

**AUTOMATISM,
INSANITY,
AND THE
PSYCHOLOGY
OF
CRIMINAL
RESPONSIBILITY**

**A Philosophical
Inquiry**

ROBERT F. SCHOPP

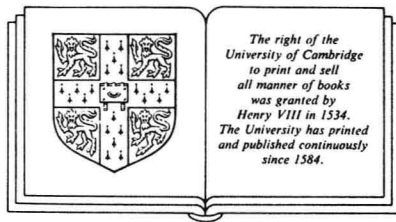
**CAMBRIDGE STUDIES IN
PHILOSOPHY AND LAW**

Automatism, insanity, and the psychology of criminal responsibility

A philosophical inquiry

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CAMBRIDGE UNIVERSITY PRESS

CAMBRIDGE

NEW YORK PORT CHESTER MELBOURNE SYDNEY

Published by the Press Syndicate of the University of Cambridge
The Pitt Building, Trumpington Street, Cambridge CB2 1RP
40 West 20th Street, New York, NY 10011, USA
10 Stamford Road, Oakleigh, Melbourne 3166, Australia

© Cambridge University Press 1991

First published 1991

Printed in Canada

Library of Congress Cataloging-in-Publication Data

Schopp, Robert F.

Automatism, insanity, and the psychology of criminal
responsibility: a philosophical inquiry / Robert F. Schopp.

p. cm.—(Cambridge studies in philosophy and law)

Includes index.

ISBN 0-521-40150-X

1. Insanity—Jurisprudence. 2. Criminal liability—Psychological
aspects. 3. Automatism. I. Title. II Series.

K5077.S36 1991

345'.04 — dc20

[342.54]

90-27604

CIP

British Library Cataloguing in Publication Data

Schopp, Robert F.

Automatism, insanity and the psychology of criminal
responsibility : a philosophical inquiry — (Cambridge
studies in philosophy and law).

1. Crime. Psychology

I. Title

364.3

ISBN 0-521-40150-X hardback

Preface and acknowledgments

In the Anglo-American tradition of criminal law, the state cannot convict and punish people for serious offenses merely because they have performed proscribed conduct. Legal guilt requires both that the defendant engaged in illegal behavior and that certain psychological requirements were fulfilled. Traditionally, these requirements have been very difficult to describe and justify. Consequently, they have been highly controversial, both in theory and in application.

This book clarifies and justifies the psychological components of criminal responsibility. It adopts two methodological premises that differentiate it from many prior investigations of these issues. First, it directs primary attention toward the structure of offenses. Historically, many writers have concentrated on the insanity defense, either as an independent concern or as the central piece of the larger puzzle involving criminal responsibility. The book treats the structure of offense elements as the core of the problem, addressing the insanity defense as an ancillary aspect of the broader system of offense elements and defenses. Second, to the extent that psychopathology undermines attributions of criminal responsibility, the book looks to the available information regarding the nature of the dysfunction involved in that pathology in order to advance the analysis of responsibility.

This book is based on a doctoral dissertation submitted to the Department of Philosophy at The University of Arizona. Several individuals made diverse and valuable contributions

Preface and acknowledgments

to that dissertation. I am particularly indebted to Joel Feinberg, who contributed both to the dissertation itself and to the educational preparation that preceded it through his direction, teaching, writing, and guidance. David Wexler helped me appreciate the complexities of the law, the myriad of interactions that occur both within the law and at its intersection with other fields, and the importance of approaching interdisciplinary studies with careful attention to the potential contributions and limitations of each discipline. Allen Buchanan, Bruce Sales, and Holly Smith each contributed substantially both to this project and to my preparation for it.

I am also grateful to Jules Coleman, who introduced me to the formal study of moral and legal philosophy and reassured me through example that one can do serious work without taking it too seriously. Michael Quattrocchi accompanied me in our first tentative attempts to explore what I now think of as the philosophy of law and clinical psychology, although neither of us realized at the time that this was what we were doing. Perhaps the greatest credit should go to Mary, Bill, and those they represent for providing the impetus sufficient to move even Mike and me. Unfortunately, it seems unlikely that they will recognize their contributions or benefit from them. Ed O'Dowd has participated in a seemingly endless series of prolonged conversations about many topics relevant to this book. Let us hope that it draws primarily on the conversations during which we made some progress. I am also grateful for helpful comments made by two anonymous reviewers from Cambridge University Press and for Ronald Cohen's editorial skills.

Finally, Joel Feinberg's prominent influence on this undertaking requires one kind word for Josiah S. Carberry. Although he contributed nothing to this project, neither did he detract from it. For some, perhaps, this is the kindest word that honesty will allow or history will record.

