Katz, direct most of their energies, and one that I think can actually succeed when coupled with the right theory of action.

The traditional approach to *actio libera in causa* cases, which is designed to establish the agent’s liability for the resulting offence and so deny him the lack of *actus reus* or involuntariness defense he otherwise seems entitled to rely on, is a causal approach. So long as the defendant at some earlier time performed a voluntary act, with the culpable mental state of intending to or anticipating that he would or might cause some legally prohibited state of affairs, and that voluntary act inaugurated a chain of events that in fact and proximately caused the legally prohibited state of affairs, then the defendant is prima facie liable for that result. As Michael Moore, the most prominent contemporary champion of the traditional view puts it, so long as we can identify some “voluntary act by the defendant, accompanied *at that* time by whatever culpable *mens rea* that is required [for the offense], which act in fact and proximately causes some legally prohibited state of affairs, then the defendant is prima facie liable for that legal harm.”<sup>17</sup> This approach finds imperfect expression in many legal doctrines, both in the Model Penal Code and in common law jurisdictions such as Canada. But Finkelstein and Katz think that *conduct* crimes create a serious problem for the traditional approach to justifying liability in *actio libera in causa* cases. In order to understand what the problem is, however, we have to deny that the defendant committed any act or action satisfying the *actus reus* definition for the crime charged. We have to accept that if a person is in a

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<sup>17</sup> See Michael S. Moore, *Act and Crime* (Oxford University Press, 1993, pp. 35-36 for an articulation and defense of the traditional view.)

‘state of irresponsibility’ then he is incapable of action, or voluntary action, and so incapable of satisfying the *actus reus* definition of conduct crimes.

In cases in which a person has himself shot out of a cannon, or hypnotized, or drinks to the point of drunkenness, they say, his is incapable of satisfying the conduct element of the *actus reus*. Nothing he does satisfies the definition of ‘entering a building’ or ‘driving’ or ‘having intercourse’ or ‘breaking into a building’ as would be required for the *actus reus* of the obvious offences. Whether this is plausible for the cases mentioned at the beginning of this paragraph, it is surely not plausible in the cases where the defendant has created the conditions of an affirmative defense of justification or excuse. Even if the defendant was acting under duress, in self-defense, or from necessity, he surely acts in every way necessary to satisfy the *actus reus* conditions of the crimes mentioned here; his action is not involuntary in the way necessary to defeat the voluntariness requirement of the *actus reus*. This is basic law, justified by both our best understanding of moral exculpation and action. So they will only be able to make their charge against the orthodox view’s treatment of conduct crimes if they adopt the more restrictive understanding of the *actio libera* doctrine.

And it is the narrower understanding of the doctrine that they use to raise the objection to the traditional approach to *actio libera* cases; they concentrate on conduct committed while in a state of drunkenness or in a trace, or that physically is compelled. In these cases, they suggest, the person is incapable of action and so incapable of satisfying the *actus reus* element of the conduct crimes in question. Even if the defendant was responsible at the earlier time, when he put in motion the sequence of events that causes the prohibited state of affairs to obtain, he was not at that time committing the conduct element of the crime; and when, later, he is seemingly committing the conduct element of the crime, he is not engaged in voluntary action and so not performing the action required in the definition of the offence.

The first problem with the traditional approach appears when one attempts to apply that solution to conduct crimes. Consider a crime like burglary, which requires the defendant to have ‘enter[ed] a building ... with purpose to commit a crime therein.’ Can the defendant be said to satisfy this act definition in the case in which he had himself shot from the mouth of a

cannon? Although he did enter a building with intent to commit a crime, he did not do so *voluntarily*, since he was in an irresponsible state at the time. What about the fact that he was in a fully responsible state when he arranged to have himself hypnotized in order to commit a burglary, as the traditional approach would have it? The problem with this earlier moment is that he did not enter a building at that time, since getting oneself hypnotized is not itself entering a building. So the trouble is that at the earlier moment in time, *T1*, the defendant was responsible but he was not entering a building, and at the later moment, *T2*, when the defendant *was* entering a building, he was not in a responsible state. To put the problem more technically, it looks as though there is no concurrency of act and mental state, which is required for the defendant to be liable for a crime.<sup>18</sup>

As they say, at the earlier time the defendant was at most *causing* himself to do the things necessary to complete the *actus reus* of the crime, but causing oneself to X is not always the same as doing X (contra to what Moore says).

To make out the claim that the traditional defense of *actio libera* cannot justify impositions of liability for conduct crimes involuntarily committed, Finkelstein and Katz have to suppose that the persons putatively committing the crime are not actually capable of voluntary action and so not capable of performing the *actus reus* of any crime. This view, however, is inconsistent with the other objections that they raise against Moore's causal defense of *actio libera*. First, they point out that with respect to results crimes, the traditional view would require that the original act of the defendant at *T1* (getting drunk, seeing the hypnotist) must be not only the but-for cause of the resulting criminal result, but the proximate cause of it as well, if the causal relations holding between the act at *T1* and the subsequent criminal state of affairs at *T2* is to ground liability for that later result. Yet they deny that we should conclude that the defendant's actions at *T1* must be the proximate cause of the criminal result at *T2*, because we might think of his later act as an intervening cause that breaks the chain of causation between the two states. Why would we think this? Their answer illustrates the inconsistency. In order to think that the act at *T1* is not just the cause in fact, but also the proximate cause, of the subsequent criminal

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<sup>18</sup> Finkelstein and Katz, p. 484, quoting Model Penal Code § 221.1(1) (1985).



result, we have to deny that any intervening act can occur that might break the chain of causation. But to think this, we must think of the defendant's action as setting in motion a chain of events that will lead inexorably to the criminal result; we must think of the defendant's getting drunk or seeing the hypnotist as like to releasing a bullet in flight, over which the defendant can exercise no further control, the results of which are all causal. But they deny that this is the right way to think of the situation. They say, "Acting in an intoxicated state, after all, is *not* like being shot from a cannon. One's actions are still voluntary, and one's bodily movements still susceptible to control. In such cases, we cannot think of the defendant who drinks to excess as a 'bullet in flight,' as the traditional approach would have it."<sup>19</sup> But this is precisely what they imagined was the case in order to get the problem with conduct crimes off the ground; it is only on the assumption that when the defendant performs what looks like the *actus reus* of the crime at *T2* he is nonetheless not acting, or not acting voluntarily, that allows them to deny that he satisfies the conduct element of the crime at *T2*. The first objection depends upon the defendant being incapable of voluntary action at *T2*, while this second objections depends on precisely the opposite possibility.

The assumption that the defendant is incapable of further voluntary action, or action for which he is responsible, is also necessary for Finkelstein's and Katz's final two objections to the traditional approach to the *actio libera* problem. They say that the traditional view sets the threshold for completed attempts too early, and does not allow a person to abandon his criminal plan after he has set it in motion. But both of these claims are true only if it is true that once the person has completed the action at *T1* (seen the hypnotist, gotten drunk), he cannot make any further causal interventions into the chain of events that ends with the prohibited state of affairs. This is, again, incompatible with the claim, just above, that the defendant remains capable of voluntary action and in control of his conduct between *T1* and *T2*. Finkelstein and Katz can't have it both ways. Most of their objections to the traditional solution to the *actio libera* problem (that arising from its application to conduct crimes, its determination of when an attempt is complete, and its disallowance of abandonment of the criminal plan set in motion at *T1*, all depend upon the view that after *T1* the defendant is incapable of acting voluntarily or doing

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<sup>19</sup> Finkelstein and Katz, p. 486.

anything to disrupt the causal sequence he has initiated at *T1*. That is incompatible with their assumption that the capacity for voluntary action breaking the causal chain is retained, an assumption invoked in their argument showing that the traditional view cannot establish that the act at *T1* was the proximate cause of the result at *T2*. And, more important for my purposes, they have not given any reason to think that this is plausible. We must, then, confront directly the question of whether an extremely intoxicated person, a person in a state of automatism or a person sleepwalking can retain enough agency to be capable of acting in the sense necessary to fulfill the *actus reus* conditions of an offence. If they can, then we might have justification for holding them responsible for acts committed in that state, as the *actio libera* doctrine suggests. If they can, and our reasons for so thinking are related to the fact that they have created the conditions resulting in their own loss of voluntary control, then our conclusion will not just be compatible with the *actio libera* doctrine, but justified by the very conditions it makes salient. In the later case, the *actio libera* doctrine will be doing the work it is meant to do in rationalizing our practice of holding offenders responsible for harms they cause involuntarily provided they were responsible for the state of involuntariness. If a person cannot fulfill the conditions of the *actus reus* of offences while intoxicated, automatistic or somnambulatory, then it seems unlikely that any justification could be found, since the requirement that we punish people only for voluntary conduct matching the definition of the *actus reus* of an offense seems so basic a requirement of justice that violating it could never be permissible. As Husak says, “A fundamental principle of criminal liability is that all offenses require an *actus reus*.”<sup>20</sup>

#### 4. Reasons to Think Voluntariness is Necessary for Action

There are good reasons to think that defendants who act while in a state of automatism, extreme intoxication, hypnotic suggestion or while sleepwalking are not capable of voluntary action and so nothing they do in such a state can fulfill the *actus reus* conditions of a crime. Yet there seem good reasons to think precisely the opposite as well.

