

A RUDE AWAKENING: WHAT TO DO WITH THE SLEEPWALKING DEFENSE?

Abstract: Some sleepwalkers commit acts of violence, or even murder, in their sleep. Courts must decide what to do with criminal defendants who raise a defense of sleepwalking. A brief review of common law reveals that courts apply the defense inconsistently under various doctrines of justification and excuse. Sleepwalking is a unique medical phenomenon, and courts are poorly equipped to evaluate claims of sleepwalking under existing common law defenses. This Note proposes a single sleepwalking defense based on a balancing test that integrates the medical understanding of sleepwalking.

INTRODUCTION

Scott Falater admits that in January 1997 he stabbed his wife forty-four times and drowned her in the swimming pool at their Arizona home.¹ Police struggled to find a motive for the crime.² Falater claims to have no recollection of the murder and believes he is not culpable for the crime because he was asleep when he killed his wife.³ At Falater's trial, an expert in sleep disorders testified that Falater's defense that he was sleepwalking during the killing was possible.⁴

Sleepwalking, also known as somnambulism, is a sleep disorder in which sleepers rise from their beds and perform various tasks while still asleep.⁵ Occasionally, sleepwalkers commit crimes.⁶ Scott Falater is

¹ See *State v. Falater*, No. CR1997-000928-A (Ariz. Super. Ct. Maricopa County), *appeal docketed*, No. CR1997-000928-A (Ariz. Ct. App. Jul. 26, 2004), <http://www.cofad1.state.az.us/casefiles/cr/CR040398.pdf> (providing case docket information for unreported opinion on appeal); Greg LaMotte, *Arizona Man Says He Was Sleepwalking When He Killed Wife*, at <http://www.cnn.com/US/9805/08/sleepwalk.defense/> (May 8, 1998).

² *LaMotte*, *supra* note 1.

³ *Id.*

⁴ *Id.*

⁵ Peter Fenwick, *Somnambulism and the Law: A Review*, 5 BEHAV. SCI. & L. 343, 344 (1987).

⁶ See *id.*; Christopher Howard & P.T. D'Orbán, *Violence in Sleep: Medico-Legal Issues and Two Case Reports*, 17 PSYCHOL. MED. 915, 916 (1987). A thirty-one-year-old fireman awoke to find himself battering his wife with a shovel. Howard & D'Orbán, *supra*, at 916. Upon realizing what he had done, he fainted in shock. *Id.* He later regained consciousness, found his wife dead, and attempted suicide. *Id.* The crime appeared entirely motiveless; he had no recollection of the assault and enjoyed an amicable relationship with his wife. *Id.*

More recently, in Canada, Kenneth Parks drove to the home of his parents-in-law while sleepwalking, attacked his father-in-law and killed his mother-in-law. R. Broughton et al.,

not the first criminal defendant to raise sleepwalking in defense of his actions.⁷ The defense of sleepwalking is rarely asserted, and there exists little case law on the subject, leaving courts and criminal defendants little or no precedent as guidance for applying the defense.⁸

There has been inconsistency among courts faced with sleepwalking defenses; there are currently three different sleepwalking defenses and no objective criteria for evaluating a defendant's claim of sleepwalking.⁹ Criminal defendants raising the defense of sleepwalking face the possibility of arbitrary and unprecedented judicial decisions due to a lack of statutory, common-law, and scholarly precedent on the sleepwalking defense.¹⁰

The problems of prosecuting, defending, and convicting defendants who commit crimes while sleepwalking strike at the heart of criminal law jurisprudence.¹¹ Criminal defendants facing prosecution have their freedom and liberty at stake.¹² Criminal justice and constitutional protections strive to promote consistency in the prosecution of criminal defendants to ensure that criminal defendants are not deprived of their liberty through arbitrary or unprecedented decisions.¹³

Courts and legal scholars have focused on the philosophical nuances of sleepwalking defenses and have neglected to answer more practical questions, such as how to raise the sleepwalking defense at trial, who should bear the burden of proving sleepwalking, and what criteria should be considered in determining a sleepwalker's criminal

Homicidal Somnambulism: A Case Report, SLEEP, Apr. 1994, at 255. From all accounts, Parks was very close with the victims, and seemed to lack motive for the attack. See *id.* at 256, 261. The defense presented substantial evidence indicating that Parks was sleepwalking during the attack, and consequently, the jury acquitted Parks of murder. See *id.* at 256-63.

⁷ See, e.g., *Lewis v. State*, 27 S.E.2d 659, 665 (Ga. 1943); *Tibbs v. Commonwealth*, 128 S.W. 871, 874 (Ky. 1910); *Fain v. Commonwealth*, 78 Ky. 183, 185 (1879); *State v. Connell*, 493 S.E.2d 292, 294-96 (N.C. Ct. App. 1997).

⁸ Emily Grant, Note, *While You Were Sleeping or Addicted: A Suggested Expansion of the Automatism Doctrine to Include an Addiction Defense*, 2000 U. ILL. L. REV. 997, 1009; see P.B.C. Fenwick, *Brain, Mind, Insanity, and the Law: Sleepwalkers Aren't Insane*, 302 BRIT. MED. J. 979, 979 (1991).

⁹ See Michael Corrado, *Is There an Act Requirement in the Criminal Law?*, 142 U. PA. L. REV. 1529, 1554 (1994); Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 MINN. L. REV. 269, 284-85 (2002). Compare *People v. Seden*, 518 P.2d 913, 922 (Cal. 1974) (classifying sleepwalking as an unconsciousness defense), with *McClain v. Indiana*, 678 N.E.2d 104, 106-07 (Ind. 1997) (classifying sleepwalking as an automatism defense), with *Tibbs*, 128 S.W. at 874 (classifying sleepwalking as an insanity defense).

¹⁰ See Corrado, *supra* note 9, at 1554; Denno, *supra* note 9, at 284-85.

¹¹ See Denno, *supra* note 9, at 284-85.

¹² See *id.*

¹³ See Corrado, *supra* note 9, at 1554; Denno, *supra* note 9, at 284-85.

culpability.¹⁴ This Note argues that the courts should apply a consistent balancing test in evaluating a defense of sleepwalking.¹⁵ Courts should require the defendant to raise sleepwalking as an affirmative defense, evaluated by comparing the facts of the case to a list of medical criteria indicative of sleepwalking behavior.¹⁶

This Note analyzes sleepwalking defenses in the context of medical research on sleepwalking and advocates a defense suited to the available medical information.¹⁷ Part I begins with a summary of psychological and medical research on sleepwalking.¹⁸ It then considers four theories of a sleepwalker's mental capacity to commit crimes, questioning the degree of control exhibited by sleepwalkers and their ability to make rational choices.¹⁹ Part II discusses the incorporation of sleepwalking defenses into the common-law legal doctrines of automatism, unconsciousness, and insanity.²⁰ Part III first considers placing the burden of proving the sleepwalking defense on the defendant as an affirmative defense.²¹ It then considers placing the burden of proof on the prosecution, who must establish that the defendant was not sleepwalking at the time of the alleged crime.²² Part IV criticizes existing sleepwalking defenses for their failure to compensate for the medical differences between sleepwalking conduct and insane, automatist, or unconscious criminal behavior.²³ It argues that a defendant should bear the burden of raising a sleepwalking defense.²⁴ Part IV proposes a new sleepwalking defense, a multi-factored balancing test of objective criteria specifically tailored to the unique medical and psychological characteristics of sleepwalking.²⁵

¹⁴ See *infra* note 64 and accompanying text.

¹⁵ See *infra* notes 256–319 and accompanying text.

¹⁶ See *infra* notes 262–319 and accompanying text.

¹⁷ See *infra* notes 26–59, 265–319 and accompanying text.

¹⁸ See *infra* notes 26–59 and accompanying text.

¹⁹ See *infra* notes 60–101 and accompanying text.

²⁰ See *infra* notes 102–169 and accompanying text.

²¹ See *infra* notes 172–188 and accompanying text.

²² See *infra* notes 190–205 and accompanying text.

²³ See *infra* notes 207–255 and accompanying text.

²⁴ See *infra* notes 313–319 and accompanying text.

²⁵ See *infra* notes 256–319 and accompanying text.

I. MEDICAL AND PHILOSOPHICAL PERSPECTIVES ON SLEEPWALKING

A. *Sleepwalking: A Medical and Psychological Perspective*

Before assessing the legal status of sleepwalking defendants, it is necessary to develop a basic understanding of what sleepwalking is and how it affects the sleepwalker's mind and body.²⁶ Advances in medical research on sleepwalking are beginning to expose the strengths and weaknesses of current legal theories on the sleepwalking defense.²⁷ The medical description of sleepwalking helps to resolve the question of whether sleepwalking is a voluntary act for the purposes of assigning criminal liability to defendants raising the defense of sleepwalking.²⁸

Recent medical and psychological research has changed the way doctors diagnose and treat sleepwalking episodes.²⁹ Until the 1960s, sleepwalking was thought to be a mental disorder related to dreaming.³⁰ Recent studies have revealed that sleepwalking does not occur in the dreaming phases of sleep, and therefore, sleepwalkers do not act out dreams in their sleep as previously believed.³¹ Sleepwalking episodes typically occur within two or three hours after the sleepwalker falls asleep and generally last less than fifteen minutes.³²

²⁶ See Fenwick, *supra* note 5, at 346-47; Ian Oswald & John Evans, *On Serious Violence During Sleepwalking*, 147 BRIT. J. PSYCHIATRY 688, 690 (1985). In a personal narrative, one doctor described his struggle with sleepwalking as follows:

I do think I know what these night wanderings are all about in my own life: they are attempts to do what can't be done in the light—to say things left unsaid that still need to be said, to try somehow to touch, to recon with, the ghost in every darkness.

John Stone, *Night Wanderings*, N.Y. TIMES, Jan. 19, 1992, § 6 (Magazine), at 14.

²⁷ See *infra* notes 29-59 and accompanying text.

²⁸ See *infra* notes 29-59 and accompanying text.

²⁹ See Fenwick, *supra* note 5, at 343; Carlos H. Schenck et al., *A Polysomnographic and Clinical Report on Sleep-Related Injury in 100 Adult Patients*, 146 AM. J. PSYCHIATRY 1166, 1170-71 (1989).

³⁰ PRINCIPLES AND PRACTICE OF SLEEP MEDICINE 700 (Meir H. Kryger et al. eds., 3d ed. 2003); Prakash Masand et al., *Sleepwalking*, 51 AM. FAM. PHYSICIAN 649, 649 (1995).

³¹ PRINCIPLES AND PRACTICE OF SLEEP MEDICINE, *supra* note 30, at 700; see Fenwick, *supra* note 5, at 344-45; Masand et al., *supra* note 30, at 649; William H. Reid et al., *Treatment of Sleepwalking: A Controlled Study*, 35 AM. J. PSYCHOTHERAPY 27, 28 (1981); Grant, *supra* note 8, at 1007.

³² PRINCIPLES AND PRACTICE OF SLEEP MEDICINE, *supra* note 30, at 701; K. Abe & M. Shimakawa, *Predisposition to Sleepwalking*, 152 PSYCHIATRIC NEUROLOGY 306, 306 (1966); Peter Fenwick, *Murdering While Asleep*, 293 BRIT. MED. J. 574, 574 (1986); Ernest Hartmann, *Night Terrors-Sleep Walking: Personality Characteristics*, 11 SLEEP RES. 121, 121 (1982); Anthony Kales et al., *Somnambulism: Clinical Characteristics and Personality Patterns*, 37 AR-

Sleepwalking in children is almost exclusively a physiological disorder (a physical defect of the body), and not a psychological disorder (a mental defect).³³ In adults, however, there may be a correlation between sleepwalking and psychological disorders, but this correlation has not been confirmed in some studies.³⁴ The balance of the available research suggests that the correlation between psychopathology and sleepwalking is tenuous, at best, and psychopathology is certainly not a prerequisite for sleepwalking.³⁵ Episodes of sleepwalking are often brought on by stress and triggered by personal crises.³⁶ Sleepwalking is more common among children than adults.³⁷ Children who sleepwalk generally stop sleepwalking in their teens, and sleepwalking becomes extremely rare beyond sixty years of age.³⁸ In old age, sleepwalking may be a manifestation of other disorders such as delirium, drug toxicity, or seizure disorder.³⁹

CHIVES GEN. PSYCHIATRY 1406, 1407 (1986); Grant, *supra* note 8, at 1007; see Fenwick, *supra* note 5, at 346; Mark W. Mahowald et al., *Sleep Violence—Forensic Science Implications: Polygraphic and Video Documentation*, 35 J. FORENSIC SCI. 413, 426 (1990). But see Kavey et al., *Somnambulism in Adults*, 40 NEUROLOGY 749, 750 (1990) (observing frequent sleepwalking episodes more than two-and-a-half hours into sleep).