ROBERT F. SCHOPP
Lincoln, Nebraska

Note to the reader on language

Previous drafts of this book were written in gender-neutral language. Unfortunately, the results were awkward, distracting, and sometimes confusing because the book contains numerous real or hypothetical actors illustrating a variety of concepts and situations. In order to avoid detracting from the substantive argument, I have reverted to the traditional practice of using male pronouns and possessive adjectives when making general statements. Identifiable actors are referred to according to their proper gender. My aim is to present the arguments clearly to readers without offending them.

Contents

Preface and acknowledgments	<i>page ix</i>
1 Introduction	1
1.1 MPC offense elements	4
1.2 Defenses	14
1.3 Conclusions and plan	24
2 Problematic defenses: Insanity	27
2.1 The search for a satisfactory standard	27
2.2 The status of the NGRI defense	51
2.3 Summary	68
3 Problematic defenses: Automatism	71
3.1 The American approach	72
3.2 The British approach	75
3.3 Conclusions	84
4 Actions, reasoning, and offenses	86
4.1 Action theory	86
4.2 An action theory analysis of offenses	94
4.3 Action and practical reason	108
4.4 Summary and conclusions	128
5 Automatism	132
5.1 Introduction and context	132
5.2 Action theory analysis	136
5.3 Applications	150
5.4 Conclusion	158

Contents

6	The insanity defense	160
6.1	Prologue	160
6.2	Introduction and context	164
6.3	Volitional standards	165
6.4	Psychopathology and the NGRI defense	176
6.5	Psychopathology and practical reasoning	188
6.6	Issues regarding classification	201
6.7	Conclusions	213
7	Moral foundations	218
7.1	Context	219
7.2	Free will as psychological capacity	226
7.3	Moral and legal applications	243
7.4	The action theory analysis, free will, and the MPC	251
7.5	Conclusions	260
	Index	263

Chapter 1

Introduction

The Anglo-American law has traditionally defined criminal offenses as requiring both an *actus reus* and a *mens rea*. The state must prove both types of elements in order to secure a conviction. The *actus reus* is usually described as the criminal act or the physical part of the offense, whereas the *mens rea* defines the required state of mind or the mental part. Various offenses have required mental states such as intent, recklessness, negligence, depraved mind, malice aforethought, and many others. Unfortunately, it has proven extremely difficult to establish either the precise meaning of these terms or the relationships among them. Additionally, many offenses are not easily divisible into physical and mental parts.

The American Law Institute's Model Penal Code (MPC) avoids some of the traditional problems by substituting a relatively simplified set of terms and requirements for offense definitions.¹ The MPC eschews the traditional terminology of *actus reus* and *mens rea* in favor of a system of objective offense elements and culpability requirements.² The basic

1 American Law Institute, Model Penal Code, and Commentaries sec. 2.01, 2.02 (official draft and revised comments, 1985).

2 *Id.* at sec. 1.13(9). The MPC includes the absence of excuse or justification in the list of offense elements. Paul Robinson makes the distinction between objective criteria and culpability requirements, and he argues that the absence of justification and excuse should not be included among the offense elements. I will adopt Robinson's approach on these issues throughout this book. See P.H. Robinson, Criminal Law Defenses sec. 11(a) (St. Paul, MN: West Pub. Co., 1984).

PSYCHOLOGY OF CRIMINAL RESPONSIBILITY

principles of the MPC are widely accepted as representative of dominant trends in mainstream American law. Many states have incorporated these principles into their criminal codes since the MPC was officially recommended by the American Law Institute in 1962.³

In order to secure a conviction in a criminal trial under the MPC, the prosecution must prove all elements in the definition of the offense.⁴ The objective elements include the conduct required for the offense as well as the circumstances and results of that conduct.⁵ That conduct must include a voluntary act as that phrase is defined in the MPC.⁶ With the exception of a few strict liability offenses, the MPC includes a culpability requirement for each material element of the offense. The state satisfies its burden to prove this culpability requirement only if it establishes that the defendant acted purposely, knowingly, recklessly, or negligently regarding each material element of the offense.⁷

When the state satisfies the burden of proving all offense elements including both the voluntary act and culpability requirements, the defendant may avoid liability by establishing a general defense. Some general defenses are based on extrinsic policy considerations, whereas others demonstrate that the defendant was not morally responsible for his actions and hence not appropriately subject to criminal liability.⁸

3 Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 Colum. L. Rev. 1897, 1897n2 (1984); W. LaFare and A.W. Scott, Jr., *Substantive Criminal Law* sec. 1.1(b) (St. Paul, MN: West Pub. Co., 1986). I will treat the MPC as representative of American law throughout this book. General terms such as "law" or "legal" will refer to the MPC and to criminal codes patterned after the MPC unless otherwise specified.