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<sup>20</sup> Douglas Husak and Craig Callender, “Willful Ignorance, Knowledge, and the ‘Equal Culpability’ Thesis: A Study of the Deeper Significance of the Principle of Legality,” *Wisconsin Law Review* (1994): 29-69; reprinted in Husak 2010, p. 229, page number are to the latter.

Let's take the case against action being possible in such states first, and look at the reasons for thinking that involuntary acts cannot constitute the *actus reus* of any crime.

To begin with, we might think that a defining feature of action, and something that distinguishes actions from mere bodily movements or happenings, is that we exercise control over actions that we lack over mere movements. Doug Husak thinks in fact that it is a 'control requirement' that better fits as a hybrid descriptive-evaluative requirement of criminal liability than an 'act requirement'.<sup>21</sup> If he is right about this, then we must ask whether individuals lose the kind of control necessary for responsibility when they act involuntarily. He thinks a person lacks the control over a state of affairs necessary for responsibility if "he is unable to prevent [it] from taking place or obtaining."<sup>22</sup> There may be good reasons to doubt that a person can exercise the needed control while in the kind of states we are considering because persons in those states seem to lack a level of self-consciousness that is necessary for control; if you are not aware of your actions, the thought might go, you cannot control them. This seems to be the conclusion of another theorist who places a premium on control: Jeffrie Murphy. He thinks we are not only agreed that "certain forms of drug- or alcohol-induced behavior (for example, behavior resulting from a drug administered to Jones without his knowledge or from his highly atypical reaction to alcohol; [and] behavior engaged in while asleep or unconscious or (although this is controversial) while under posthypnotic suggestion"<sup>23</sup> is involuntary and so cannot fulfill the *actus reus* conditions of any crime, he also thinks that that agreement is based on further consensus that the relevant feature that unites such cases as involuntary is the actor's lack of control over his movements.

Stephen Morse has discussed the complexities involved in understanding the kinds of unconscious and automatistic behaviors that are of interest here.<sup>24</sup> Pathological states of altered self-consciousness include fugue states, sleepwalking or episodes of depersonalization experienced as automatism. Automatism or unconsciousness is the

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<sup>21</sup> Husak, "Does Criminal Law Require an Act?" 2010.

<sup>22</sup> Husak, "Does Criminal Liability Require an Act?" 2010, p. 38.

<sup>23</sup> Jeffrie G. Murphy, "Involuntary Acts and Criminal Liability," *Ethics* 81:4 (1971): 332-342, p. 333. Murphy confuses the issue somewhat by including in his examples cases of physical compulsion in which the actor does not do anything, even something involuntary, such as convulsions and reflex movements, but I ignore that complication above.

<sup>24</sup> In, for example, Stephen J. Morse, "Culpability and Control," *University of Pennsylvania Law Review* 142:5 (1994): 1587-1660, IV.D.

standard legal defense under which such cases would fall. Yet, as Morse notes, there is disagreement as to whether automatism or unconsciousness should be treated as negating the voluntary act requirement (and so the *actus reus*) or as an affirmative defense that excuses. He says of such cases, “in dissociative states, consciousness is not fully integrated because the normal ability self-consciously to observe oneself, to be aware of and monitor oneself, is missing or severely diminished. The self-protective variable of self-awareness seems crucial because it enables us to perceive our conduct and to behave more adaptively by correcting ourselves. In moral terms, the self-awareness operates as a censor or self-inhibitor: its absence makes it hard to fly straight by facilitating ‘unthinking’ immoral behavior.”<sup>25</sup> But only if we must say that those operating without self-consciousness are unable to control their wrongful actions, will we be forced to conclude that such persons are incapable of performing the *actus reus* of crimes. Morse is not sure that we should also draw such a conclusion.

Though Husak says that persons lack control over acts that are “non-voluntary,” he identifies the conditions of involuntariness in Anglo-American criminal law as requiring for such a state the “complete non-involvement of the will and a total loss of control”.<sup>26</sup> I will suggest that such complete non-involvement does not obtain in the *actio libera* cases where the agent has created the condition of involuntariness purposefully or knowingly.

Of course, some theorists are committed to specific theories of action that will preclude them from recognizing unconscious or involuntary acts as actions in the sense needed for *actus rei*. Moore’s volitional theory, for example, might be taken to mean that involuntary acts are not actions, because they are not caused by volitions (immediate intentions for a specific bodily movement). This is not certain; to say that an action is not voluntary does not necessarily mean that it is not volitional. This is more obvious, perhaps, if we have in mind the expanded notion of involuntary, which excludes choices made under duress as voluntary; such actions may be volitional even if they are not voluntary. But if self-consciousness is necessary for volition, then presumably a person cannot act in a state of automatism or somnambulism on Moore’s view. This would be

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<sup>25</sup> Morse 1994, p. 1642.

<sup>26</sup> Husak, “Does Criminal Liability Require an Act? 2010, p. 39.

unwelcome to Moore, since he wants to allow liability to attach for involuntary conduct on the basis of the *actio libera* doctrine, as we have seen.

Similarly, to give but one more example, Michael Corrado argues that the voluntary act requirement in criminal law requires that the course of conduct followed by the actor was one she chose and her choice was itself voluntary. A condition of her choice being voluntary is that she could have chosen otherwise. Voluntariness will then be defeated, making an *actus reus* impossible for the actor, only if the act was not caused by the actor's choice or if she could not have chosen otherwise.<sup>27</sup>

Claire Finkelstein thinks that the theory of action she favors rules out the possibility of 'involuntary actions'. This is the theory of action defended by such luminaries as Donald Davidson and Jennifer Hornsby. As Finkelstein identifies the incompatibility of between 'action' and 'involuntariness', the problem is this: actions are (1) particular (2) events that are (3) describable in multiple ways (4) according to their attributes, but (5) under at least one description it is something someone did intentionally; "an event is an action as long as there is a [true] description of it under which it is an agent's doing something intentionally."<sup>28</sup>

How, then, does this framework apply to the kinds of bodily movements a person makes in her sleep or while suffering an epileptic seizure? The question is whether there is a description under which such movements can be understood as intentional. Clearly there cannot be. At the moment that the agent suffers an epileptic seizure, there is nothing she is trying to do, no purpose her movements seek to fulfill. We can now see that the expression 'involuntary action' is confused: the movements of a person experiencing an involuntary condition, like epilepsy, are not intentional under any description, and consequently they cannot be regarded as actions of any sort. This should also help clarify why I have been insisting that we cannot treat lack of voluntariness as a *mens rea* defense: to say that the person has a mental state defense *presupposes* that what she does is an action, and that would mean that there is a way of describing the

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<sup>27</sup> Michael Corrado, "Is There an Act Requirement in the Criminal Law?" *University of Pennsylvania Law Review* 142:5 (1994): 1529-1561.