³³ PRINCIPLES AND PRACTICE OF SLEEP MEDICINE, *supra* note 30, at 701; Howard & D'Orbán, *supra* note 6, at 921; Kales et al., *supra* note 32, at 1410; see J.V. Gilmore Jr., *Murdering While Asleep: Clinical and Forensic Issues*, 4 FORENSIC REP. 455, 457 (1991); Oswald & Evans, *supra* note 26, at 690.

³⁴ PRINCIPLES AND PRACTICE OF SLEEP MEDICINE, *supra* note 30, at 701; Kavey et al., *supra* note 32, at 749. Adult sleepwalking appears to be a different medical phenomenon from childhood sleepwalking. See Kavey et al., *supra* note 32, at 749. Compare Kales et al., *supra* note 32, at 1408, 1410 (finding 72% of adult sleepwalkers in the study were diagnosed with psychiatric disorders, including impulsivity, antisocial behavior, and hypomania; no patient was overtly psychotic), with D. Hartman et al., *Is There a Dissociative Process in Sleepwalking and Night Terrors?*, 77 POSTGRADUATE MED. J. 244, 246 (2001) (finding significant psychologically traumatic experiences in 27% of sleepwalking or night terror sufferers, most of whom were adults), and Howard & D'Orbán, *supra* note 6, at 922 (suggesting that sleep violence is a physiological phenomenon unrelated to psychological conditions.)

³⁵ See Howard & D'Orbán, *supra* note 6, at 922, 924; Schenck, *supra* note 29, at 1171.

³⁶ Reid et al., *supra* note 31, at 28; see Mahowald et al., *supra* note 32, at 420; Masand et al., *supra* note 30, at 650.

³⁷ PRINCIPLES AND PRACTICE OF SLEEP MEDICINE, *supra* note 30, at 701; Kales et al., *supra* note 32, at 1406; Reid et al., *supra* note 31, at 28; see Gilmore, *supra* note 33, at 455; Schenck, *supra* note 29, at 1170.

³⁸ PRINCIPLES AND PRACTICE OF SLEEP MEDICINE, *supra* note 30, at 701; Abe & Shimakawa, *supra* note 32, at 308; Kales et al., *supra* note 32, at 1408; Ismet Karacan, *Parasomnias, in SLEEP DISORDERS: DIAGNOSIS AND TREATMENT* 131, 132 (Robert L. Williams et al. eds., 2d ed. 1988).

³⁹ Masand et al., *supra* note 30, at 649.

Sleepwalkers appear dazed, with a blank, staring expression, and seldom respond to communication or actions of others.⁴⁰ Sleepwalking behavior generally is limited to sitting up in bed, occasional rising and walking around, and rare instances of leaving the house.⁴¹ Sleepwalking movements are usually clumsy, but researchers disagree about the potential extent of the sleepwalker's dexterity and motor skills.⁴² Sleepwalking violence is often instigated by a bystander who attempts to wake the sleepwalker.⁴³ Complex behavior while sleepwalking is rare.⁴⁴ Incidents of self-inflicted injuries and violence toward others during episodes of sleepwalking are not uncommon.⁴⁵ Instances of violent sleepwalking do not generally occur in isolation; they are usually accompanied by prior violent sleepwalking acts.⁴⁶ Researchers also disagree about the clinical classification of sleepwalking as automatism, which is a non-reflex act without conscious volition.⁴⁷

Sleepwalkers seldom remember what happened during an episode.⁴⁸ They act confused and disoriented after being woken from

⁴⁰ Anthony Kales et al., *Hereditary Factors in Sleepwalking and Night Terrors*, 137 *BRIT. J. PSYCHIATRY* 111, 111 (1980); Karacan, *supra* note 38, at 132; Masand et al., *supra* note 30, at 649; see E.P. Sloan & E.M. Shapiro, *An Overview of Sleep Physiology and Sleep Disorders*, in *FORENSIC ASPECTS OF SLEEP* 7, 21 (Colin Shapiro & Alexander McCall Smith eds., 1997).

⁴¹ See Fenwick, *supra* note 5, at 346; Masand et al., *supra* note 30, at 649; Sloan & Shapiro, *supra* note 40, at 21.

⁴² *PRINCIPLES AND PRACTICE OF SLEEP MEDICINE*, *supra* note 30, at 701; Alexander Bonkalo, *Impulsive Acts and Confusional States During Incomplete Arousal from Sleep: Criminological and Forensic Implications*, 28 *PSYCHIATRIC Q.* 400, 407 (1974); Fenwick, *supra* note 5, at 346 ("The subject can carry out purposeful acts, many of which are highly complex. . . . Sleepwalkers have walked out onto fire escapes, fired guns, driven cars, sometimes with the result of serious self-injury, or of injury to others."); Kales et al., *supra* note 32, at 1406; Karacan, *supra* note 38, at 132; Kavey et al., *supra* note 32, at 749; Masand et al., *supra* note 30, at 650, 652 (suggesting that complicated goal-oriented activities during supposed sleepwalking cast doubt on the patient's claim of sleepwalking); L.B. Raschka, *Sleep and Violence*, 29 *CAN. J. PSYCHIATRY* 132, 133 (1984).

⁴³ *PRINCIPLES AND PRACTICE OF SLEEP MEDICINE*, *supra* note 30, at 701.

⁴⁴ Kavey et al., *supra* note 32, at 749 (stating that "frenzied behavior or aggression to persons or objects is infrequent"); Masand et al., *supra* note 30, at 650, 652.

⁴⁵ *PRINCIPLES AND PRACTICE OF SLEEP MEDICINE*, *supra* note 30, at 701; Kavey et al., *supra* note 32, at 750; see Fenwick, *supra* note 5, at 346; Schenck et al., *supra* note 29, at 1167, 1171.

⁴⁶ See Mahowald et al., *supra* note 32, at 426.

⁴⁷ Masand et al., *supra* note 30, at 650. One possible reason for the controversy over sleepwalking's classification as automatism is the fear that courts might confuse the legal definition of automatism with the medical definition of automatism. Howard & D'Orbán, *supra* note 6, at 922.

⁴⁸ *PRINCIPLES AND PRACTICE OF SLEEP MEDICINE*, *supra* note 30, at 701-02; Bonkalo, *supra* note 42, at 407; Fenwick, *supra* note 32, at 574; Hartmann, *supra* note 32, at 121; Kales et al., *supra* note 32, at 1406; Karacan, *supra* note 38, at 132; see Masand et al., *supra* note 30, at 650 (suggesting that sleepwalking is not commonly accompanied by a recollection of

their sleep.⁴⁹ Researchers believe this is why sleepwalkers can be dangerous, and their actions often result in violent behavior and injuries to the sleepwalker and others.⁵⁰ Motivated or premeditated violence suggests the patient was not sleepwalking.⁵¹

The exact causes of sleepwalking are unknown, but relevant trigger factors include the following: developmental disorders, stress, medication or drug use, sleep deprivation, and environmental stimuli.⁵² Sleepwalking often runs in the family suggesting that it is partly an inheritable genetic condition.⁵³ Sleepwalking may be confused with other sleep disorders such as sleep drunkenness and night terrors.⁵⁴ Sleep drunkenness is a gradual and incomplete waking where the sleeper's motor skills and consciousness remain impaired.⁵⁵ Night terrors are closely related to sleepwalking, except that night terrors are shorter and more severe, accompanied by panic, screaming, increased heart rate, and sweating.⁵⁶ Recent research suggests

the episode); Oswald & Evans, *supra* note 26, at 688. *But see* Schenck et al., *supra* note 29, at 1171 (stating that some adult sleepwalkers reported substantial recall of nighttime behavior).

⁴⁹ See Masand et al., *supra* note 30, at 650.

⁵⁰ *Id.*

⁵¹ See Fenwick, *supra* note 5, at 354; Mahowald et al., *supra* note 32, at 426.

⁵² PRINCIPLES AND PRACTICE OF SLEEP MEDICINE, *supra* note 30, at 701; Fenwick, *supra* note 5, at 346, 347, 350, 354; Gilmore, *supra* note 33, at 457–58; Howard & D'Orbán, *supra* note 6, at 922; Brett R. Kuhn & Amy J. Elliott, *Efficacy of Behavioral Interventions for Pediatric Sleep Disturbance*, in TREATING SLEEP DISORDERS: PRINCIPLES AND PRACTICE OF BEHAVIORAL SLEEP MEDICINE 415, 429, 430 (Michael L. Perlis & Kenneth L. Lichstein eds., 2003); Masand et al., *supra* note 30, at 650–52.

⁵³ Abe & Shimakawa, *supra* note 32, at 306; Gilmore, *supra* note 33, at 455; Kales et al., *supra* note 40, at 111 (finding that a first-degree relative of a sleepwalker is ten times more likely to sleepwalk than a member of the general population); Kales et al., *supra* note 32, at 1409; Kuhn & Elliott, *supra* note 52, at 429; Masand et al., *supra* note 30, at 650–51; Reid et al., *supra* note 31, at 28. About 80% of sleepwalkers have an immediate family history of sleepwalking or night terrors. PRINCIPLES AND PRACTICE OF SLEEP MEDICINE, *supra* note 30, at 700.

⁵⁴ Kales et al., *supra* note 40, at 111–12; Raschka, *supra* note 42, at 132 (stating that although most sleep-related violence is presumed to occur during sleepwalking, other sleep disorders may lead to sleep violence); see SLEEP RESEARCH AND CLINICAL PRACTICE 38 (Gene Usdin ed., 1973); Karacan, *supra* note 38, at 132; J. Catesby Ware, *Sleep and Anxiety*, in SLEEP DISORDERS: DIAGNOSIS AND TREATMENT, *supra* note 38, at 189, 203. Although the defense of somnambulism theoretically may cover all violence committed during sleep, this Note is concerned only with the legal consequence of sleepwalking and does not address the treatment of other sleep-related violence in the criminal law. A. McCall Smith & C.M. Shapiro, *supra* note 40, at 1, 39.

⁵⁵ Raschka, *supra* note 42, at 132.

⁵⁶ Hartman et al., *supra* note 34, at 244; Howard & D'Orbán, *supra* note 6, at 921; Karacan, *supra* note 38, at 134; Kuhn & Elliot, *supra* note 52, at 429; Ware, *supra* note 54, at 203 (noting that night terrors, unlike sleepwalking episodes, are commonly associated with

that sleepwalking and night terrors may be the same physiological disorder differing only in severity.⁵⁷ Complex goal-oriented behavior, episodes lasting more than fifteen minutes, or episodes reportedly occurring at a time of night when sleepwalking does not generally occur may indicate that the patient is faking an episode of sleepwalking.⁵⁸ Sleepwalking is a rare phenomenon afflicting only 2.5% of the general population.⁵⁹

B. Philosophical Perspective on Sleepwalking: Criminal Culpability

Theories of criminal culpability focus on criminal intent (*mens rea*) and criminal action (*actus reus*), both of which are required for conviction of a defendant.⁶⁰ Generally, for a criminal defendant to be held culpable, the prosecution must prove that the defendant committed the act voluntarily.⁶¹ Therefore, criminal defendants who successfully prove that they were sleepwalking during the alleged crime cannot be convicted unless the prosecution establishes that sleepwalking is a voluntary act.⁶² Based on the available medical research, sleepwalking behavior is neither obviously voluntary, nor obviously involuntary.⁶³

Much of the recent discussion about sleepwalking defenses focuses on the behavior and state of mind of the sleepwalker at the time of criminal misconduct.⁶⁴ The basic premise of sleepwalking defenses

psychiatric disorders such as depression, anxiety, aggression, obsessive-compulsive tendencies, and phobicness).