4 MPC, *supra* note 1, at sec. 1.12(1).

5 *Id.* at sec. 1.13(9); Robinson, *supra* note 2, at sec. 11(a).

6 *Id.* at sec. 2.01.

7 *Id.* at sec. 2.02. According to section 1.13(10) of the MPC, material elements of an offense are those elements that do not relate exclusively to the statute of limitations, jurisdiction, venue, or other matters unconnected to the harm or evil of the offense or the existence of a justification. This book will address only material offense elements.

8 Robinson, *supra* note 2, at sec. 21, 25 (1984). See *infra*, chapter 1.2 for further discussion of defenses.

Introduction

The psychological states and processes of the defendant are relevant to the voluntary act and culpability requirements, as well as to certain general defenses. Although these provisions directly address the psychological states and processes of the defendant, the exact nature of these offense requirements and defenses, the relationships among them, and the significance of various forms of psychopathology for them remain unclear. Certain defenses, such as the insanity defense and automatism, are relevant to criminal liability, yet the theoretical foundation of these defenses in the conceptual structure of offense elements and general defenses remains controversial. For example, automatism has been accepted as a defense in the United States and Britain, but it has been interpreted in various cases as relevant to the voluntary act provision, the culpability requirement, or the insanity defense.⁹ One commentator has rejected all three of these options, recommending a separate general defense of "impaired consciousness."¹⁰

The history of the insanity defense reveals a similar picture of theoretical uncertainty. Although the defense is long established, the courts and legislatures continue the search for a satisfactory standard of exculpation.¹¹ Theorists also continue to debate the status of the insanity defense in the broader system of criminal liability. Some interpret it as a special defense, based on considerations uniquely appropriate to the mentally ill, whereas others argue that it is merely a special application of the common excusing conditions such as ignorance or coercion.¹²

9 LaFave and Scott, *supra* note 3, at sec. 4.9. See *infra*, chapter 3.

10 Robinson, *supra* note 2, at sec. 172.

11 S.J. Brakel, J. Parry, and B.A. Weiner, *The Mentally Disabled and the Law* 707–19 (Chicago, American Bar Foundation, 3d ed. 1985); Callahan, Mayer, and Steadman, *Insanity Defense Reforms in the United States – Post-Hinckley*, 11 *Mental and Physical Disabilities L. Rep.* 54 (1987); LaFave and Scott, *supra* note 3, at sec. 4.2, 4.3. See *infra*, chapter 2.1.

12 For examples of writers who have taken former position see: H. Fingarette, *The Meaning of Criminal Insanity* (Berkeley: Univ. of Calif. Press, 1972); M. Moore, *Law and Psychiatry* 217–45 (1984); Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 *S. Cal. L. Rev.*

PSYCHOLOGY OF CRIMINAL RESPONSIBILITY

This book will examine the offense elements and general defenses that directly address the psychological states and processes of the defendant. It will advance a conceptual framework for the structure of these offense elements, and it will contend that this framework clarifies the nature of these requirements, the appropriate interpretation of certain general defenses, and the relationships among these provisions. This framework supports the contention that these provisions can be understood in a manner that is internally consistent and morally defensible. As an initial step in this process, the remainder of this chapter will examine the MPC's system of offense elements and describe a framework for categorizing defenses that involve the psychological processes of the defendant.

1.1 MPC OFFENSE ELEMENTS

The conduct that renders an actor liable for a criminal offense must include either a voluntary act, or a voluntary omission of an act that the defendant has a legal duty to perform and is physically capable of performing.¹³ The MPC defines an act as a bodily movement without regard for the circumstances, consequences, or internal processes related to that movement.¹⁴

The MPC follows in the tradition of Aristotle in that it initially defines voluntariness by exclusion.¹⁵ According to the MPC, bodily movements that occur as a result of reflex or convulsion, or during sleep, unconsciousness, or hypnosis are not voluntary. Generally, acts are not voluntary unless they are the product of the effort or determination of the

777 (1985). The latter position has been defended by Goldstein and Katz, *Abolish the Insanity Defense – Why Not?*, 72 Yale L. J. 853 (1963) and, initially, by J. Feinberg, *Doing and Deserving* 272–92 (Princeton: Princeton Univ. Press, 1970).