<sup>28</sup> Finkelstein 2002, p. 163, with credit to Jennifer Hornsby and Donald Davidson.

defendant's behavior under which it is something she did intentionally. Where movements performed in the grip of an involuntary condition are concerned, however, there is no possible intentional description, and thus there is no action and no prohibited action (*actus reus*) either.<sup>29</sup>

I agree entirely that intentions are the key to actions, but I reach a different conclusion than Finkelstein does as to whether conduct undertaken while in a state of involuntariness can be intentional and so action. But I think a small clarification is in order before proceeding. Finkelstein talks about 'involuntary conditions', and this has the potential to mislead. Epilepsy might or might not be an involuntary condition, depending on the degree of control an agent has over it; if she has fully effective medication to control its effects, it may not be involuntary as a condition. Certainly intoxication will not typically be an involuntary condition. But whether the condition giving rise to the circumstance in which a person's body moves in ways that are entirely unintentional and involuntary is itself voluntary or not is neither here nor there for the point that the bodily movements so caused are not actions and so cannot constitute the *actus reus* of criminal offences. Both Finkelstein and I are concerned with attributions of responsibility for the outcome of conditions that produce involuntary conduct. Since I want to say that we can be responsible for such conduct, even though it is involuntary, provided that it is caused by choices to create or risk that very result, it is important to me that at least some of the conditions that cause involuntary conduct themselves be voluntary and intentional (or knowing or reckless), since agents must be culpable for them in order to be responsible for the involuntary actions they produce. I will return to Finkelstein and give my reasons for thinking she is wrong about the implications of her theory of action later. Rather than run through all the possible theories of action that make 'involuntary action' a category mistake because they characterize action so that it includes or is constituted by something voluntary, or that provide substantive conceptions of action that make it implausible to think that involuntary action could satisfy the conditions for action, I will simply move on to provide what we need, namely a defense of the claim that a person can

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<sup>29</sup> Finkelstein 2002, p. 164.

be acting involuntarily (can meet the conditions of an automatism or involuntariness defense) and so can satisfy the requirement that what she does satisfies the conditions of the *actus reus* of the crime with which she is charged, if she does so because she has created those very conditions as part of a broader plan of action which includes culpability with respect to the *actus reus*. That is, I will provide an provide a brief account of action that I think can justify the use of the *actio libera* doctrine to impose liability on individuals for actions they commit in a state of involuntariness, if that state of involuntariness was culpably caused by the agent.

Notice that nothing I say in what follows suggests that a person acting in an automatistic state, while sleepwalking, or while in a state of dissociation due to extreme intoxication makes the voluntariness of an act at *T2* depend on the voluntariness of an act at an earlier time *T1*. This is something one would have to say if one wanted to defend that view that D can be held responsible for his action at *T2* because (contrary to appearances), this actions were not really involuntary after all, because they were caused by earlier actions that were voluntary. In other words, if one's strategy for defending *actio libera* is that persons at *T2* were really acting voluntarily after all, and so they can unproblematically satisfy the *actus reus* conditions of offences, it will face a serious difficulty raised by Finkelstein. Such a defense of liability in *actio libera* cases would require the theorists to say that voluntariness at a given time can depend upon mental states at an earlier time. As Finkelstein points out, this would make voluntariness a pretty mysterious property.

Exploring the problem of intended or anticipated involuntariness should provide a way of considering the nature of voluntariness more generally.

What sort of thing could voluntariness be that a person's prior psychological state could affect it? In particular, does the intention to perform an involuntary act, or the knowledge that one will perform such an act, make voluntary what would otherwise be involuntary? It is hard to see how this could be, any more than a person's prior intention to become intoxicated could make his subsequent drunken movements acts of sobriety. It is hard to see, in other words, how having a certain mental state at one time could affect the voluntariness of one's actions at an entirely different time. But if intending or knowing that one will perform

an involuntary act does not make the act itself voluntary, why should we blame the person who contrives to kill someone involuntarily for the resulting death?<sup>30</sup>

What follows is my attempt to answer that question, and the answer will not deny that the person at *T2* is acting involuntarily (and so will not deny that the person is acting involuntarily at *T2 because* she was acting voluntarily at an earlier time).

#### 5. Reasons to Think Voluntariness is Not Always Necessary for Action, or Defending the *Actio libera in causa* Doctrine

Just as there are powerful intuitions leading to the conclusion that a person does not engage in action when she acts in an involuntary state, so there seem to be good reasons to think that persons can (and sometimes do) act (in the sense necessary for responsibility) even if they are in a state of automatism, extremely intoxicated, sleepwalking or acting under the influence of hypnosis. After explaining this generally, I will suggest that the possibility of action and responsibility is realized in precisely the *actio libera* cases.

Perhaps the most compelling evidence that persons are capable of action even when in states of automatism, while sleepwalking, and while extremely intoxicated, comes from accounts of the behavior of such persons. Consider, for example, Mr. Parks.<sup>31</sup> In the wee hours of a May morning, 23 year old Mr. Parks got out of bed and into his car, which he drove 23 kms to the home of his in-laws, whom he stabbed repeatedly in their bed. One died and the other was seriously wounded. After the attack, he drove to a near-by police station and reported what he had done. He was sleepwalking the whole time, and at every stage was acquitted on grounds of automatism (first by a jury and then by a unanimous appellate court), and his acquittal was eventually affirmed by the Supreme Court of Canada. His behavior certainly seemed to fit the definition of automatism in Black's Law Dictionary: "Behavior performed in a state of mental

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<sup>30</sup> Claire Finkelstein, "Involuntary Crimes, Voluntarily Committed," p. 144.

<sup>31</sup> R. v. Parks, [1992] 2 S.C.R. 871.



unconsciousness or dissociation without full awareness, *i.e.*[sic], somnambulism, fugues. Term is applied to actions or conduct of an individual apparently occurring without will, purpose, or reasoned intention on his part ...”<sup>32</sup> Yet it is difficult to reconcile the facts of his conduct with a claim that he was incapable of action: that he drove, that he entered, that he stabbed, that he killed, and that he confessed, among others.

Stephen Morse, among others, sees that there is a compelling case to be made for classifying such conduct as involuntary action, in some robust sense of action sufficient to ground *prima facie* liability. As he says, “the dissociated defendant has been able successfully to engage in conduct demonstrating accurate understanding of the environment and goal-directedness, suggesting that the bodily movements are intentional states. These are certainly not cases of reflex or physically compelled movement. Nor are they cases of random bodily movements: some mental state is directing the bodily movements quite effectively.”<sup>33</sup>

Even Moore admits that the sleepwalker, the classically dissociated unconscious agent, performs ‘complex routines requiring perception and readjustment in order to reach certain goals’<sup>34</sup>. Both Moore and Morse agree that the sleepwalker is substantially aware of herself and of her relationship to the environment. Accurate perceptions and feedback loops to guide behavior are present”.<sup>35</sup> And, most importantly, her movements seem to execute more general intentions. If the actions are not random, they must express her desires and beliefs. “To execute a general intention requires that the agent *must* be aware at some level of the intention that she is trying to execute.”<sup>36</sup> Nonetheless, Moore wants to deny that the state that executes the sleepwalker’s more general intention is a volition, and so to deny that her acts are actions. Morse doubts this. “The unconscious agent’s behavior is simply too ‘actish,’ too complex, too goal-directed, too dependent on awareness of self and environment, to claim that the agent’s movements lack the essential

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<sup>32</sup> Quoted with approval by the Lamar, C.J. (dissenting in part, but not on this point) in *R. v. Parks* 1992, p. 884.

<sup>33</sup> Morse 1994, pp. 1641-1642.

<sup>34</sup> Moore, *Act and Crime* (1993), p. 257.

<sup>35</sup> Morse 1994, p. 1644.

<sup>36</sup> Morse 1994, p. 1645.

qualities of actions. Dissociated action differs from consciously integrated action in important ways, but it is more parsimonious to think that both are essentially actions.”<sup>37</sup>

Even if Mr. Parks ‘acted’ during his extended somnambulatory excursion, and so can be found to have fulfilled the *actus reus* conditions of murder and attempted murder, he was, in my view, rightfully acquitted on the grounds of a general defense of automatism (involuntariness in other jurisdictions). It is true that he lacked the *mens rea* for the crimes charged as well, but that his was not a *mens rea* defense is demonstrated by the fact that he should rightfully have been acquitted of any strict liability offenses whose *actus reus* terms he fulfilled too. But how does Mr. Parks differ from those whom we want to convict of crimes committed while they were rendered in an involuntary state by their own prior choice? How do we support the judgment that Mr. Parks should be acquitted while other defendants who similarly act under the conditions of automatism or extreme intoxication should be convicted? The answer, surely, depends upon the *actio libera* doctrine. Those who did not culpably create the conditions of their involuntariness (like Mr. Parks) are to be treated differently than those who culpably create the conditions of their own defense (as the *actio libera* doctrine suggests). I shall now briefly outline a theory of action that I think supports this conclusion and allows us to distinguish cases along the morally salient lines so as to ensure that we punish only those who deserve it.

## 6. Agency, Action and Extended Plans

Why do we generally think that persons who commit what would otherwise be criminal offences in a state of involuntariness or automatism are not properly punished for doing so? Why can their actions not be attributed to them in such a way that it would be proper to label them as criminals of a certain type (thieves, murderers, home invaders, etc.) and in such a way that they deserve condemnation or censure for those actions? The view I favor has been called the “practical agency condition”: “punishment in a specific instance is unjust unless the crime charged was caused or constituted by the agent’s conduct

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<sup>37</sup> Morse 1994, p. 1646.