⁵⁷ Kales et al., *supra* note 40, at 111-12 (citing a common genetic and neurophysiologic connection between sleepwalking and night terrors); Kales et al., *supra* note 32, at 1409; Kuhn & Elliot, *supra* note 52, at 429.

⁵⁸ Masand et al., *supra* note 30, at 652; see PRINCIPLES AND PRACTICE OF SLEEP MEDICINE, *supra* note 30, at 704.

⁵⁹ Fenwick, *supra* note 5, at 346; Kales et al., *supra* note 40, at 111; Kavey et al., *supra* note 32, at 749; Mahowald et al., *supra* note 32, at 420. Only 0.7% of adults sleepwalk according to one study. Kavey et al., *supra* note 32, at 749.

⁶⁰ See *New Jersey v. Overton*, 815 A.2d 517, 522 (N.J. Super. Ct. App. Div. 2003).

⁶¹ See MODEL PENAL CODE § 2.01 (1962); *Overton*, 815 A.2d at 522.

⁶² See Elyn R. Saks, *Multiple Personality Disorder and Criminal Responsibility*, 25 U.C. DAVIS L. REV. 383, 434-35 (1992).

⁶³ A. McCall Smith & C.M. Shapiro, *Sleep Law: A Challenge in Law and Medicine*, in FORENSIC ASPECTS OF SLEEP 1, 2 (Colin Shapiro & Alexander McCall Smith eds., 1997); see Masand et al., *supra* note 30, at 650; Michael S. Moore, *More on Act and Crime*, 142 U. PA. L. REV. 1749, 1812-13, 1815 (1994); Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587, 1641-42 (1994).

⁶⁴ See Adam Candeb, *Consciousness and Culpability*, 54 ALA. L. REV. 113, 119, 121 (2002); Michael Corrado, *Addiction and Causation*, 37 SAN DIEGO L. REV. 913, 919-20 (2000); Mark E. Hindley, *United States v. Denny-Shaffer and Multiple Personality Disorder: "Who Stole the Cookie from the Cookie Jar?"*, 1994 UTAH L. REV. 961, 993-94; Bruce Ledewitz, *Mr. Carroll's Mental State or What Is Meant by Intent*, 39 AM. CRIM. L. REV. 71, 80-81 (2001);

is that sleepwalkers are not aware of their actions, and thus, should not be held culpable for actions beyond their control.⁶⁵ If sleepwalkers are capable of exercising discretion over their actions, the premise of involuntariness is undermined, and the sleepwalking defense fails.⁶⁶ The philosophical debate over sleepwalking volition has identified the following four theories of sleepwalking action: (1) the Model Penal Code approach, (2) the voluntary act theory, (3) the dual-self theory, and (4) the semi-voluntary act theory.⁶⁷

1. Sleepwalking Is Not a Voluntary Act: The Model Penal Code

The Model Penal Code (the "MPC") adopts a voluntary act requirement, which does not specifically define a voluntary act, but uses sleepwalking as an example of what is not voluntary.⁶⁸ Under the MPC, a voluntary act is an essential component of any crime, and therefore, any act that is not voluntary is not a crime.⁶⁹

Under this theory of sleepwalking, actions of sleepwalkers are not voluntary because sleepwalkers lack the ability to entertain and resolve conflicting interests.⁷⁰ Sleepwalkers are not conscious of their actions.⁷¹ Even if sleepwalkers are capable of considering and executing volitional movements, the decision-making process is so impaired that sleepwalkers cannot effectively restrain their behavior.⁷² Thus, sleepwalkers should not be punished for their behavior because they did not have the mental or physical capacity to choose any alternate

Moore, *supra* note 63, at 1809, 1818; Morse, *supra* note 63, at 1646; Paul H. Robinson, *A Functional Analysis of Criminal Law*, 88 NW. L. REV. 857, 898-900 (1994); Bernard Williams, *The Actus Reus of Dr. Caligari*, 142 U. PA. L. REV. 1661, 1664, 1667 (1994).

⁶⁵ Fenwick, *supra* note 32, at 574; see Moore, *supra* note 63, at 1812-13; Saks, *supra* note 62, at 434-35.

⁶⁶ See Candeub, *supra* note 64, at 121; Corrado, *supra* note 9, at 1553-54.

⁶⁷ See *infra* notes 68-101 and accompanying text.

⁶⁸ See MODEL PENAL CODE § 2.01(2) (1962) (listing four examples of actions that are not voluntary, including "a bodily movement during unconsciousness or sleep"); see also Denno, *supra* note 9, at 287-89 (discussing the MPC's failure to define "voluntary" and "unconsciousness"). Due to a lack of case law addressing various theories of sleepwalking volition, the following discussion relies primarily on the MPC and legal scholarship. See MODEL PENAL CODE § 2.01(2); Denno, *supra* note 9, at 287-89.

⁶⁹ See MODEL PENAL CODE § 2.01(2).

⁷⁰ See Moore, *supra* note 63, at 1817.

⁷¹ See *People v. Sedeno*, 518 P.2d 913, 922 (Cal. 1974).

⁷² See Moore, *supra* note 63, at 1817.

course of action.⁷³ They could not have avoided the allegedly criminal behavior.⁷⁴

Furthermore, the theory of sleepwalking as an involuntary act proposes that sleepwalkers are unable to attend consciously to detailed behavior and have no memory of their sleepwalking episodes upon waking.⁷⁵ The full range of desires and intentions that are available to waking persons are not available to the sleepwalker.⁷⁶ Accordingly, the crucial component of volition, the ability to choose between alternate courses of action, the ability to choose between right and wrong, is not available to the sleepwalker.⁷⁷ This is why sleepwalkers do not act voluntarily, and this is why they are incapable of criminal conduct.⁷⁸

2. Sleepwalking Is a Voluntary Act

The MPC's classification of sleepwalking as an involuntary act has been greeted with skepticism.⁷⁹ The skeptics propose that sleepwalking is a voluntary act and criminal acts performed while sleepwalking are within the sleepwalker's control.⁸⁰ Sleepwalkers appear to exhibit a substantial amount of control over their actions, making their behavior seem voluntary and uninhibited.⁸¹ Some sleepwalkers perform complicated tasks in their sleep and often respond to environmental stimuli.⁸² This responsive behavior appears to be goal-oriented, leading some to believe that sleepwalkers are aware of themselves and the surrounding environment, and therefore, their bodily movements are intentional actions.⁸³ Sleepwalkers respond to their perceptions of the waking world, and exhibit behavior that is not just patterned after waking conduct, but interactive with the waking world.⁸⁴

⁷³ Smith & Shapiro, *supra* note 54, at 2; see H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN PHILOSOPHY OF LAW 109, 153 (1968); Moore, *supra* note 63, at 1817.

⁷⁴ See Moore, *supra* note 63, at 1817.

⁷⁵ See *id.* at 1813.

⁷⁶ See *id.* at 1815.

⁷⁷ Smith & Shapiro, *supra* note 54, at 32; see Moore, *supra* note 63, at 1817.

⁷⁸ See Moore, *supra* note 63, at 1817.

⁷⁹ See *id.* at 1809, 1812; Williams, *supra* note 64, at 1664, 1667.

⁸⁰ See Candeub, *supra* note 64, at 121; Corrado, *supra* note 9, at 1554; Moore, *supra* note 63, at 1812, 1813; Williams, *supra* note 64, at 1664, 1667.

⁸¹ See Corrado, *supra* note 9, at 1553-54; Moore, *supra* note 63, at 1813.

⁸² See Corrado, *supra* note 9, at 1553; Fenwick, *supra* note 5, at 346; Morse, *supra* note 63, at 1641. But see PRINCIPLES AND PRACTICE OF SLEEP MEDICINE, *supra* note 30, at 701 (suggesting that sleepwalkers have a diminished response to environmental stimuli).

⁸³ See Corrado, *supra* note 9, at 1554; Morse, *supra* note 63, at 1641, 1646.

⁸⁴ See Morse, *supra* note 63, at 1641, 1646.

Sleepwalking conduct appears to be volitional, purposeful action, and without evidence to the contrary, a presumption of intent should apply to defendants raising the sleepwalking defense.⁸⁵ According to this theory, not only does sleepwalking behavior appear voluntary to onlookers, the behavior is guided by the intentions of the sleepwalker, and therefore, is voluntary.⁸⁶ Thus, sleepwalking defenses are dubious, at best, because the criminal conduct was probably a manifestation of the sleepwalker's intent.⁸⁷ Furthermore, sleepwalking is easily diagnosed, and proper treatment can mitigate sleepwalking violence or even eliminate episodes altogether, which suggests that sleepwalking violence is preventable.⁸⁸

3. The Dual-Self Theory

The dual-self theory proposes that sleepwalking behavior is volitional but is not criminal because sleepwalkers are not conscious of their actions.⁸⁹ Under this theory, sleepwalkers have some basic level of comprehension about their actions, but they lack the consciousness to fully understand the consequences of those actions.⁹⁰ The waking self cannot be held responsible for the actions of the unconscious sleeping self, and it would be wrong to punish criminal defendants for actions perpetrated while unconscious.⁹¹ Under this dual-self theory of sleepwalking, the sleeping self is not governed by the intentions and volitions of the waking self.⁹² Unlike the waking self, the sleeping self is unconscious of its behavior, and therefore, unable to perpetrate any criminal act.⁹³

In 1974, in *People v. Sedeno*, the California Supreme Court implicitly supported the dual-self theory.⁹⁴ The court ruled that under the California Penal Code, unconscious actors (including sleepwalkers)

⁸⁵ See *id.* at 1651–52.

⁸⁶ See *id.*

⁸⁷ See *id.*

⁸⁸ Karacan, *supra* note 38, at 133–34; Raschka, *supra* note 42, at 133–34; Paula K. Rauch & Theodore A. Stern, *Life Threatening Injuries Resulting from Sleepwalking and Night Terrors*, 27 *PSYCHOSOMATICS* 62, 64 (1986) (describing various preventative measures that sleepwalkers should take to minimize potential harm to themselves and others); Reid et al., *supra* note 31, at 36 (finding a positive response to hypnotherapy among severely somnambulistic patients subject to six brief sessions).

⁸⁹ See Candeub, *supra* note 64, at 117; Saks, *supra* note 62, at 434–35.

⁹⁰ See Candeub, *supra* note 64, at 117; Saks, *supra* note 62, at 434–35.