13 MPC, *supra* note 1, at 2.01.

14 *Id.* at sec. 1.13(2); LaFave and Scott, *supra* note 3, at sec. 3.2(a).

15 Aristotle, *Nicomachean Ethics* 53–59, 1109b L.30–1111b L.4 (T. Irwin trans., Indianapolis: Hackett Pub. Co., 1985).

Introduction

actor.¹⁶ Commentators have described the voluntariness requirement as one that excludes acts that are not the product of the actor's will or conscious volition.¹⁷ This conception of voluntariness reflects the traditional notion of voluntary conduct as an "external manifestation of the actor's will." It is intended to differentiate movement due to reflex or convulsion from conduct that is within the actor's control in the sense that ordinary human conduct is under control. The voluntary act provision requires an inquiry into the mental states of the actor, and constitutes a preliminary requirement of culpability.¹⁸

The phrase "ordinary human conduct" bears closer examination. As used in the comments to the MPC, such conduct is contrasted with reflexes or convulsion. If the term "ordinary" is interpreted broadly, seizures, reflexes, or convulsions are ordinary human movements. Eye blinks and heart beats, for example, are perfectly ordinary bodily movements in the statistical sense of "ordinary." Yet the MPC conception of a voluntary act apparently should not be interpreted to include either eye blinks or heart beats as they occur under usual conditions. In order to be useful and consistent with the examples given in the MPC, "ordinary human conduct" must be understood as activity that is subject to direction by the actor's effort, determination, or will in the manner that conscious, intentional movement is related to these faculties in the unimpaired person.

On this interpretation, the term "ordinary" is in some manner a normative one and not merely statistical. An act that is voluntary in the sense that ordinary human activity is voluntary must be the kind of action that we would usually consider as appropriate grounds for evaluating the blameworthiness or praiseworthiness of the actor. This cannot be the criterion

16 MPC, *supra* note 1, at sec. 2.01.

17 H.L.A. Hart, *Punishment and Responsibility* 105 (1968); H. Packer, *The Limits of the Criminal Sanction* 76 (Stanford: Stanford Univ. Press, 1968).

18 MPC, *supra* note 1, at sec. 2.01 and comments at 215–21. This interpretation will be examined more closely in chapter 4.

PSYCHOLOGY OF CRIMINAL RESPONSIBILITY

of voluntariness, however, because voluntariness serves as one necessary condition for culpability. If acts were categorized as voluntary on the basis of their being of the type for which the actor is appropriately held liable, then voluntariness would be rendered vacuous as a necessary condition for liability. That is, the voluntary act requirement would reduce to the claim that an actor can be held liable only if his conduct includes an act of the type for which he can be held liable. In order to avoid rendering the voluntary act requirement trivial, one needs a conception of voluntariness that takes the form of a descriptive account of the appropriate relationship between bodily movements and mental processes and that does not appeal to considerations of culpability. This issue will be addressed again in Chapters 4 and 5.

It is important to recognize that this voluntary act requirement applies a rather narrow conception of voluntariness. Joel Feinberg has advanced a much more comprehensive account of voluntariness as a relationship among an individual's rational capacities, his action, and his environment. According to this conception of voluntariness, an act is fully voluntary when it is a product of the actor's rational capacities without undue ignorance or impairment on the part of the actor or excessive pressure from the environment. Voluntariness, on this account, is a matter of degree, and it is important to determine whether a particular act was voluntary enough for specific purposes.¹⁹

The conception of voluntariness contained in the MPC's voluntary act requirement, in contrast to Feinberg's account, is a threshold concept. The conduct that constitutes the offense must include a voluntary act. If it does, the requirement is met, and if it does not, there is no offense (putting omissions aside). Voluntariness, on Feinberg's comprehensive account, is reduced by undue ignorance, impairment, or pressure because it describes a relationship among the actor's act, his psychological processes and his environment.²⁰

19 J. Feinberg, *Harm to Self* 117–24 (New York: Oxford Univ. Press, 1986).

20 *See generally, id.* at 143–374.

Introduction

The limited MPC conception of a voluntary act addresses a much more narrow relationship between the actor's physical movements and a rather vaguely defined subset of his psychological processes. Although it is not clear exactly what this relationship involves, many factors that would impair voluntariness on Feinberg's account are not relevant to the MPC's voluntary act requirement. For example, an individual who acted in response to a threat from another person or on the basis of an important mistake of fact would not have acted in a fully voluntary manner on Feinberg's interpretation, although he would clearly satisfy the MPC's voluntary act requirement. Chapter 4 will include an account of the relationship between bodily movement and the actor's psychological processes that is required by the MPC's voluntary act provision. Throughout this book, the term "voluntary" will be used in the narrow sense in which it is employed by the MPC unless the more comprehensive use is specified.