(broadly understood) qua practically rational agent.”<sup>38</sup> Such a view supposes that it is a necessary condition of criminal liability that the criminal state of affairs the defendant is charged with was caused or constituted by the agent’s conduct qua practically rational agent.<sup>39</sup> An agent is a practically rational agent provided he “is in a position to guide his conduct through the normal use of his deliberative and executive capacities—that is, those capacities for forming and acting on intentions.”<sup>40</sup> An agent is a practically rational agent so long as he has the capacity and opportunity to recognize and act on reasons. This is a very basic capacity, one not easily disrupted; it is not disrupted, for example, by extreme provocation or duress, which may influence which reasons a person acts on but without undermining his capacity to act on reasons altogether. To lack the capacity for practically rational agency one would have to be non-reasons-responsive, and so incapable of forming and acting on intentions.

Advocating and applying the practical agency condition, Vincent Chiao suggests that cases of conduct committed while sleepwalking, while under hypnotic control, and presumably while in a state of extreme intoxication akin to automatism, are problematic because such conduct seems to have some intentional contours. Mr. Parks, for example, seemed to be responsive to his environment and acting intentionally. Likewise, presumably Mr. Daviault engaged in conduct that looked intentional when he entered the bedroom of his victim, removed her from her wheelchair and placed her on her bed, and touched her in a sexual manner. The same can no doubt be said for Mr. Honish, who took what he hoped would be a fatal overdose of pills and who after losing consciousness got out of bed, recovered his car keys, got into his car, and drove a number of blocks from his home before causing an accident [ref] Were the stabbings, sexual assault or dangerous driving caused or constituted by these men’s conduct qua practically rational agents? The drinking and the pill taking no doubt were so caused, but the question is whether the subsequent conduct was as well. Chiao, like me, wants to say no. Chiao tentatively suggests that such agents act intentionally, but they lack executive self-control, acting in a means-ends rational way but for ends that are no part of any plan they take themselves to be pursuing, for ends that are given extrinsically, and which are no part of their sense

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<sup>38</sup> Chiao 2009, p. 2.

<sup>39</sup> This is Chiao’s formulation: Chiao 2009, p. 16.

<sup>40</sup> Ibid.

of self. Metaphorically, they have been commandeered and their agendas set by someone else. But while we don't want to hold these people responsible for their subsequent conduct, that suspension of blame only holds on the assumption that the actors in question did not culpably create the conditions that render them non-practically rational agents at the time the criminal acts occurred.

In the sleepwalking case, we might doubt that Mr. Parks caused the conditions of his own sleepwalking. He no doubt in some sense caused himself to sleep, but that is not the condition of relevance. Unless he knew (or perhaps ought to have known), intended or had as his purpose to sleepwalk, he should surely not be deemed to have caused that condition. In other words, our intuitions here likely follow those invoked by 'culpability-in-causing cases'. Those who think that Mr. Decina can be properly held responsible for running over the children with his car after he has lost conscious control of it due to an epileptic seizure surely think so only because he knew he was subject to such seizures and had medication he could have taken to avoid one on this occasion. It was because he culpably chose to drive, knowing he had not taken his anti-seizure medication and so risked having a seizure while driving, that we think he can rightly be held liable for that result and its consequences.<sup>41</sup> Since his driving in a state that caused serious risk of harm to others was caused by his practically rational agency, and his driving in that condition was the proximate cause of the children's deaths, the deaths can be attributed to him qua practically rational agent, even though he lacked the capacities for rational agency at the time of the accident. As Chaio explains, "given the defendant's knowledge of his condition, his deciding to drive without the antiseizure medication itself amounts to conduct as a practically rational agent that causes the harm with which he is charged. Thus, on the practical-agency condition, we can easily accommodate culpability-in-causing cases without modifying the supposedly general norms of criminal responsibility through ad hoc qualifications or tortured and underinclusive prior-acts analysis."<sup>42</sup> While I agree that this is a significant advantage over the act requirement as traditionally understood, we must still ask how culpability at the earlier time can transform the later actions into intentional actions (actions that can satisfy the *actus reus* definition of the

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<sup>41</sup> *People v. Decina*, 2 N.Y. 2d 133 (1965).

<sup>42</sup> Chaio 2009, p. 19.

crime), or how prior culpability can allow us to find guilt even in the absence of voluntariness at the time of the offence.

Can we reach the same conclusion about liability in the two intoxication cases as we reached in *Decina*? Clearly the intoxication was the result of the exercise of their practically rational agency. But on the assumption that neither Mr. Daviault or Mr. Honish had even assaulted someone after becoming intoxicated, and had no other reason to anticipate that they might harm someone or drive after becoming intoxicated, can the conduct they engaged in after losing the capacities for rational agency be attributed to them? I don't see how. True: they created the conditions of their own defense (if defense they have). But they did so non-culpably. Mr. Daviault did not do anything inherently blameworthy in drinking almost a full bottle of whiskey, nor did Mr. Honish in taking a bunch of pills to kill himself; even if their conduct was in some sense wrongful, it hardly seems wrongful in a way that should attract criminal attention.

If the agent's culpability in creating his state of involuntariness is what makes it permissible to hold him liable for the acts committed in that state, there must be a tight connection between the prior culpability and the resulting crime. Indeed, I will suggest that there must be a causal and an agential relation between the two. In some cases, the causal relation will suffice: where the agent puts in place a series of events culminating with the criminal state of affairs, when the agent has no further control over the sequence after its initiation to its completion with the crime, he functions like a bullet in flight. The agential relation is trivially satisfied in such cases if the agent intentionally or knowingly set the causal sequence in play, with the purpose of causing the crime or anticipating its occurrence.

Now let's return to Finkelstein's view. She denies that 'acts' committed involuntarily can be 'actions' in the sense needed to constitute the *actus reus* of crimes. And she does not think we can appeal to the voluntary actions of the agent at an earlier time so as to change that fact. Because she thinks D's act at *T2* cannot be the *actus reus* of the crime charged (because it cannot be any action at all), she thinks the only way liability could be imposed on D for that act (consistently with the *actus reus* requirement) is if it is equivalent to the action taken earlier at *T1* when D was acting voluntarily and intentionally. Thus Finkelstein now describes the question as: can the voluntary act of the

agent at *T1* be described as an act of the agent at *T2* (can ‘seeing a hypnotist’ at *T1* be described as ‘causing the death of another human being’ at *T2*)? In order to see how this might be possible, we first have internalize the consequences of actions into the description of the action itself (we have to internalize the consequences of the act ‘moves his index finger’ so that it includes ‘the depression of the trigger’, ‘the firing of a gun’, ‘the killing of a human being’, and ‘frightening a squirrel’). We describe the action in terms of its consequences, thereby expanding the agency of the actor.<sup>43</sup> Theorists of action typically allow that agency can be extended to all consequences the original action causes in fact. But that provides too expansive a notion of agency, and would make persons responsible for too much. Lawyers invoke the requirement of proximate causation to limit the consequences that can be properly attributed to the person’s action, and philosophers can use the description-as-intentional test for the same purpose. (Indeed, we might think the two tests will give the same results, but that would need to be argued for.)

Agency is not spread along all causal lines, but it is spread along some. What marks the difference?

[I]n any case in which we have a sequence of events, each of which is a necessary cause of the next, we will sometimes want to divide that sequence up into different redescriptive segments. In the cases in which causal relations do not translate into agentic relations, there appears to be a break, such that while redescription is possible on the near side of the break, we cannot redscribe in the relevant way across it. Rather than scrutinizing the obscure notion of proximate cause in order to determine whether an involuntary condition impairs responsibility, we can address the question of agency more directly. We can determine whether a defendant’s voluntary performance of an earlier act is sufficient to make his performance of the later, prohibited act it causes voluntary by asking whether the earlier act can be redscribed in terms of the later one. The cases in which it can are the ones in which the performance of the prior act

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<sup>43</sup> Finkelstein 2002, p. 164, crediting Joel Feinberg.

*is* sufficient to make the latter act voluntary. The cases in which it cannot are the ones in which the performance of the prior act is not sufficient.”<sup>44</sup>

In adopting this approach, we replace a causal inquiry used in the orthodox approach with an agentic one. Those events that have traditionally been thought to break causal chains (intervening human acts and unusual natural events or coincidences) are also the kinds of events that block agency from passing from one act to a subsequent act or event. In particular, there may be some events that prevent the defendant’s agency from spreading from his earlier voluntary act to the subsequent prohibited act. Those are conditions in which liability should be blocked. Advanced knowledge (as in anticipation cases) and intention (as in purposeful creation of involuntariness), while they were unlikely candidates for determining when a causal chain was broken, seem much more acceptable as conditions of agency. Indeed, prior knowledge and intention seem uniquely suited for determining when agency spreads from one action to another, understood as events truly describable as intentional.