⁹¹ Saks, *supra* note 62, at 435.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ See 518 P.2d at 922; *infra* notes 133–137 and accompanying text.

do not act with volition because they are not aware that they are acting.⁹⁵ Implicit in the decision was the belief that a sleepwalker's actions are not controlled by the sleepwalker's conscience, so the sleepwalker cannot be punished for actions committed while asleep.⁹⁶

4. The Semi-Voluntary Act Theory

The semi-voluntary act theory asserts that sleepwalking behavior is neither clearly voluntary, nor clearly involuntary, and either classification of sleepwalking conduct is premature and unfounded.⁹⁷ Adherents to the semi-voluntary act theory believe that the MPC dichotomy between voluntary and involuntary conduct is arbitrary and that there seems to be little medical support for drawing such an absolute distinction.⁹⁸ According to this theory, sleepwalking should be classified as a semi-voluntary act, because it is neither completely voluntary, nor completely involuntary.⁹⁹ This would allow courts to determine, on an ad hoc basis, which sleepwalking acts are voluntary and which acts are involuntary.¹⁰⁰ Sleepwalking is not easily classified as either conscious or unconscious action, leading to the possible conclusion that the sleepwalker's consciousness should be evaluated on a sliding scale, which is entirely consistent with the notion of sleepwalking as a semi-voluntary act.¹⁰¹

II. HISTORY OF THE SLEEPWALKING DEFENSE

Regardless of whether sleepwalking behavior is voluntary or involuntary, sleepwalking has been raised and accepted as a defense to criminal culpability in common-law jurisdictions for over three hundred years.¹⁰² The sleepwalking defense is asserted rarely in American courts, leaving judges and criminal defendants wondering how the

⁹⁵ See *Sedeno*, 518 P.2d at 922; see also CAL. PENAL CODE § 26(4) (2003).

⁹⁶ See *Sedeno*, 518 P.2d at 922; see also CAL. PENAL CODE § 26(4).

⁹⁷ See Moore, *supra* note 63, at 1815.

⁹⁸ See Denno, *supra* note 9, at 287, 292, 308.

⁹⁹ See *id.* at 359, 361.

¹⁰⁰ See *id.* at 357, 369, 371-74.

¹⁰¹ Smith & Shapiro, *supra* note 54, at 59.

¹⁰² See Bonkalo, *supra* note 42, at 401 (tracing the roots of the sleepwalking defense back as far as 1313 when the Council of Vienne declared that if a sleepwalking person killed or wounded someone, he was not held culpable); Fenwick, *supra* note 5, at 351 ("In England, in 1686, a Colonel Culpepper shot a guardsman and his horse on night patrol. At his trial he pleaded, successfully, that he committed the crime when asleep, and was convicted of manslaughter while insane.").

defense should be applied.¹⁰³ Sleepwalking has been raised under three criminal law defenses: automatism, unconsciousness, and insanity.¹⁰⁴ Courts agree that sleepwalking is a defense to criminal conduct, but they do not agree about how to apply the defense.¹⁰⁵

A. *Somnambulism: Automatism and Unconsciousness*

Occasionally, sleepwalkers run afoul of the law, much to the surprise of sleepwalkers, their victims, and the courts who must decide what to do with these defendants.¹⁰⁶ Courts have generally classified sleepwalking, also known as somnambulism, as a defense to criminal charges under the common-law doctrines of automatism and unconsciousness.¹⁰⁷ Legal scholars use the term "automatism" to classify states of involuntary bodily movement, and "unconsciousness" to describe states of temporary mental incapacity.¹⁰⁸

Criminal justice has long supported the belief that criminal defendants should only be held responsible for actions that could have been avoided had the defendant simply chosen otherwise.¹⁰⁹ Actors must have some control over their physical and mental capacities to be held responsible for criminal wrongdoing.¹¹⁰ Consequently, society does not punish actions performed in a state of uncontrolled motion or unconsciousness.¹¹¹

¹⁰³ See Grant, *supra* note 8, at 1009.

¹⁰⁴ See Denno, *supra* note 9, at 284–85. The recent decision of *New Jersey v. Overton* is a departure from the traditional approach to sleepwalking defenses. See generally 815 A.2d 517 (N.J. Super. Ct. App. Div. 2003). The court held that sleepwalking negates the voluntary act requirement and implicitly recognized a general sleepwalking defense outside the confines of the traditional doctrines of automatism, unconsciousness, and insanity. *Id.* at 522.

¹⁰⁵ See *supra* note 9 and accompanying text. The *Overton* decision further illustrates the inconsistency among courts faced with sleepwalking defenses. See *supra* notes 9, 104 and accompanying text.

¹⁰⁶ See Denno, *supra* note 9, at 346–48; Grant, *supra* note 8, at 1009–11.

¹⁰⁷ *People v. Sedeno*, 518 P.2d 913, 922 (Cal. 1974) (classifying sleepwalking as an unconsciousness defense); *McClain v. Indiana*, 678 N.E.2d 104, 106–07 (Ind. 1997) (classifying sleepwalking as an automatism defense); see Denno, *supra* note 9, at 284–85.

¹⁰⁸ See Denno, *supra* note 9, at 283–84. Unconsciousness is not to be confused with insanity. The unconsciousness defense applies to defendants who claim to have been temporarily mentally incapacitated at the time of the crime, whereas, the insanity defense applies to defendants with permanent mental incapacities. *McClain*, 678 N.E.2d at 108; Denno, *supra* note 9, at 283–84.

¹⁰⁹ See HART, *supra* note 73, at 153; Corrado, *supra* note 9, at 1553.

¹¹⁰ See HART, *supra* note 73, at 158; Denno, *supra* note 9, at 271, 283.

¹¹¹ See *People v. Coogler*, 454 P.2d 686, 696 (Cal. 1969).

1. Automatism

Sleepwalking, under specific circumstances, has been a complete defense to criminal culpability under the doctrine of automatism.¹¹² Automatism is a common-law defense where defendants are released from criminal culpability upon proving that their actions were the result of involuntary bodily movement.¹¹³ Automatism relies on the assumption that a sleepwalker's bodily motions are beyond the sleepwalker's waking control, and the waking self should not be punished for the misdeeds of the sleeping self.¹¹⁴ In 1950, in the English case of *King v. Cogdon*, the defendant was acquitted on charges of murdering her daughter with an axe.¹¹⁵ Mrs. Cogdon had been sleepwalking when she wandered into her daughter's room, and believing that there were soldiers attacking her daughter, she struck twice with an axe, killing her daughter.¹¹⁶ In her defense, Mrs. Cogdon claimed automatism, more specifically somnambulism, and sought to establish that her actions were beyond her control.¹¹⁷ Her story was supported by testimony of a physician, a psychiatrist, and a psychologist, who all believed that she suffered from a series of mental and physical stresses which made her prone to sleepwalking.¹¹⁸ The jury believed Mrs. Cogdon and acquitted; they believed the killing was not an act within her control.¹¹⁹

2. Unconsciousness

Sleepwalking also has been classified as an unconsciousness defense.¹²⁰ Unconsciousness is a common-law defense absolving criminal defendants of culpability upon proving they were temporarily mentally incapacitated at the time of the criminal act.¹²¹ The unconsciousness defense assumes that sleepwalkers are incapable of crimi-

¹¹² See Howard & D'Orbán, *supra* note 6, at 923 (discussing the tendency of British courts to accept, in principle, the defense of automatism for sleepwalking defendants because it seems unfair to hold them morally accountable for their actions); Morse, *supra* note 63, at 1641; Grant, *supra* note 8, at 1000, 1004.

¹¹³ See McClain, 678 N.E.2d at 106.

¹¹⁴ Hindley, *supra* note 64, at 993; Saks, *supra* note 62, at 434-35.

¹¹⁵ *King v. Cogdon* (Vict. 1950) (unreported), discussed in Norval Morris, *Somnambulist Homicide, Ghosts, Spiders, and North Koreans*, 5 RES JUDICATE 29, 29 (1951).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*; see Denno, *supra* note 9, at 369-73.

¹²⁰ See Sedeno, 518 P.2d at 922; *Fain v. Commonwealth*, 78 Ky. 183, 189, 193 (1879).

¹²¹ See Sedeno, 518 P.2d at 922.

nal activity because their minds are asleep, and therefore, sleepwalkers do not exhibit the requisite mental capacity to commit a crime.¹²² Accordingly, criminal defendants who prove that they performed their actions while asleep must be acquitted because they were not capable of conscious thought or criminal intent.¹²³

In 1879, the Court of Appeals of Kentucky in *Fain v. Commonwealth* reversed the defendant's conviction for manslaughter after finding that the trial court should have admitted evidence confirming the defendant's history of sleepwalking.¹²⁴ In *Fain*, Welsh and the defendant fell asleep in the lobby of the Verdana Hotel where Welsh later woke and tried to wake the defendant.¹²⁵ When the defendant did not stir, Welsh asked a stranger to wake him.¹²⁶ The stranger picked up the defendant, who suddenly pulled a gun and shot the stranger three times, inflicting lethal wounds.¹²⁷ The defendant claimed that he slept through the entire ordeal.¹²⁸ The court held that evidence of the defendant's history of sleepwalking would have confirmed that the defendant was unconscious at the time of the shooting, and therefore, was unable to understand the circumstances or consequences of his actions.¹²⁹ Implicit in the court's reasoning was the belief that if the defendant could prove that he was sleeping when he killed the stranger, the unconsciousness defense would apply, and the defendant would be acquitted.¹³⁰

California has codified the unconsciousness defense and interpreted the defense to include sleepwalking.¹³¹ The California Penal Code exempts from criminal liability persons who committed an allegedly criminal act while unconscious.¹³² In 1974, in *People v. Sedeno*, the Supreme Court of California found the Penal Code's definition of

¹²² See Hindley, *supra* note 64, at 993-94; see also Louise Harmon, *Wild Dreamers: Meditations on the Admissibility of Dream Talk*, 79 WASH. L. REV. 575, 576-77 (2004) (stating that "[t]he law belongs to the waking world, not to the world of sleep; it presupposes consciousness, social interaction, verticality").

¹²³ See Hindley, *supra* note 64, at 993-94; see also Overton, 815 A.2d at 522 (holding that sleepwalking negates the voluntary act requirement, but leaving open the possibility that sleepwalking behavior may be reckless when the sleepwalker is aware of the condition and fails to take adequate preventative measures).

¹²⁴ 78 Ky. at 189, 193.

¹²⁵ *Id.* at 184.

¹²⁶ *Id.*

¹²⁷ *Id.* at 185.

¹²⁸ See *id.* at 186, 189.

¹²⁹ *Fain*, 78 Ky. at 186, 189.

¹³⁰ *Id.*

¹³¹ CAL. PENAL CODE § 26(4) (2003); *Sedeno*, 518 P.2d at 922.

¹³² CAL. PENAL CODE § 26(4).

unconsciousness to include acts performed while sleepwalking.¹³³ The court reasoned that an unconscious act is one committed by a person whose act cannot be deemed volitional due to sleepwalking, a blow to the head, or a similar cause.¹³⁴ The defendant, charged with first degree murder, was struck in the head during a fatal fight with his prison guard.¹³⁵ The defendant claimed that the blow to his head rendered him unconscious for the duration of the fight, so he requested an unconsciousness defense.¹³⁶ Criminal defendants who wish to raise the sleepwalking defense in California must assert the defense of unconsciousness, which, if proven, results in acquittal.¹³⁷

The distinction between unconsciousness and automatism has faded, and because the defenses are functionally equivalent, sleepwalking could be raised under both doctrines.¹³⁸ Automatism and unconsciousness remain the predominant defenses to criminal culpability, and in some jurisdictions, remain the only recognized defenses for sleepwalking defendants.¹³⁹

B. *Sleepwalking and Insanity*

The only other recognized defense for criminal acts perpetrated while sleepwalking is legal insanity.¹⁴⁰ The insanity defense applies when the defendant has a mental disease or defect, which renders the defendant incapable of cognitive awareness and control at the time of the criminal conduct.¹⁴¹ Most jurisdictions have distinguished a sleepwalking defense from an insanity defense, and few courts continue to

¹³³ 518 P.2d at 922.

¹³⁴ See *Sedeno*, 518 P.2d at 922; see also CAL. PENAL CODE § 26(4).

¹³⁵ *Sedeno*, 518 P.2d at 917.

¹³⁶ *Id.* at 922.

¹³⁷ See *id.*

¹³⁸ See Michael Corrado, *Automatism and the Theory of Action*, 39 EMORY L.J. 1191, 1217 (1990); Denno, *supra* note 9, at 338.

¹³⁹ See *Sedeno*, 518 P.2d at 922.

¹⁴⁰ See *Tibbs v. Commonwealth*, 128 S.W. 871, 874 (Ky. 1910).