A voluntary act is necessary but not sufficient for criminal liability. In addition, the actor must meet the culpability requirement by acting with the specified psychological attitude (purposely, knowingly, recklessly or negligently) regarding each material offense element.²¹ Although the culpability requirement is expressed in terms of specified psychological states and labeled "culpability," both the culpability and voluntary act requirements involve examination of the psychological processes of the actor and evaluation of the relationship between those processes and other offense elements. In addition, both requirements are relevant to the blameworthiness of the actor. Yet, these two provisions do not merely restate the same requirements, as the following example illustrates.

A person commits murder if he purposely or knowingly causes the death of another human being.²² By virtue of the voluntary act requirement, the conduct that caused the death must include a voluntary act. If A were driving a car in the

21 MPC, *supra* note 1, at sec. 2.02.

22 *Id.* at sec. 210.1, 210.2.

PSYCHOLOGY OF CRIMINAL RESPONSIBILITY

ordinary sense of "driving" when he hit and killed B, this requirement would be met, but if A were unconscious behind the wheel due to an unanticipated convulsion, there would be no voluntary act. The culpability requirement would be met if A hit and killed B purposely (for the conscious object of killing B) or knowingly (aware that it is practically certain that B's death will result whether A wants B's death to occur or not).

Although the MPC requires both a voluntary act and the appropriate level of culpability in order to establish criminal liability for an offense, the relationship between the two requirements is not clear. One can argue with some confidence that voluntariness does not entail culpability. A may be driving carefully and competently when B darts out from between two cars in such a way that A is not even aware of B until A hits B. In such a case, A would have engaged in voluntary conduct (driving) that caused the death of B, but the conduct would not constitute homicide because A did not act with any culpable mental state toward B's death. That is, A drove voluntarily, but A did not kill purposely, knowingly, recklessly, or negligently. Thus, A did not kill voluntarily in Feinberg's more comprehensive sense in which voluntariness is defeated by ignorance or mistake. In the terms employed by the MPC, however, A's killing B met the voluntary act requirement, but it did not satisfy the culpability provision.

The converse relationship is more troublesome. H.L.A. Hart suggests that satisfaction of the culpability requirement entails voluntariness. Hart argues that only severe psychopathology can render an act involuntary, and such pathology will prevent culpability. Hence, any condition that negates the voluntariness requirement will also negate the culpability condition.²³

Hart's claim may be accurate when one uses "voluntary"

23 Hart, *supra* note 17, at 107. I use the term "suggests" here because Hart speaks of most cases, not all. The context indicates, however, that he intends his claim to apply to all cases except strict liability ones.

in the broad sense in which Feinberg uses the term, but it does not hold for the narrow MPC sense of “voluntary.” If Hart’s claim were accurate, then voluntariness would be a necessary condition for fulfilling the culpability requirement, and therefore, fulfilling the culpability requirement would be a sufficient condition for voluntariness. On this account, inquiry into the voluntariness condition is superfluous in all but strict liability cases. The court can simply address the culpability element. If it is satisfied – and satisfaction of culpability entails voluntariness – then the voluntariness requirement must be met. If the culpability element is not present, then the defendant is not guilty regardless of voluntariness.

This analysis is problematic, however, in that voluntariness and culpability are presented in the MPC as separate requirements that must each be proven by the state. Furthermore, defenses that defeat an ascription of voluntariness are sometimes allowed by the courts in cases in which the defendants have acted in an organized, and apparently goal-directed, manner that would usually indicate that they acted purposefully. In one case, for example, the defendant called the victim to the window, hit him with a mallet, and threw him from a window.²⁴ The defendant apparently performed this series of actions for the purpose of injuring the victim, yet the defendant was acquitted on the grounds that he had not acted consciously. In cases such as these, the defendant satisfies the most stringent culpability requirement without meeting the voluntary act criterion. It seems, therefore, that as applied by the courts, culpability cannot entail voluntariness.

24 Regina v. Charlson, [1955] 1 All E.R. 859; see also People v. Newton, 8 Cal. App. 3d 359, 87 Cal. Rptr. 394 (1970); Fain v. Commonwealth, 78 Ky. 183 (1879). The English courts retain the older terminology regarding *actus reus*; hence, the Charlson court does not directly address the voluntary act requirement. The relationship between the voluntary act and culpability requirements is discussed more fully in chapter 4.2. Chapters 5.1 and 5.2 will address Hart’s entailment thesis more completely and present an alternate account of the automatism defense.