Though Finkelstein thinks the redescription strategy is successful in solving the causation problem in such a way as to allow law to both excuse involuntary conduct in strict liability crimes while holding those who contrive to become incapable of voluntary actions responsible for conduct committed while in that state, she expresses doubts that even it can solve the definitional problem (that no description of the earlier voluntary action seems to fit the definition of the *actus reus* in a given defense). ‘Seeing a hypnotist’ simply does not meet the definitional requirements of ‘causing the death of another person’, or ‘taking the jewelry’, or ‘entering a dwelling place’. Indeed, she thinks this problem plagues both result and conduct alike. Whether the offence definition includes action verbs or causal verbs, it seems like the person cannot have done or caused the prohibited act if he cannot perform any act at all. Thus she still thinks involuntary acts cannot fulfill the definition of the *actus reus* of offences.

But I think this is too quick. The kinds of cases she considers are those in which a person goes to a hypnotist at *T1* and has implanted a suggestion that he poison his wife or rob a jewelry store while in a trance at *T2*. True, the action at *T2* is not the action at *T1*,

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<sup>44</sup> Finkelstein 2002, pp. 165-166.

and no there is no immediate redescription that will make them the same acts. But this ignores what redescription is supposed to do: it is supposed to track agency across causally related sequences of events. Surely the right description, then, is that defendant sees the hypnotist at  $T1$ , at which time he is given a post-hypnotic suggestion that at  $T2$  he will poison his wife or enter the home and remove the jewelry. What happens in between? If he then (voluntarily and in furtherance of the over-arching plan that rationalized his going to the hypnotist) returns home, stopping on route to purchase the poison, which he then hides in a convenient but out-of-sight location in the kitchen, kisses his wife and turns on the kettle, then all we need is to be able to spread his agency from these events to those of putting the poison in the tea and giving it to his wife. Even if between buying and positioning the poison and preparing to make the tea, on the near side, and placing the poison in the tea and giving it to his wife, on the other, the post-hypnotic state is triggered and he completes the remaining tasks in a trace, I have no problem thinking that his conduct while in the trace can be truly described as intentional. And this seems almost certain in all of the contrivance and awareness cases. So perhaps the redescription solution works better than Finkelstein originally thought. The reason his agency extends across the whole causal sequence, even over those bits of it that are not voluntary, is because they are united as a sequence by the overarching intention that makes them all components of a single plan – the plan to kill his wife by poisoning her – and there is a true description of that plan under which the result of it – the wife’s death by poisoning – is itself intentional. Our agency is very often expressed when we execute complex plans, and in such execution we might often do things that are not themselves voluntary acts (including involuntary movements, omissions, reflect actions, behavior that is characterized more-or-less as a state of automaticity, etc.); they are still expressions of agency provided they are all united as serving the success of the plan. Only if they disrupt achievement of the plan’s over-arching purpose will we even be inclined to question whether our agency ranges over all of them. And then the question will have to be answered by the intentions, purposes, and beliefs we had prior to the point of the disruption. So such assessment will necessarily be a tracing exercise that refers to mental states. The actions taken between that of seeing the hypnotist and poisoning his



wife seem united by the relation of means-end coherence and internal connectedness we would expect to see if they were all subparts of the plan to kill his wife.

Thus I think we should develop the practical agency account of responsibility and the intentional account of action in tandem. On intentional theories of action like Hornsby's, a psychological element is an indispensable element of 'action', and that element is best thought of as intention. As Hornsby characterizes her view: "There is some action if and only if there is an event of a person's intentionally doing something."<sup>45</sup> She thinks this account is compatible with seeing the deeds of those who are sleepwalking or under the influence of hypnotism as acting, even though their actions lack voluntariness. Provided that at least one of the things the sleepwalker or hypnotized agent did was something she intentionally did, the event is an action of hers.

The approach to action that treats it as something a person does intentionally has the further advantage of being capable of integration with a planning theory of intention, such as has been developed by Michael Bratman. Finkelstein recognizes the importance of plans, but I think the combination of a planning theory of intention, an intentional theory of action, and a practically rational agency theory of responsibility together provide the resources we need to vindicate the *actio libera* doctrine so as to hold those who are blameworthy with respect to their involuntary conduct responsible for it while excusing those who are not.

Finkelstein recognizes the importance of plan to both rationality and morality. And in the context of discussions of *actio libera* specifically, she and Katz have suggested that placing the involuntary acts within the context of their larger plans might be fruitful. I think they were absolutely right in this insight. As they say, we "must assess plans—and component parts of those plans—in the context of the overall moral character of the entire package."<sup>46</sup> What has been missing in the description of the cases of involuntariness is the plan under which the creation of the condition of involuntariness seemed rational. Once we put the involuntary action in the context of the overall plan that rationalizes it, we shall see that it has the same moral quality as the overall plan (which in cases of contrivance and anticipation, are blameworthy).

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<sup>45</sup> Jennifer Hornsby, "Action and Aberration," *University of Pennsylvania Law Review* 142:5 (1994): 1719-1747, p. 1727.

<sup>46</sup> Finkelstein and Katz, p. 502.

Let's look at contrivance cases (or 'grand schemer' cases, as Robinson once called them [ref]). We are committed to saying that *A* can only be an action if there is a true description of what D did that has the form 'D *A-d* intentionally', which in turn implies that D tried to *A*. Thus every action is partly constituted by a person's trying to do something.<sup>47</sup> This has led some (perhaps Finkelstein herself) to think that what a person does in an automatist state or while sleepwalking cannot be actions, because there is nothing persons in such states are trying to do. But that will be true only if being in that state and doing what they do in it are not parts of a larger plan. If they caused the state of involuntariness and do what they do in that state as part of the execution of a broader plan, then what they do is intentional. The resources of Robert Audi and Michael Bratman should be utilized to fill in the details of what plans are and how they structure intentional action.

From Audi we should accept that the best explanation of the dynamics of actions requires adoption of a theory that is permissive in terms of the events that can cause action. He identifies at least six types of events that can and regularly do cause action: perceptions, thoughts, executive actions (decisions, choices, resolutions), changes in the balance of motivation forces, overcoming inertia, and awareness of an appealing prospect.<sup>48</sup> These events must be related to desires and beliefs and intentions before they can figure into causal explanations of the actions they trigger, but against that background such events often help explain why the action was appropriate in the circumstances and so enrich such explanations. All are relevant in explaining the execution of intentions.

If, plausibly enough, we think of intentions and other action-explaining motivational states, such as aims, purposes, and desires, as partly constituted by a tendency to do things believed necessary for realization of their objects, [and intending implies wanting, and wanting is in part constituted by tendencies to perform actions believed to contribute to the thing wanted, so intending likewise implies not just a tendency to perform the intended action but also a tendency to perform actions believed to be necessary or useful for doing so] it is to be expected that certain

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<sup>47</sup> See, for defense of the 'trying' condition, Hornsby 1994, p. 1744.

<sup>48</sup> Robert Audi, "Volition, Intention, and Responsibility," *University of Pennsylvania Law Review* 142;5 (1994): 1675-1704.

perceptions, thoughts, decisions, and changes in the balance of (aroused) motivational forces should be capable of accounting for the execution of intention and the realization of other motivational states. For Mary to intend to drop the key as soon as it rests above my hands still *is*, in part, for her to be such that, on perceiving, or in some other way coming to believe, that it is in that position, she tends to release it. And to want something, say to call Joe, is, in part, to be such that if one has the thought that now is a good time to do so by using the phone before one, one tends to use it. Similarly, to conclude practical reasoning with a judgment that one must *A* is, in part, to be receptive to perceived opportunities to *A* (at least if one takes them to be opportunities), to be responsive to the thought that now is the time to *A*, and to be disposed to form an intention to *B* if it becomes clear that *B-ing* is an excellent way to *A*.<sup>49</sup>

Audi's insights about the events that cause actions are useful here because they remind us, first, that usually such events as the perceptions and thoughts that help explain action do so because they have the appropriate content to connect the action with the intention or other motivation that explains it. But the connection between the events not only explains the action as intentional; they also in a sense 'rationalize' that action. This is what is normally missing in the case of automatism and other involuntary conduct, as it was with Mr. Parks. But if there is prior intention that relates the elements in these kinds of ways, connecting perceptions and thoughts by their contents to intentions and desires, so that the action is not only intentionally explicable but rationalized as well, then the mere fact that the action so explained and rationalized is involuntary is not determinative of its imputability to the agent.<sup>50</sup> (This is what is missing in cases even like Mr. Parks, where there seems to be no overarching intention or plan that explain or rationalize his actions. It is even clearer in more standard cases of dissociation, where agents engage in a sequence of events that seem utterly random, unpredictable and inexplicable. I want to make this contrast clearer in another paper looking at some actual intoxication/automatism cases.)