¹⁴¹ Patricia J. Faulk, *Novel Theories of Criminal Defense Based upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication, and Black Rage*, 74 N.C. L. REV. 731, 784 (1996). An alternative analysis requires the following three components: (1) mental disease or defect, (2) lack of cognition, and (3) lack of volition. See Grant, *supra* note 8, at 1004.

recognize sleepwalking as an insanity defense.¹⁴² A minority of courts, however, have treated sleepwalking as an insanity defense.¹⁴³

Some courts have instructed juries on the insanity defense when defendants asserted a sleepwalking defense.¹⁴⁴ In 1910, the Court of Appeals of Kentucky in *Tibbs v. Commonwealth* affirmed the trial court's decision to instruct the jury on the insanity defense, rather than a separate sleepwalking defense.¹⁴⁵ In *Tibbs*, the defendant left a "house of ill fame" and fell asleep after consuming alcohol.¹⁴⁶ The defendant's friend tried to wake defendant causing defendant to punch him.¹⁴⁷ Immediately after punching his friend, the defendant apologized and shook hands with his friend, but later stabbed his friend above the eye, inflicting fatal wounds.¹⁴⁸ The defendant claimed that he was sleepwalking throughout the entire incident and that he remembered nothing of the encounter.¹⁴⁹ The court declared that even if the defendant was sleepwalking, the only defense appropriate for that claim was insanity.¹⁵⁰

Similarly, in 1925, in *Bradley v. State*, the Court of Criminal Appeals of Texas reversed the defendant's conviction for murder, holding that the trial court should have applied the insanity defense to the defendant, who claimed that he was sleepwalking during the incident.¹⁵¹ In *Bradley*, the defendant put a pistol under his pillow before falling asleep, rose when he heard a noise, and fired several shots, killing Ada Jenkins in his bed.¹⁵² His conviction was reversed partially on the grounds that the trial court failed to consider his claim that he was sleepwalking at the time of the shooting.¹⁵³ The court stated that

¹⁴² See Denno, *supra* note 9, at 342-48. The reluctance of courts to accept insanity defenses for sleepwalking defendants might be attributed to the tenuous link between medical definitions of insanity and attempts to classify sleepwalking under the legal definition of insanity. See Howard & D'Orbán, *supra* note 6, at 924.

¹⁴³ See Michael J. Davidson & Steve Walters, *United States v. Berri: The Automatism Defense Rears Its Ugly Head*, 1993 ARMY LAW. 17, 19; Denno, *supra* note 9, at 284, 343-44, 346-48; Grant, *supra* note 8, at 1003.

¹⁴⁴ See, e.g., *Tibbs*, 128 S.W. at 874; *Bradley v. State*, 277 S.W. 147, 149 (Tex. Crim. App. 1925).

¹⁴⁵ See 128 S.W. at 874.

¹⁴⁶ *Id.* at 872.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 873, 874.

¹⁵⁰ See *Tibbs*, 128 S.W. at 874 ("We fail to see how these facts would constitute any defense other than that embraced in a plea of insanity.")

¹⁵¹ 277 S.W. at 149, 150.

¹⁵² *Id.* at 148.

¹⁵³ *Id.* at 149, 150.

the sleepwalking defense should take the form of an insanity defense, which results in acquittal if believed by the jury.¹⁵⁴ The court in *Bradley* considered sleepwalking to be the legal equivalent of insanity.¹⁵⁵

In contrast, some courts distinguish sleepwalking from insanity defenses.¹⁵⁶ In 1997, in *McClain v. Indiana*, the Supreme Court of Indiana, faced with no binding precedent, held that sleepwalking cannot be raised as an insanity defense.¹⁵⁷ The court held that automatism, including sleepwalking, was a matter of voluntary action, not a matter of mental defect, and therefore, the automatism defense should be distinct from the defense of legal insanity.¹⁵⁸ The court reasoned that the difference between insanity and automatism/unconsciousness is the potential punishment.¹⁵⁹ Criminally insane defendants are considered mentally impaired and may be committed to a mental institution, whereas defendants raising the automatism/unconsciousness defense do not suffer from any long-term mental deficiencies and would not benefit from institutionalization.¹⁶⁰ Requiring the institutionalization of sleepwalkers would result in the commitment of defendants who are entirely sane and who do not suffer from any mental defects.¹⁶¹ Consequently, the court ruled that the defense of automatism, which includes the defense of sleepwalking in Indiana, is separate from the defense of insanity.¹⁶²

Few courts continue to recognize sleepwalking as an insanity defense and there is little precedent on which a court could justify such a classification.¹⁶³ Modern courts and scholars have abandoned the classification of sleepwalking as an insanity defense, primarily because criminally insane defendants are often committed to a mental institution for mental rehabilitation, an inappropriate treatment for sleepwalkers.¹⁶⁴ Criminally insane defendants are considered to have a permanent or semi-permanent mental incapacity, making rehabilitation and institutionalization appropriate remedies.¹⁶⁵ Conversely, sleepwalk-

¹⁵⁴ *Id.* at 149.

¹⁵⁵ *See id.*

¹⁵⁶ *See, e.g., McClain*, 678 N.E.2d at 107.

¹⁵⁷ *Id.*

¹⁵⁸ *See id.* at 106-07.

¹⁵⁹ *See id.* at 108-09.

¹⁶⁰ *See id.* at 109; Grant, *supra* note 8, at 1004-05.

¹⁶¹ *See McClain*, 678 N.E.2d at 109.

¹⁶² *See id.* at 107.

¹⁶³ *See id.*

¹⁶⁴ *See Fulcher v. State*, 633 P.2d 142, 145 (Wy. 1981); Grant, *supra* note 8, at 1004-05.

¹⁶⁵ *See Grant*, *supra* note 8, at 1004.

ing defendants do not suffer from any permanent mental disorders and receive no benefit from rehabilitative treatment.¹⁶⁶

Sleepwalkers resemble the criminally insane in appearance only; the psychological and physiological causes of sleepwalking differ substantially from the causes of insanity.¹⁶⁷ The classification of sleepwalking as an insanity defense was based on the assumption that sleepwalkers suffered from a mental disease similar to insanity, as seen in *Bradley*.¹⁶⁸ Recent medical research suggests that sleepwalking is not a psychological disorder, but a physiological phenomenon triggered by a combination of genetic and environmental factors.¹⁶⁹

III. SLEEPWALKING ON TRIAL: THE BURDEN OF PROVING SLEEPWALKING

If a court chooses to recognize a defense based on sleepwalking, either through the automatism or unconsciousness defenses or through legal insanity, it must decide which party should bear the burden of proving whether sleepwalking occurred at the time of the allegedly criminal act.¹⁷⁰ Common-law decisions indicate that courts have reached different decisions on who should bear the burden of proof in cases where defendants were allegedly sleepwalking.¹⁷¹

A. Defendant's Burden: The Affirmative Defense

Some courts require the defendant to raise sleepwalking as an affirmative defense.¹⁷² This requires defendants to prove that they were sleepwalking at the time of the criminal acts in question.¹⁷³ The affirmative defense of sleepwalking is a complete defense resulting in acquittal.¹⁷⁴

In 1879, in *Fain v. Commonwealth*, the Court of Appeals of Kentucky found reversible error in the trial court's failure to admit evi-

¹⁶⁶ See *Fulcher*, 633 P.2d at 146; Grant, *supra* note 8, at 1004.

¹⁶⁷ See *Fulcher*, 633 P.2d at 145; Grant, *supra* note 8, at 1004; *supra* notes 33-35 and accompanying text.

¹⁶⁸ Oswald & Evans, *supra* note 26, at 690; see 277 S.W. at 149.

¹⁶⁹ See *supra* notes 33-35 and accompanying text.

¹⁷⁰ See *Morse*, *supra* note 63, at 1641, 1651.

¹⁷¹ See *Fain v. Commonwealth*, 78 Ky. 183, 188 (1879) (implicitly placing burden of proof on the defendant through an affirmative defense); *Fulcher v. State*, 633 P.2d 142, 147 (W. 1981) (suggesting that the burden of proof lies with the prosecution if the facts suggest the defendant may have lost consciousness or control of his actions during the crime).

¹⁷² See *Corrado*, *supra* note 9, at 1554; *Morse*, *supra* note 63, at 1651.

¹⁷³ See *Morse*, *supra* note 63, at 1651-52.

¹⁷⁴ See Grant, *supra* note 8, at 1000.

dence in support of the defendant's claim that he was sleepwalking when he shot a stranger who tried to wake him.¹⁷⁵ The court implicitly found that the defendant needed an opportunity to rebut the presumption that he was awake during the shooting, which if such evidence were admitted, would have served as an affirmative defense to the shooting.¹⁷⁶

In 1943, the Supreme Court of Georgia in *Lewis v. State* found that the sleepwalking defense did not apply because the defendant failed to offer evidence in support of his claim that he suffered from sleepwalking at the time of the shooting.¹⁷⁷ In *Lewis*, the defendant laid his pistol on the mantle before falling asleep and woke the next morning to find his friend in the bed next to him, lying dead from bullet wounds.¹⁷⁸ The defendant did not remember anything of the previous night's events and asserted a defense of sleepwalking.¹⁷⁹ The court's reasoning implied that the defendant, if anyone, was responsible for raising the issue of sleepwalking, and he must offer some evidence in support of his claim.¹⁸⁰

In both *Fain* and *Lewis* the courts made an a priori assumption that shootings generally occur while the shooter is awake.¹⁸¹ Based on the evidence presented in these cases, an inference of sleepwalking does not arise from the facts, and therefore, any effort to prove that the defendant was sleepwalking should fall on the defendant.¹⁸² If the fact pattern suggests that sleepwalking was a possibility at the time of the alleged crime, then the defendant needs an opportunity to present that defense to the jury.¹⁸³

Supporters of the affirmative defense to sleepwalking suggest several advantages.¹⁸⁴ Defendants have the best access to the necessary evidence of sleepwalking, such as past instances of sleepwalking and testimony from family members and loved ones of sleepwalking ten-

¹⁷⁵ 78 Ky. at 185, 189 (the defendant sought to offer evidence that he had been a sleepwalker since childhood); see *supra* notes 124-130 and accompanying text.

¹⁷⁶ See *Fain*, 78 Ky. at 189.

¹⁷⁷ 27 S.E.2d 659, 665-66 (Ga. 1943) (finding the sleepwalking defense inapplicable in this case). Sleepwalking is a recognized defense to criminal charges. See *id.*; *State v. Williams*, 252 S.E.2d 739, 744 (N.C. 1979) (citing generally *Lewis*).

¹⁷⁸ 27 S.E.2d at 659.

¹⁷⁹ *Id.*

¹⁸⁰ See *id.*

¹⁸¹ See *Lewis*, 27 S.E.2d at 665; *Fain*, 78 Ky. at 189.

¹⁸² See *Lewis*, 27 S.E.2d at 665-66.

¹⁸³ See *Lewis*, 27 S.E.2d at 665; *Fain*, 78 Ky. at 189.

¹⁸⁴ See *Morse*, *supra* note 63, at 1651-52.

dencies.¹⁸⁵ Furthermore, affirmative defense advocates believe that defendants should carry the burden of proof because they are the ones aware of their state of consciousness at the time of the acts in question.¹⁸⁶ The affirmative defense approach assumes that most actions are voluntary and that to prove otherwise, a defendant must show a lack of substantial control at the time of the act.¹⁸⁷ According to affirmative defense advocates, claims of sleepwalking are too difficult to refute and too easy to fake, and therefore, the burden of proof should remain with the defendant.¹⁸⁸

B. *The Voluntary Act: The Prosecution's Burden*

Some jurisdictions have left open the possibility of placing the burden of proof on the prosecution to establish that the defendant was not sleepwalking.¹⁸⁹ Under this approach, the prosecution would have to disprove the defendant's claim of sleepwalking.¹⁹⁰

The MPC implicitly supports placing the burden of proof on the prosecution through the voluntary act requirement.¹⁹¹ The MPC requires proof of a voluntary act for criminal culpability and defines sleepwalking as a non-voluntary act.¹⁹² A voluntary act is an essential element of any crime, and sleepwalking defendants would be acquitted if the jury believed that they were sleepwalking at the time of the act.¹⁹³ According to this argument, volition is the primary concern, so sleepwalkers, who are incapable of voluntary actions as a matter of law, are incapable of committing criminal acts.¹⁹⁴ If sleepwalkers are not responsible for their actions, they need not excuse their conduct.¹⁹⁵

In 1981, in *Fulcher v. State*, the Supreme Court of Wyoming held that the unconsciousness/automatism defense is separate from the defense of insanity, and the burden of establishing automatism/un-

¹⁸⁵ See Masand et al., *supra* note 30, at 652; Morse, *supra* note 63, at 1652.

¹⁸⁶ See Grant, *supra* note 8, at 1002.

¹⁸⁷ See Denno, *supra* note 9, at 271; Ledewitz, *supra* note 64, at 102-03.

¹⁸⁸ Morse, *supra* note 63, at 1651-52.

¹⁸⁹ See, e.g., *State v. Connell*, 493 S.E.2d 292, 296 (N.C. Ct. App. 1997); *Fulcher*, 633 P.2d at 147; Grant, *supra* note 8, at 1002.

¹⁹⁰ See *Connell*, 493 S.E.2d at 296; *Fulcher*, 633 P.2d at 147; Grant, *supra* note 8, at 1002.

¹⁹¹ See MODEL PENAL CODE § 2.01 (1962); Corrado, *supra* note 9, at 1554; Ledewitz, *supra* note 64, at 80-81.

¹⁹² See MODEL PENAL CODE § 2.01.

¹⁹³ See *id.*; McClain v. State, 678 N.E.2d 104, 107-08 (Ind. 1997); Corrado, *supra* note 9, at 1554; Denno, *supra* note 9, at 271, 284-85; Ledewitz, *supra* note 64, at 80-81.

¹⁹⁴ Corrado, *supra* note 9, at 1554; see Denno, *supra* note 9, at 275-76; Ledewitz, *supra* note 64, at 80-81.

¹⁹⁵ John Gardner, *The Gist of Excuses*, 1 BUFF. CRIM. L. REV. 575, 589 (1998).

consciousness rests upon the defendant, unless it arises from the prosecution's evidence.¹⁹⁶ The court provided sleepwalking as an example of when an automatism/unconsciousness instruction should apply.¹⁹⁷ The language of the *Fulcher* opinion is ambiguous, and it could be interpreted to suggest that the burden of proof may shift to the prosecution if, and only if, evidence presented by the prosecution would lead the fact finder to believe that the defendant perpetrated the allegedly criminal act while sleepwalking.¹⁹⁸

Subsequently, in 1997, the Court of Appeals of North Carolina in *State v. Connell* ordered a new trial of the defendant accused of sexual assault of a minor, in part because the trial court failed to instruct the jury with an unconsciousness defense.¹⁹⁹ The facts showed that the defendant went to bed and fell asleep, soon to be joined by his girlfriend and her daughter.²⁰⁰ The defendant was accused of sexually molesting his girlfriend's daughter during the night.²⁰¹ He claimed that even if he did commit the acts in question, he was asleep at the time.²⁰² The court set forth an ambiguous opinion, faulting the prosecution for failing to provide any evidence that the defendant was awake, while simultaneously affirming the defendant's duty to raise sleepwalking as an affirmative defense.²⁰³ The court noted the lack of judicial precedent as to who should bear the burden of proving sleepwalking behavior.²⁰⁴ Like *Fulcher*, where the court relied on the same interpretation of the unconsciousness defense, one possible interpretation of the *Connell* court's decision is that the burden of disproving the defendant's sleepwalking shifts to the prosecution if the prosecution presents evidence suggesting that the defendant may have been asleep.²⁰⁵

¹⁹⁶ 633 P.2d at 147.

¹⁹⁷ See *id.* app. at 147.

¹⁹⁸ See *id.* at 147 ("We now hold that, under the law of this state, unconsciousness, or automatism . . . is an affirmative defense; and that the burden rests upon the defendant to establish this defense, unless it arises out of the State's own evidence, to the satisfaction of the jury." (quoting *State v. Caddell*, 215 S.E.2d 348, 363 (N.C. 1975))); see also *Connell*, 493 S.E.2d at 296.

¹⁹⁹ 493 S.E.2d at 296, 297.

²⁰⁰ *Id.* at 294.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ See *id.* at 296.

²⁰⁴ *Connell*, 493 S.E.2d at 296 ("Although our research discloses no case law as to whether being asleep is an appropriate circumstance that requires an unconsciousness or diminished capacity instruction, we conclude that on this record both instructions would be proper.").

²⁰⁵ See *id.* at 294-95 (stating that "there was no evidence presented to suggest that the defendant was awake at the time of the alleged incident"); *Fulcher*, 633 P.2d at 147; see also

IV. A NEW AND COMPREHENSIVE SLEEPWALKING DEFENSE

Sleepwalking should be recognized as a defense to criminal charges.²⁰⁶ Current sleepwalking defenses do not account for the available medical information on sleepwalking.²⁰⁷ The insanity defense rests on the false presumption that sleepwalking is a mental defect.²⁰⁸ Criminal defendants who wish to raise a defense of sleepwalking find themselves at the mercy of the courts, which have failed to apply the sleepwalking defense consistently.²⁰⁹ These inconsistencies are further exacerbated by the scarcity of judicial opinions addressing the legal analysis of sleepwalking defenses.²¹⁰ Courts need to apply the defense consistently using objective criteria to evaluate the defendant's claim of sleepwalking.²¹¹ This Note advocates a distinct, affirmative defense of sleepwalking to accommodate the unique mental and physical characteristics of sleepwalking.²¹²

A. Problems with Current Sleepwalking Defenses

The preceding review of case law exposes inconsistencies in the application of the sleepwalking defense.²¹³ Courts have classified sleepwalking defenses as unconsciousness, automatism, or insanity.²¹⁴ Some courts allow sleepwalking as an affirmative defense whereas

New Jersey v. Overton, 815 A.2d 517, 522 (N.J. Super. Ct. App. Div. 2003) (stating that once a defendant raises a question of his or her mental state the prosecution must establish beyond a reasonable doubt that the defendant acted consciously, purposely, and knowingly).

²⁰⁶ See *Overton*, 815 A.2d at 522; Broughton et al., *supra* note 6, at 263 (laying to rest any worries that sleepwalking defenses might be abused). Sleepwalking defenses have been available for over one hundred years and the defense has been used sparingly. See Broughton et al., *supra* note 6, at 263. Furthermore, it would be extremely difficult for a defendant to fake the genetic history and medical evidence necessary to establish a persuasive sleepwalking defense. See *id.*

²⁰⁷ Smith & Shapiro, *supra* note 54, at 33; see Fenwick, *supra* note 8, at 979-80; see also Howard & D'Orbán, *supra* note 6, at 925 (chastising courts for their failure to consider the medical realities of sleepwalking, and recommending that courts faced with the sleepwalking defense "should not exploit medical terminology in a manner which, as things stand, does no justice to medical thinking"); *supra* notes 26-59 and accompanying text (reviewing medical information on sleepwalking).

²⁰⁸ See *supra* notes 30-35 and accompanying text.

²⁰⁹ See *supra* note 9 and accompanying text.

²¹⁰ See Smith & Shapiro, *supra* note 54, at 33.

²¹¹ See Denno, *supra* note 9, at 357.

²¹² See *infra* notes 256-319 and accompanying text.

²¹³ See *supra* notes 102-205 and accompanying text.

²¹⁴ See *supra* notes 102-169 and accompanying text.

other courts place the burden of proof on the prosecution.²¹⁵ Inconsistent application of the sleepwalking defense prejudices criminal defendants who rely on judicial precedent and leaves judges wondering how to instruct juries on the sleepwalking defense.²¹⁶ Much depends on the resolution of the essential question—who should bear the burden of proof at a criminal trial when sleepwalking is raised as a defense?²¹⁷ Criminal defendants raising the sleepwalking defense have their freedom at stake and are greatly concerned with consistent application of the defense.²¹⁸ Existing defenses purporting to protect sleepwalking defendants are not sufficiently adapted to the medical information available on the causes and effects of sleepwalking.²¹⁹

1. Sleepwalking Is Neither Automatism Nor Unconsciousness

Sleepwalking is a peculiar and distinct medical phenomenon, and medical information on sleepwalking does not support the current practice of lumping sleepwalking in with the automatism and unconsciousness defenses.²²⁰ Classifying sleepwalking as automatism or unconsciousness oversimplifies the issue.²²¹ Unconsciousness is a state of temporary mental incapacity; automatism is a state of involuntary bodily movement.²²² Both the automatism and unconsciousness defenses are based on a premise of involuntary action and thought, which is not supported by medical evidence on sleepwalking.²²³

Sleepwalking is not exactly automatism because the sleepwalker's bodily movements are not clearly involuntary.²²⁴ First, sleepwalkers are solely responsible for their physical movements; their movements are directed by their own actions, not some external impetus.²²⁵ Second, based on the medical and psychological evidence of sleepwalking, the sleepwalker's actions may be partially voluntary.²²⁶ Sleep researchers

²¹⁵ See *supra* notes 170–205 and accompanying text.

²¹⁶ See Denno, *supra* note 9, at 284–85.

²¹⁷ See Grant, *supra* note 8, at 1002.

²¹⁸ See McClain v. Indiana, 678 N.E.2d 104, 109 (Ind. 1997); Denno, *supra* note 9, at 284–85.

²¹⁹ See Smith & Shapiro, *supra* note 54, at 33; *supra* notes 26–59 and accompanying text.

²²⁰ Smith & Shapiro, *supra* note 54, at 33; see *supra* notes 26–59 and accompanying text.

²²¹ Smith & Shapiro, *supra* note 54, at 33; see Corrado, *supra* note 9, at 1553; Fenwick, *supra* note 32, at 575.

²²² See *supra* notes 107–108 and accompanying text.

²²³ Smith & Shapiro, *supra* note 54, at 33; see *supra* notes 26–59 and accompanying text.

²²⁴ See Smith & Shapiro, *supra* note 54, at 32; *supra* notes 79–87 and accompanying text.

²²⁵ See Corrado, *supra* note 9, at 1553–54; Morse, *supra* note 63, at 1646.

²²⁶ Smith & Shapiro, *supra* note 54, at 32; see *supra* notes 26–59 and accompanying text.

disagree about whether sleepwalking is automatism and, therefore, the legal classification of sleepwalking as a form of automatism lacks a consistent medical basis.²²⁷

Furthermore, sleepwalking is not unconsciousness because the sleepwalker is not temporarily mentally incapacitated.²²⁸ Sleep research suggests that sleepwalking is a physiological condition of the body, not a psychological condition of the mind.²²⁹ Sleepwalkers do not suffer from mental incapacity or psychological disorders, and consequently, they have no temporary mental incapacitation.²³⁰

The medical information available on sleepwalking suggests that many factors contribute to sleepwalking behavior.²³¹ People prone to sleepwalking can reduce or even eliminate sleepwalking episodes through simple lifestyle changes, such as reduced alcohol and drug consumption, regular sleeping schedules, and stress reduction.²³² Research suggests that sleepwalkers have the ability to mitigate sleepwalking violence.²³³ This suggests that sleepwalking is not completely beyond the sleepwalker's control as unconsciousness or automatism would suggest, but rather it is preventable and curable.²³⁴

Rather than considering the factors contributing to sleepwalking, courts have been more comfortable treating sleepwalking as a defense based on involuntary mental incapacity (unconsciousness) or physical incapacity (automatism).²³⁵ Automatism and unconsciousness do not adequately describe the defense of sleepwalking, and they reduce sleepwalking to a simple physical or mental disorder, when in fact sleepwalking is a combination of physical, genetic, and environmental

²²⁷ See Masand et al., *supra* note 30, at 650.