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<sup>49</sup> Audi 1994, pp. 1695-1696.

<sup>50</sup> Audi 1994, p. 1696.

Audi's theory of action also helps us to overcome the fact that persons acting in an involuntary state typically lack the normal level of self-consciousness, and are often described as acting unconsciously. As Morse says, self-consciousness is an important capacity for both rational and moral action. But its absence need not be fatal to a finding of action even in the absence of consciousness, since so much of the story can be told in dispositional terms, and dispositions need not be conscious to the mind. As Audi says, "such events are among the eliciting conditions in terms of which one would explicate the nature of the relevant dispositional states, and hence should be expected to figure in clarifying the manifestations of those states. Intentions, for example, are by their very nature manifested in the agent's avowing and executing them. Wants and beliefs are similarly manifested both in verbal behavior and the intentional actions explainable in terms of them, such as releasing the key in order to get it to someone waiting to catch it below. ...[T]hese and other dispositions are realized by thoughts and perceptions, for instance the perception of opportunities."<sup>51</sup> If this is plausible, then the lack of consciousness is compatible with action. (Though I think we need to be more discriminating even in the description, since persons sleepwalking, for example, see conscious in the sense of being able to adjust their conduct to the external environment, and to respond appropriately to external stimuli. But I leave these descriptive worries aside for now.)

On the dynamic view of action, there are lots of events that can elicit action by executing intentions. Audi's view, with its richness of resources and the familiarity of the action initiators it contains, seems superior to a view like Moore's, in which all actions are initiated by volitions. But from my point of view, what is important is to recognize that all of these events are relevant to determining whether an action is intentional, and whether it can be rationalized in the sense of being explained as something a practically rational agent has done. In almost all cases of intoxicated action, the answer is surely yes. We would be able to identify these kinds of factors in explaining the behavior of the intoxicated offender. But we cannot, even with this rich pool of phenomenological resources, find events that rationalize or explain the actions of the sleepwalker or the automaton, unless we can look back to the time prior to the onset of the disabled

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<sup>51</sup> Audi 1994, p. 1696.

condition and find a plan which rationalizes some of the subsequent actions as sub-plans or means-end reasons, or reasons related to a state of wanting that is still truly ascribable to the agent even after the disabling condition has been created.

This is a happy result for me, because I am more inclined toward Audi's "guidance and control model" of action than something like Moore's "executive thrust model". At least, insofar as we want to be able to explain exercises of practical agency as acting for reasons, such a model seems preferable. On the guidance and control model, "actions result when energy already present in the motivational structure is released in the appropriate direction by a suitable eliciting event, such as a thought or decision or a perception of an opportunity to get what one wants, and guided in that direction by (above all) the agent's beliefs."<sup>52</sup> Given that intentions, wants and beliefs are dispositional, it is not decisive that the person does not form a volition to do what he does while in an automatistic state; what he does may still be action if it is motivated by such standing motivations, triggered or guided by the relevant kinds of perceptions, beliefs, thoughts, and decisions. The cases raised in discussion of *actio libera in causa* are of exactly the latter kind: we are to imagine a person who forms an intention to bring about the prohibited result or engage in the prohibited conduct, who then forms an elaborate plan for doing so, including various future-directed intentions, all united by the overarching desire for the criminal outcome. Even if part of the plan involves rendering himself insensible, the plan can only work if he nonetheless is able to be guided by the perceptions, beliefs and decisions that rationalize the actions in execution of the plan. But if they do, then they can be ascribed to him as action for which he bears responsibility, it seems, just as easily as can the actions we engage in that seem automatic, habitual or otherwise motivated but not by any volition with such determinate content or conscious immediacy as to fit something like Moore's volitional model of action. So long as the dispositional states (the wants and intentions especially) persist through the plan, the person acts for the reasons given by those states. And that they persist through the relevant time is evident from the fact that the agent responds appropriately to opportunities to get what he desires, acts on appropriate means-ends beliefs, is guided by perception of relevant external factors, etc.. If he weren't, his plan could not succeed. If

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<sup>52</sup> Audi 1994, p. 1697.

we allow that a person can have indefinitely many intentional dispositions, and even a large number of beliefs and intentions can be causally affecting his behavior at any given time, without the beliefs and intentions being present in consciousness, then the fact that persons sleepwalking or acting while in a dissociative state lack consciousness of their own actions is also not determinative of whether they are acting in the sense relevant to law (whether what they are doing is expressive of their practical agency). If “one’s actions can be controlled by motivation and cognition even when one’s consciousness is almost wholly occupied with something other than one’s motivational or cognitive states or even with the objects toward which those states are directed”, as Audi argues, then the lack of consciousness is not a necessary bar to finding that the conduct of sleepwalkers and automatons is action.

Moreover, it seems that our stable desires, beliefs, wants, intentions and plans are much more revelatory of the kinds of persons we are, of our character, than specific volitions might be. A volition may be caused by a passing fancy or a sudden emotion, and so tell us little about the degree to which a person generally manifests the appropriate care for the interests protected by criminal law in her actions; while our long-term intentions and the stable beliefs and desires that underlay them tell us much about whether we have the appropriate level of concern for others and the values protected by law. True, we do and should punish conduct displaying a lack of such concern even if it is caused by a volition that is out of character; if the action was volitional, it manifests the character of the person sufficiently to ground responsibility. But the lack of volition with respect to a particular act is not, conversely, exculpatory, especially if the action is in character, in the sense of manifesting the content of the person’s will (as constituted by her long-standing intentions) and the structure of her will (as constituted by her deepest desires and most fundamental beliefs).<sup>53</sup>

When a person successfully executes a plan (and planning itself seems necessarily intentional), the sub-parts of the plan are actions in virtue of their role within that intentional structure. “Action is under the control of reasons. It is guided by thoughts, perceptions, and other natural events. And it is explainable by reference to the psychological framework in which the basic ends of our behavior are contained in our

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<sup>53</sup> See Audi 1994, pp. -1702-1703.

desires and intentions, and its basic direction is determined by our desires.”<sup>54</sup> All of this seems true of those who successfully execute complex plans such as contrivers and grand schemers do.

This approach to action allows us to capture what was surely right in the view of H.L.A. Hart, when he said that mere reflexes and other involuntary acts were not actions because “they were not required for any action (in the ordinary sense of action) which the agent believed himself to be doing”; involuntary movements “are not subordinated to the agent’s conscious plans of action; they do not occur as part of anything the agent takes himself to be doing.”<sup>55</sup> While I cannot follow Hart all the way to a non-causal theory of action, he was right to think that whether an event is an action depends in part on its role within the broader motivational structure of the acting agent. We can even understand why he thought the cognitive accompaniments of action were important: when we are conscious of what we are doing, and see what we are doing as something we are trying to do (as something we are doing intentionally), then we can be sure that we are acting. His mistake was in thinking that the normal conscious accompaniments of action are necessary. That mistake caused him to overlook the possibility that one can be acting involuntarily but responsibly because one’s involuntary conduct is in fact subordinated to a plan of the agent’s, though the plan may not be conscious to the agent at the time. Mine is a causal theory of action (unlike Hart’s): *actions* are events caused by intentions and rationalized by underlying desires and beliefs. Their conscious accompaniments are typically relevant, not because they constitute actions as Hart thought, but as evidence of their causal history. Desires, intentions, reasons are causes, and when a person’s actions are consciously motivated by such causes we know all we need to conclude that they are actions. But a person can also act without those conscious accompaniments, so long as the action is caused by intentions and properly related to the motivational base of those intentions (rationalized by them as components in an over-arching plan, for example). In cases where the agent is rendered unconscious between forming the intention and its execution, the *only* way she could successfully satisfy her intention is by putting in place causal mechanisms that are self-executing, as it were, requiring no further executive

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<sup>54</sup> Audi 1994, p. 1704.

<sup>55</sup> H.L.A. Hart, “Acts of Will and Responsibility,” in *Punishment and Responsibility* (OUP, 1968), p. 105.

direction from her. But then she look little different from the person who kills by firing a gun or who protects his property by placing an automatically-triggered booby trap on his windows.