²²⁸ PRINCIPLES AND PRACTICE OF SLEEP MEDICINE, *supra* note 30, at 701; see Gilmore, *supra* note 33, at 457; Mahowald et al., *supra* note 32, at 420.

²²⁹ PRINCIPLES AND PRACTICE OF SLEEP MEDICINE, *supra* note 30, at 701; see Gilmore, *supra* note 33, at 457; Howard & D'Orbán, *supra* note 6, at 922; Mahowald et al., *supra* note 32, at 420.

²³⁰ PRINCIPLES AND PRACTICE OF SLEEP MEDICINE, *supra* note 30, at 701; see Gilmore, *supra* note 33, at 457; Howard & D'Orbán, *supra* note 6, at 922; Mahowald et al., *supra* note 32, at 420.

²³¹ PRINCIPLES AND PRACTICE OF SLEEP MEDICINE, *supra* note 30, at 701; see Mahowald et al., *supra* note 32, at 420, 426; Masand et al., *supra* note 30, at 650-52.

²³² PRINCIPLES AND PRACTICE OF SLEEP MEDICINE, *supra* note 30, at 701; see Gilmore, *supra* note 33, at 457-58.

²³³ PRINCIPLES AND PRACTICE OF SLEEP MEDICINE, *supra* note 30, at 701; see Gilmore, *supra* note 33, at 457-58.

²³⁴ PRINCIPLES AND PRACTICE OF SLEEP MEDICINE, *supra* note 30, at 701; see Gilmore, *supra* note 33, at 457-58.

²³⁵ See *supra* notes 102-139 and accompanying text.

conditions that lead the sleepwalker to commit acts of violence.²³⁶ If sleepwalking can be justified as a defense to criminal culpability it is not because the sleepwalker suffers from a simple mental or physical incapacity.²³⁷

2. Sleepwalking Is Not Insanity

The defense of insanity is not a proper means of evaluating a sleepwalking defense.²³⁸ Under the insanity defense, defendants generally must prove that they suffered from a mental defect or disorder.²³⁹ Sleepwalking is not a mental disorder, and therefore, the defense of insanity is rendered useless because sleepwalking does not result from a mental disease or defect.²⁴⁰

Insanity was thought to be a proper sleepwalking defense at a time when sleepwalking was viewed as a type of insanity.²⁴¹ Sleepwalking has not been raised successfully as a defense of insanity since the 1925 case of *Bradley v. State*, when the Texas Court of Criminal Appeals based its ruling on outdated medical information on sleepwalking.²⁴² The court reasoned implicitly that if modern science (as of 1925) characterized sleepwalking as a form of insanity, then the law might as well do the same.²⁴³ The court reversed the defendant's conviction because the trial court should have allowed the defendant to present his defense of sleepwalking through an insanity defense.²⁴⁴

More recently, in 1997, in *McClain v. Indiana*, the Indiana Supreme Court ruled that insanity was a separate defense from sleepwalking and automatism.²⁴⁵ The court reasoned that policies behind the insanity defense counsel against classifying automatism as a mental disease or defect.²⁴⁶ The court was concerned about the fairness of punishing automatist defendants and attempts to correct their behavior.²⁴⁷ Defendants found not guilty by reason of insanity are confined

²³⁶ See *supra* notes 220–234 and accompanying text.

²³⁷ See *supra* notes 220–234 and accompanying text.

²³⁸ Fenwick, *supra* note 8, at 980; see *supra* notes 30–35, 156–169 and accompanying text.

²³⁹ See Grant, *supra* note 8, at 1004.

²⁴⁰ See *McClain*, 678 N.E.2d at 108–09; Gilmore, *supra* note 33, at 457.

²⁴¹ See *Bradley v. State*, 277 S.W. 147, 149 (Tex. Crim. App. 1925).

²⁴² See *id.*

²⁴³ See *id.*

²⁴⁴ See *id.* at 149, 150.

²⁴⁵ 678 N.E.2d at 108.

²⁴⁶ See *id.* at 108–09.

²⁴⁷ See *id.*

to mental institutions to correct their mental defects and to mitigate further harm to themselves and others.²⁴⁸ The policy of correcting a defendant's mental defect clearly does not apply to defendants who commit sleepwalking violence.²⁴⁹ Sleepwalkers are not insane, and consequently, mental institutions cannot correct a defect that does not exist.²⁵⁰ By rejecting the insanity defense in cases where the defendant raises sleepwalking as a defense, the *McClain* court recognized that sleepwalking is substantially different from insanity, and the two defenses should remain separate.²⁵¹ Following the lead of *McClain*, other jurisdictions should not recognize sleepwalking as an insanity defense.²⁵²

Traditional and modern doctrines of sleepwalking are ill-adapted to trying defendants who raise the sleepwalking defense.²⁵³ Case law and legal scholarship provide no consistent formula for evaluating sleepwalking defenses.²⁵⁴ Sleepwalking is a unique medical condition, and the defenses of unconsciousness, automatism, and insanity are not equipped to handle the defense of sleepwalking.²⁵⁵

B. Proposed Resolution

Because existing defenses are ill-equipped to handle sleepwalking defenses, sleepwalking should be a separate, affirmative defense with the burden of proof on the defendant.²⁵⁶ The defense should apply when either the defense or the prosecution offers evidence suggesting that the defendant may have been asleep at the time of the alleged crime.²⁵⁷ Defendants should be given an opportunity to prove that they were sleepwalking at the time of the crime and that the sleepwalking was sufficiently debilitating to render them incapable of committing criminal acts.²⁵⁸ A distinct affirmative defense for sleepwalking would provide courts with a consistent, scientific, and specific

²⁴⁸ Fenwick, *supra* note 8, at 980; see *McClain*, 678 N.E.2d at 109.

²⁴⁹ Fenwick, *supra* note 8, at 980; Fenwick, *supra* note 32, at 575; see *McClain*, 678 N.E.2d at 109.

²⁵⁰ Fenwick, *supra* note 8, at 980; Fenwick, *supra* note 32, at 575; see Grant, *supra* note 8, at 1004-05.

²⁵¹ See *McClain*, 678 N.E.2d at 108.

²⁵² See *id.*

²⁵³ See *supra* notes 213-252 and accompanying text.

²⁵⁴ See *supra* notes 213-252 and accompanying text.

²⁵⁵ See *supra* notes 213-252 and accompanying text.

²⁵⁶ See Smith & Shapiro, *supra* note 54, at 33; Morse, *supra* note 63, at 1651-52.

²⁵⁷ See *Overton*, 815 A.2d at 522; *Fulcher v. State*, 633 P.2d 142, 147 (Wy. 1981).

²⁵⁸ See Fenwick, *supra* note 5, at 355.

formula for determining criminal culpability.²⁵⁹ Criminal defendants would no longer have to guess whether sleepwalking could be admitted as an unconsciousness defense, an automatism defense, an insanity defense, or rejected altogether.²⁶⁰ Courts should evaluate, on a case-by-case basis, the credibility of the defendant's sleepwalking claim according to a reliable, objective set of criteria based on empirical medical research.²⁶¹

1. Incorporation of Medical Evidence on Sleepwalking

Current legal doctrines of sleepwalking do not adequately address what sleepwalking is, how it works, and how it affects the sleepwalker's body and mind.²⁶² In *Fain v. Commonwealth*, the Court of Appeals of Kentucky declared that the law must acknowledge the medical phenomenon of sleepwalking and offer the defendant an opportunity to present the defense.²⁶³ Implicit in the decision is the belief that the law should respond to medical information on sleepwalking to determine the defendant's criminal culpability.²⁶⁴

Sleepwalking defenses should be evaluated using objective criteria consistent with the medical information available on sleepwalking.²⁶⁵ Sleepwalking research has identified several trigger factors contributing to the onset of sleepwalking episodes.²⁶⁶ These factors include the following: drug and alcohol use, irregular sleep patterns or sleep deprivation, and environmental stresses.²⁶⁷ Courts should use this information to evaluate the credibility of defendants claiming that they were sleepwalking at the time of the alleged crimes.²⁶⁸

²⁵⁹ See Denno, *supra* note 9, at 357.

²⁶⁰ See *id.* at 284-85. Defendants may also fear that expert testimony on sleepwalking might be excluded altogether. See *People v. Cegers*, 9 Cal. Rptr. 2d 297, 298 (Cal. Ct. App. 1992).

²⁶¹ See Denno, *supra* note 9, at 357. This proposal is implicitly supported in a thorough analysis of a recent decision of the Supreme Court of Canada affirming the acquittal of Kenneth Parks, who drove to the home of his parents-in-law while sleepwalking, and assaulted his father-in-law and killed his mother-in-law. See Broughton et al., *supra* note 206, at 254-60.

²⁶² See Fenwick, *supra* note 5, at 355.

²⁶³ 78 Ky. 183, 188 (1879).

²⁶⁴ See *id.* at 188.

²⁶⁵ See PRINCIPLES AND PRACTICE OF SLEEP MEDICINE, *supra* note 30, at 704; Fenwick, *supra* note 5, at 353-55.

²⁶⁶ Fenwick, *supra* note 5, at 347, 350, 354; Mahowald et al., *supra* note 32, at 420, 423; Masand et al., *supra* note 30, at 652.

²⁶⁷ See Fenwick, *supra* note 5, at 347, 350, 354; Mahowald et al., *supra* note 32, at 420, 423; Masand et al., *supra* note 30, at 652.

²⁶⁸ See Overton, 815 A.2d at 520; Fenwick, *supra* note 5, at 353-55.

Furthermore, sleep experts have identified medical conditions that are commonly associated with sleepwalking.²⁶⁹ Sleepwalking typically occurs within the first two or three hours of sleep.²⁷⁰ A family history of sleepwalking raises the likelihood that the defendant suffers from sleepwalking.²⁷¹ Past instances of sleepwalking suggest a predisposition to sleepwalking.²⁷² Sleepwalking rarely begins after childhood,²⁷³ and children are more likely to sleepwalk than adults.²⁷⁴ In the absence of these conditions, a defendant's claim of sleepwalking at the time of the act should be doubted.²⁷⁵ Proof of these conditions would bolster a claim that the defendant was sleepwalking at the time of the act.²⁷⁶

2. The New Sleepwalking Defense

The sleepwalking defense should be a multi-factored balancing test setting forth specific criteria, which if proven, would result in acquittal.²⁷⁷ Judges should instruct juries on the sleepwalking defense, and juries should be left to determine whether, based on the medical and circumstantial evidence presented at trial and the guidelines of the defense, the defendant was sleepwalking during the alleged crime.²⁷⁸ If the jury determines that the defendant was sleepwalking, it should acquit.²⁷⁹ An effective and consistent sleepwalking defense should evaluate specific medical and circumstantial criteria in determining whether the defendant was sleepwalking.²⁸⁰ The following discussion proposes

²⁶⁹ PRINCIPLES AND PRACTICE OF SLEEP MEDICINE, *supra* note 30, at 701, 704; *see* Fenwick, *supra* note 5, at 353–55.

²⁷⁰ Fenwick, *supra* note 5, at 346, 354; Gilmore, *supra* note 33, at 455.

²⁷¹ PRINCIPLES AND PRACTICE OF SLEEP MEDICINE, *supra* note 30, at 700; *see* Fenwick, *supra* note 5, at 346, 354; Gilmore, *supra* note 33, at 455; Mahowald et al., *supra* note 32, at 420; Masand et al., *supra* note 30, at 650–51.

²⁷² *See* Fenwick, *supra* note 5, at 354; Mahowald et al., *supra* note 32, at 426.