Such cases look, in other words, like the classic Jekyll-and-Hyde case:

Consider the Jekyll-and-Hyde choice to render oneself an involuntary actor as part of a criminal scheme, for example, taking a potion that one knows will later induce homicidal automatism: there is no question but that the culpable choice [of taking a potion one knows will later induce homicidal automatism] satisfies the voluntary act requirement despite involuntariness at the time of the homicidal conduct.<sup>56</sup>

Both Larry Alexander and Doug Husak think Dr. Hyde satisfies the voluntary act requirement. But the voluntary act here is just the act of taking the potion (ingesting the intoxicant), not the resulting homicide committed while D is in a state of homicidal automatism. The act of killing is committed while Hyde lacks all control over his action; his is typically held up as a paradigmatic case of involuntary conduct. But it is also a classic case of *actio libera in causa*, and Husak think the doctrine produces the right result insofar as it would have us hold Hyde responsible for the killing.<sup>57</sup>

Husak justifies holding Hyde responsible for the homicide he commits while acting as Jekyll because he thinks the voluntary act requirement can be satisfied so long as D performed a voluntary act *in order to* bring about the prohibited state of affairs. If a voluntary act (drinking the potion) and a criminal state of affairs (the killing) are related by what Husak and Brian Mclaughlin call the ‘relevance relation’, D can be responsible for the criminal result even if it was not itself caused by a voluntary act.<sup>58</sup> The voluntary act and the criminal result need not be temporally concurrent to satisfy the ‘relevance relation’, because such temporal relatedness is not generally necessary for a person to be able to voluntarily act; to do what he intends to do by the voluntary act does not require

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<sup>56</sup> Larry Alexander, “Reconsidering the Relationship Among Voluntary Acts, Strict Liability, and Negligence in Criminal Law,” in Ellen Frankel Paul, Fred D. Miller Jr., and Jeffrey Paul, eds., *Crime, Culpability, and Remedy* (Cambridge: Basil Blackwood, 1990), p. 92; quoted and discussed in Husak and Mclaughlin 1993, p. 107.

<sup>57</sup> Douglas Husak and Brian P. Mclaughlin, “Time-frames, Voluntary Acts, and Strict Liability,” *Law and Philosophy* 12:1 (1993): 95, p. 110.

<sup>58</sup> Husak and Mclaughlin 1993, p. 110; emphasis added.



that the voluntary action and the intended result occur simultaneously.<sup>59</sup> D takes an overdose of pills in order to commit suicide. The voluntary act of taking the pills is both the cause in fact and the proximate cause of the intended outcome, the death, even if taking the pills did not commence the death. Likewise, Husak says about the Jekyll-and-Hyde case (taking D to be the agent and *O* to be the criminal offence): the criminal offence “itself need not begin with a voluntary act, since the voluntary act D performs in order to *O* need not commence D’s *O-ing*. For example, Jekyll’s taking the potion in order to kill did not commence his killing. However, it seems that when [D performed a voluntary act in order to *O*] is satisfied, the agent is culpable for *O*, since he engaged in the criminal conduct purposefully.”<sup>60</sup>

Sometime it appears that Finkelstein thinks there must be temporal concurrence between the voluntary act and subsequent criminal result if the former can be redescribed as the latter. And she thinks this cannot typically be done, as we have seen. But I think we need to distinguish between two different scenarios. Take the case to be ‘D drank himself into insensibility/had himself hypnotized in order to kill his wife/burglar a jewelry store’. Finkelstein sometimes says D cannot be responsible for the resulting crimes because D is not voluntarily acting at the time of the offence, and so cannot commit the *actus reus* needed for guilt. On her view that means that we cannot redescribe his conduct at the time of the offence as something he does intentionally. On this reading, what is necessary to establish the required relation between the voluntary acts at *T1* and the resulting crimes at *T2* is equivalence under description as intentional. The mere fact that the two are separated in time should not preclude successful translation. So why should we think such translation is impossible?

The orthodox approach would say we should be able to successfully redescribe the former action in terms of the later result by internalizing all the results the former action causes. If the required relation is in place, this should ground a finding of the requisite relation of proximate causation.

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<sup>59</sup> Finkelstein says that both Moore and Robinson must abandon the ‘concurrency requirement’. To the extent that she thinks this is a serious criticism of their views, she must think it is an important principle of penal law. See Finkelstein 2002, p. 158.

<sup>60</sup> Husak and McLaughlin 1993, pp. 111-112.

But Husak has identified what I think is the more fundamental relation that makes the former act relevant to the latter: namely, they are related by the *purpose* of the agent. If D acts in order to commit the resulting crime, then the resulting crime is relevantly related to the former voluntary action as its intentional object, as the object the intention causing the action is motivated by and designed to realize. The former intention establishes the criterion of success for the subsequent conduct. The relation established by purpose is relevant on a causal story, a straight-forwardly normative story, an agential story, and on a view that makes description-under-an-intention central. There is a morally important difference between the case in which ‘D performs a voluntary act *in order to O*’ and that in which ‘D *O-s* by performing a voluntary act’.<sup>61</sup> A person can bring about a criminal result unknowingly and without fault; D can *O* by performing a voluntary act, without being aware that he is doing *O*. He may not be liable for *O-ing* in such a case. But if he performs a voluntary act for the purpose of *O-ing*, he is responsible for *O-ing*. And this is so even if there is a temporal lag between the voluntary act and *O* being realized, even if between the two D is rendered insensible, so long as the original purpose is not renounced along the way.

Sometimes Finkelstein seems to imagine that there is nothing between the voluntary act at *T1* (visiting the hypnotist) and the resulting criminal result at *T2*. There seem to be required no steps between *T1* and *T2*, and the steps taken at *T1* guarantee the result at *T2*. If that is the kind of case Finkelstein has in mind, however, then it seems to represent the agent after *T1* as nothing more than an executor of the intention at *T1*. The agent, in other words, seems indistinguishable from a bullet in flight. If Finkelstein wants to allow that D can kill at *T2* by firing a gun at *T1*, and that this causal connection suffices either for proximate causation or redescription as intentional, then if this is her view of the *actio libera* cases, she should find liability here as well. There is no need to examine whether the agent acts at *T2*, since the only relevant act is the voluntary one at *T1*; everything else is causation, as in the bullet in flight case.

If, on the other hand, Finkelstein wants to say that there are intervening events between *T1* and *T2*, and that we need an action at *T2* that causes or constitutes the criminal offence, then we will need our account of action to supply the relevant relation

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<sup>61</sup> See Husak and Mclaughlin 1993.

between *T1* and *T2*. She thinks that relation cannot be cashed out as a causal relation in such cases, because that would make causation depend on an agent's mental states. If the agent intends or foresees the criminal result at *T1* then her action is the proximate cause of that result, but if she does not intend or foresee the result then her action at *T1* is not the cause of the criminal state of affairs at *T2* (what she calls a 'mentalist' conception of causation).

It is open to a defender of the orthodox view to defend such a mentalist conception of proximate causation, allowing that causation does depend on such mental states as foresight or foreseeability. (Finkelstein talks about 'foreseeability' and treats this as a mental state, but I am less sure it is a mental state – it seems to say something objective about a state that it is foreseeable, rather than anything about what a particular person actually foresaw – but perhaps nothing hangs on this.) A person who thinks that proximate causation is fundamentally a culpability concept, rather than a causal concept, might welcome such a result. But Finkelstein rejects the mentalist view of causation. She notes that if proximate causation is fixed by foreseeability, causation would be rendered otious: "if intending a harm can serve to establish that a the defendant caused the harm, this would entail that 'intention' imparts all the information we need to hold agents responsible."<sup>62</sup> Causation on such a view would have no independent role to play in fixing responsibility. But if we adopt, instead of the orthodox causal view, the practical agency view of voluntary action, it seems we can escape this worry. Even if we should reject the view that whether or not the defendant caused the prohibited state of affairs depends on whether he intended or anticipated that result, we surely should accept that whether the defendant's practical agency is implicated in a prohibited state of affairs can be determined by that fact that he intended or anticipated that result.

Imagine a man who has resolved to kill his wife because he believes she has been unfaithful. To quell his conscience, to distance himself from the knowledge that he is intent on such serious wrongdoing, to buck up his courage, and to allow him to focus more exclusively on the perceived wrong she has done him and so feel the insult in a more lively way, he undertakes to drink as much alcohol as he can prior to the time of the

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<sup>62</sup> Finkelstein 2002, pp. 149-150. Such a result would not be unwelcome to some, of course, such as Larry Alexander and Kimberley Ferzan.

killing. Even if he is in a state of insensibility when the killing subsequently takes place, he is surely fully responsible for the death as a murderer. Indeed, I think this judgment is so secure that if we are offered theories that require a contrary finding, say because our understanding of ‘acts’ within the *actus reus* requirement suggest that the husband did not murder his wife because he did not commit an act of killing, then this should count as a counter-example to that understanding of what the *actus reus* requirement is. The husband formed an intention to do what he knew is contrary to the law and a serious moral wrong; he took various steps to execute that intention, many of which were surely acts or actions on any acceptable theory of action; the sequence of events that he initiated, some of which were actions, formed a single plan that had as its object the death of his wife at his own hands; his adoption of the plan resulted in the intended death. Surely he is responsible for that death. The only ground I can see for saying he was not is that he was not responsive to reasons or in control of his conduct at the time of the killing. But since he had caused his non-reasons responsive state, for the very purpose of causing the killing, I don’t see how that differs from saying that a person is not guilty of killing because the bullet from the gun he has intentionally fired at his victim is not reasons-responsive or subject to his control. The vast majority of what we do, how we exercise our practical agency in the world, involves planned conduct rather than discrete basic actions. Even the person who kills by scooting his victim is engaged in executing a plan with multiple parts; some of the events that make up the plan will be actions, and some will not (such as the trajectory of the bullet); but no one thinks that such a shooting is not a killing because it involves parts that are not themselves actions. So long as the right causal and agential connections between the events obtain to make the description of them all parts of a single plan, a single exercise of agency, then the metaphysical nature of the events that make up the plan seem irrelevant. And what makes it appropriate to say that all the events are events of a single plan is fixed by the purpose for which they are caused. This, at least, seems to me to be the way we should approach genuine *actio libera in causa* cases, in which the person created the conditions of his own defense for the purpose of engaging in prohibited conduct or bringing about a prohibited result. And in such cases it does not matter what kind of defense the person established: failure of proof or exculpation.

I am not, moreover, convinced that it is even right to describe such cases as involving a lack of control. If the person genuinely lacks all control and is incapable of responding to any reasons after *TI* (if there is a “complete non-involvement of the will and a total loss of control”, as Husak says), then it seems she just is a bullet in flight. All that is necessary is responsibility for the action at *TI*, and that is not in dispute, But short of this extreme, I doubt that in either contrivance or anticipation cases we should say that D lacks the control necessary for voluntary action. Husak says the control necessary for responsibility is the ability to prevent the state of affairs from taking place or obtaining”.<sup>63</sup> Presumably those who contrive to or anticipate that they will commit a crime exercise this control at the time they initiate the sequence of events that will result in the prohibited state of affairs obtaining. If we want to say they lack such control once they have been rendered incapable of voluntary action, then we are back to treating them as bullets in flight. And I also wonder how we can say, on any plausible theory of control, that D lacks control with respect to a given state of affairs when, by hypothesis, he has brought it about because he wanted to bring it about (or brought it about knowingly in the course of doing something else that he wanted to do).

Cases like those of Decina and [? person who knew he suffered from a condition of somnosexualism, in which he would unconsciously have sexual intercourse while sleeping, and who went to sleep at a party in a room where other people were sleeping, without warning them or taking precautions against his condition, and he then had sex with a woman who was passed out] also seem relatively easy. Decina knew he was subject to epileptic seizures that could lead to his loss of control over his bodily motions, he had anti-seizure medication available to him which would eliminate or minimize that risk, and he drove knowing he had not taken the medication and so knowing he was at risk of losing control of the vehicle at a later time. The risk of which he was aware in fact materialized, and he struck and killed four children when he lost control of his car. He was reckless with respect to precisely the danger that in fact resulted in harm, and so can be held responsible for that harm. His agency surely tracks across all the events, in part because his knowledge relates them, in addition to their causal relation. It is because his

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<sup>63</sup> Husak, “Does Criminal Liability Require an Act? 2010, p. 38..

agency extends through the whole sequence that it is proper to think he is not just the but-for case, but also the proximate cause, of the deaths he caused.

Some intoxication cases seem relevantly similar to the Decina facts. If a woman knows that every time she drinks a certain amount of alcohol she becomes short-tempered and even violent toward her children, she is reckless with respect to that danger should she drink that amount and not take precautions to protect her children from her foreseeable violence. Indeed, it does not seem necessary that she know that she always gets violent when she becomes intoxicated, or even that she occasionally does; a single past instance seems sufficient to put her on notice that becoming intoxicated is risky conduct for her, and she has a duty to take suitable precautions.

But the situation seems very different if the risk that in fact materializes in harm is of an entirely different kind than that for which she can be considered reckless based on past experience. The mother can anticipate becoming violent if she allows herself to become intoxicated, but she should not be expected to anticipate that her house will be broken into while she is intoxicated and she will be successfully coerced by the home invader into helping to rob her neighbor. Perhaps other cases lie somewhere in between: perhaps everyone who becomes intoxicated should anticipate that he might fall asleep at an inopportune time, and so should anticipate that he might fall asleep while smoking, thus risking causing a fire. Even then, we might want to insist that he be held responsible for the fire only if he foresaw the risk of becoming intoxicated from his conduct (something not actually demanded under most current laws).

## 7. Conclusion

I am surprised by where I have arrived. I originally thought that no justification could be given for finding defendants responsible for acts they committed involuntarily because of intoxication reaching to extremity or automatism. Canadian laws says that even if defendants ‘lacked ... the voluntariness required to commit the offence’ ‘while in a state of self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person’ then they have

demonstrated a marked departure from the level of care required in our society and are guilty of any crime that ‘includes as an element an assault or any other interference or threat of interference ... with the bodily integrity of another person’. (s. 33.1(1)-(3) of the Canadian Criminal Code, specific provision enacted in 1995 in response to the Daviault decision allowing the defense of automatism to extremely intoxicated offenders acting involuntarily.)

I thought this provision could never be justified. In light of the exploration of the *actio libera* doctrine, however, I must restrict that judgment. While I think it will still be unjustly applied in the vast majority of cases, because Canadian law allows a finding of *self-induced* intoxication for conduct that is at most negligent with respect to the resulting intoxication, it could lead to the right result in cases involving defendants who contrived their loss of voluntariness for the purpose of committing the resulting crime, or for those who foresee the risk of criminality that results.

#### Incidentals I Can't Go Into Here

Typically in general intent crimes, we infer the basic *mens rea* from the *actus reus*. Consciousness is needed to establish the minimal intent to do the deed from the *actus reus* directly. Generally we can infer minimal *mens rea* from the *actus reus*, but that inference cannot be drawn if the voluntariness of the act is called into question. My view allows that a person can commit the *actus reus* of a crime even in a state of unconsciousness. It would seem that if we allow me this move, then I face the difficulty that we will be unable to prove the *mens rea* in all such cases. So even if my approach allows us to say that the person in a state of unconsciousness and involuntariness can still ‘act’, she necessarily must be judged to lack any *mens rea* (even basic intent) and so she cannot be found liable after all.

This misunderstands the relationship between consciousness, voluntariness and *mens rea* I think. It is true that we can only infer the basic intent to commit the criminal act *solely* from the *actus reus* if the act is committed not just voluntarily but consciously. The person must be minimally aware that he is doing O if we are to infer just from his doing O that he intends to do O. But here conscious and voluntary action is just an

evidentiary basis for inferring *mens rea* (minimal basic intent). In contrivance and anticipation cases, we have independent grounds for knowing that D intended or anticipated O, and so we have no need of the usual basis for establishing *mens rea*. We have *mens rea* directly in such cases (at least by hypothesis, though there may be daunting issues of proof in the absence of conscious and voluntary action). So we are not, after all, forced to conclude from lack of voluntariness or consciousness that *mens rea* cannot be established. And, moreover, it is culpability with respect to O specifically that is needed (not just with respect to the earlier voluntary actions that cause O). D must intend to bring about or do O, or foresee the substantial risk of O, if he is to be liable for it under the *actio libera* doctrine defended here.

There are substantive issues in how culpability of intoxication is established. The test for involuntary intoxication is too stringent.

There is a basic inconsistency between our treatment of involuntary and self-induced intoxication. If self-induced intoxication does not deprive one of the capacities needed for responsibility (whatever they are), it seems hard to say why intoxication that is involuntary should be different. We might be expected to take precautions if we know we might be impaired, and the person who becomes intoxicated involuntarily does not have an opportunity to do that. But that hardly seems enough for the radically different treatment, or for allowing the involuntary intoxication can excuse any crime, regardless of its actual effects on the person.