²⁷³ PRINCIPLES AND PRACTICE OF SLEEP MEDICINE, *supra* note 30, at 701; Fenwick, *supra* note 5, at 354; Gilmore, *supra* note 33, at 455; Masand et al., *supra* note 30, at 649–50.

²⁷⁴ PRINCIPLES AND PRACTICE OF SLEEP MEDICINE, *supra* note 30, at 701; Gilmore, *supra* note 33, at 455; Mahowald et al., *supra* note 32, at 420; Masand et al., *supra* note 30, at 649; Schenck et al., *supra* note 29, at 1170.

²⁷⁵ *See* Fenwick, *supra* note 5, at 353–55; Mahowald et al., *supra* note 32, at 426.

²⁷⁶ *See* Fenwick, *supra* note 5, at 353–55.

²⁷⁷ *See id.*

²⁷⁸ *See id.*

²⁷⁹ *See id.*; Howard & D'Orbán, *supra* note 6, at 923 ("Running through many judicial decisions [in Britain] is a recognition that there are cases of automatism in which it seems unfair to impute moral responsibility and unnecessary to impose restriction.").

²⁸⁰ *See* Fenwick, *supra* note 5, at 353–55.

criteria for courts to consider in evaluating a defendant's claim of sleepwalking.²⁸¹

a. *Evidence of Sleepwalking at the Time of the Crime*

In evaluating evidence of possible sleepwalking at the time of the crime courts should compare the nature of the criminal act with the degree of control exhibited by the defendant.²⁸² The nature of the criminal act affects the credibility of the defendant's claim of sleepwalking in proportion to the complexity of the crime.²⁸³ Some crimes require more complex actions than others.²⁸⁴ Violent crimes involving simple motions are more likely to occur during sleepwalking than crimes that require planning and intricate thought.²⁸⁵ For example, sleepwalking is a much more persuasive defense to assault and battery than it is to shoplifting.²⁸⁶ The degree of control exhibited by the defendant is also relevant to the credibility of the sleepwalking claim.²⁸⁷ For example, a defendant who tied his friend to a chair and abused him over the course of several hours was probably not sleepwalking, but if he pushed his friend down the stairs, his claim of sleepwalking would be more credible.²⁸⁸ The nature of the crime should be compared with the degree of control exhibited by the sleepwalker to determine if, based on the comparison, the resulting behavior took place while the defendant was asleep.²⁸⁹

b. *Elapsed Time*

Sleepwalking usually occurs within the first two or three hours of sleep.²⁹⁰ The time when the defendant fell asleep should be consid-

²⁸¹ See *infra* notes 282-307 and accompanying text.

²⁸² See Fenwick, *supra* note 5, at 353-55; Mahowald et al., *supra* note 32, at 426; Oswald & Evans, *supra* note 26, at 691.

²⁸³ See Fenwick, *supra* note 5, at 353-55; Masand et al., *supra* note 30, at 652; Oswald & Evans, *supra* note 26, at 691.

²⁸⁴ See Fenwick, *supra* note 5, at 353-55; Mahowald et al., *supra* note 32, at 426; Oswald & Evans, *supra* note 26, at 691.

²⁸⁵ See Mahowald et al., *supra* note 32, at 426; Masand et al., *supra* note 30, at 652.

²⁸⁶ See Mahowald et al., *supra* note 32, at 426; Oswald & Evans, *supra* note 26, at 691.

²⁸⁷ See Mahowald et al., *supra* note 32, at 426; Oswald & Evans, *supra* note 26, at 691.

²⁸⁸ See Oswald & Evans, *supra* note 26, at 691.

²⁸⁹ See Mahowald et al., *supra* note 32, at 426; Oswald & Evans, *supra* note 26, at 691.

²⁹⁰ PRINCIPLES AND PRACTICE OF SLEEP MEDICINE, *supra* note 30, at 701; Abe & Shimakawa, *supra* note 32, at 306; Fenwick, *supra* note 32, at 574; Grant, *supra* note 8, at 1007; Hartmann, *supra* note 32, at 121; Kales et al., *supra* note 32 at 1407; see Fenwick, *supra* note 5, at 346; Mahowald et al., *supra* note 32, at 426.

ered to determine if the crime took place within the three hour window.²⁹¹ If a crime occurs more than two hours after the defendant fell asleep, the defendant's claim of sleepwalking becomes less credible.²⁹²

c. *Predisposition to Sleepwalking*

A defendant's history of sleepwalking, genetics, and age should be taken into account when evaluating sleepwalking defenses.²⁹³ Sleepwalking generally does not occur in isolated incidences;²⁹⁴ a history of the defendant's sleepwalking episodes will help determine if the defendant was sleepwalking during the crime.²⁹⁵ Family members, spouses, and friends are often available to testify about the defendant's sleeping habits.²⁹⁶ A family history of sleepwalking increases the likelihood that the defendant is genetically prone to sleepwalking and should be considered by the court.²⁹⁷ The age of the defendant is also relevant;²⁹⁸ sleepwalking is much more common in children than adults and rarely begins after childhood.²⁹⁹ For example, a middle-aged defendant with no prior instances of sleepwalking and no family history of sleepwalking is not likely to succeed on a sleepwalking defense.³⁰⁰

d. *Trigger Factors*

Ingestion of drugs, alcohol, and medication can trigger sleepwalking episodes.³⁰¹ Allegations of sleepwalking become more credible when defendants can prove that they ingested any of these sub-

²⁹¹ See Fenwick, *supra* note 5, at 354; Gilmore, *supra* note 33, at 455.

²⁹² See Fenwick, *supra* note 5, at 354; Gilmore, *supra* note 33, at 455.

²⁹³ See Fenwick, *supra* note 5, at 353-55; Mahowald et al., *supra* note 32, at 426; Masand et al., *supra* note 30, at 651-52.

²⁹⁴ See Fenwick, *supra* note 5, at 354; Mahowald et al., *supra* note 32, at 426.

²⁹⁵ See Masand et al., *supra* note 30, at 652.

²⁹⁶ See Mahowald et al., *supra* note 32, at 425; Masand et al., *supra* note 30, at 652.

²⁹⁷ Fenwick, *supra* note 5, at 346, 353-55; Gilmore, *supra* note 33, at 455; Mahowald et al., *supra* note 32, at 420; Masand et al., *supra* note 30, at 650-51.

²⁹⁸ See PRINCIPLES AND PRACTICE OF SLEEP MEDICINE, *supra* note 30, at 701; Abe & Shinakawa, *supra* note 32, at 308; Fenwick, *supra* note 5, at 354; Gilmore, *supra* note 33, at 455; Kales et al., *supra* note 32, at 1408; Karacan, *supra* note 38, at 132; Masand et al., *supra* note 30, at 649-50.

²⁹⁹ PRINCIPLES AND PRACTICE OF SLEEP MEDICINE, *supra* note 30, at 701; Abe & Shinakawa, *supra* note 32, at 308; Fenwick, *supra* note 5, at 354; Gilmore, *supra* note 33, at 455; Kales et al., *supra* note 32, at 1408; Karacan, *supra* note 38, at 132; Masand et al., *supra* note 30, at 649-50; Reid et al., *supra* note 31, at 28; Schenck et al., *supra* note 29, at 1170.

³⁰⁰ See Fenwick, *supra* note 5, at 354-55; Oswald & Evans, *supra* note 26, at 691.

³⁰¹ See *supra* note 52 and accompanying text.

stances prior to the alleged crime.³⁰² Irregular sleep patterns, sleep deprivation, and stress are also probative of sleepwalking.³⁰³

e. *Circumstantial Evidence*

Courts should also consider any other relevant information which tends to support or refute the defendant's claim of sleepwalking.³⁰⁴ Motive and premeditation decrease the likelihood that the defendant was sleepwalking.³⁰⁵ Because sleepwalking behavior is usually impulsive and senseless, the act of sleepwalking violence should seem random, and there should be no signs of premeditation.³⁰⁶ Victims of sleepwalking violence tend to be those who aroused the sleepwalker or who just happened to be nearby at the wrong time.³⁰⁷

3. The Balancing Test

All five of the following factors should be considered in determining the credibility of the defendant's sleepwalking defense: (1) evidence of sleepwalking at the time of the crime, (2) elapsed time between falling asleep and the criminal act, (3) medical factors, (4) trigger factors, and (5) circumstantial evidence.³⁰⁸ Courts should adopt a balancing test of these criteria when evaluating a sleepwalking defense.³⁰⁹ If the court determines that evidence supporting the defendant's claim of sleepwalking is credible, the jury should be instructed to weigh the evidence to determine if the defendant was sleepwalking at the time of the crime.³¹⁰ The relative weight of the five criteria depends

³⁰² See Fenwick, *supra* note 5, at 353-55; Mahowald et al., *supra* note 32, at 423, 426; Masand et al., *supra* note 30, at 652.

³⁰³ See *supra* note 52 and accompanying text.

³⁰⁴ See Fenwick, *supra* note 5, at 354-55; Mahowald et al., *supra* note 32, at 426.

³⁰⁵ See Fenwick, *supra* note 5, at 354; Howard & D'Orbán, *supra* note 6, at 920; Mahowald et al., *supra* note 32, at 426.

³⁰⁶ Howard & D'Orbán, *supra* note 6, at 920; see Mahowald et al., *supra* note 32, at 426.

³⁰⁷ See Mahowald et al., *supra* note 32, at 426.

³⁰⁸ See Fenwick, *supra* note 5, at 353-55; Gilmore, *supra* note 33, at 455, 457-58; Mahowald et al., *supra* note 32, at 420, 426; Masand et al., *supra* note 30, at 652.

³⁰⁹ See Fenwick, *supra* note 5, at 353-55; Mahowald et al., *supra* note 32, at 426.

³¹⁰ See Fenwick, *supra* note 5, at 353-55; Mahowald et al., *supra* note 32, at 426. A group of doctors and lawyers analyzing the recent prosecution of Kenneth Parks (in Canada) believe that the jury, in acquitting Parks on the charge of murder, employed a similar balancing test. See Broughton et al., *supra* note 206, at 263. Parks displayed most of the symptoms of sleepwalking outlined in this Note: the killing lacked motive, Parks had many sleepwalkers in his family, the timing of the attack was not inconsistent with the length of a sleepwalking episode and occurred within three hours of Parks falling asleep, and Parks had been suffering from severe stress and anxiety prior to the attack. *Id.* at 256, 260-62.

on the nature of the charge and the specific facts of the case.³¹¹ The judge should instruct the jury to acquit if the jurors reasonably believe the defendant was sleepwalking during the crime.³¹²

4. Affirmative Defense

Fairness demands that defendants bear the burden of proving sleepwalking.³¹³ The defendant has the best access to evidence of sleepwalking.³¹⁴ A family history of sleepwalking and previous instances of sleepwalking are more readily obtained by the defendant than the prosecution.³¹⁵ Requiring an affirmative sleepwalking defense deters unfounded sleepwalking defenses by placing the burden of proof on the criminal defendant.³¹⁶

The sleepwalking defense presumes that defendants who prove that they were sleepwalking at the time of the crime, and had no control over that behavior, should be acquitted.³¹⁷ The sleepwalking defense would be a complete defense to criminal culpability.³¹⁸ Sleepwalkers act without complete discretion over their actions and they should not be held criminally culpable for actions they cannot reasonably restrain.³¹⁹

CONCLUSION

On rare occasions, defendants facing criminal charges have claimed they were sleepwalking during the crime and should not be held culpable for their actions. Due to a lack of judicial and scholastic precedent on the topic, courts have been inconsistent in trying these defendants. The traditional response has been to treat sleepwalking as an unconsciousness, automatism, or insanity defense, whereby defendants must prove that they were mentally or physically incapacitated at the time of the criminal act. Those defenses have offered little consistency in application and have failed to respond to current medical

The jury acquitted Parks of murder, and the prosecution did not challenge the acquittal on appeal. *Id.* at 263.

³¹¹ See Fenwick, *supra* note 5, at 353–55; Mahowald et al., *supra* note 32, at 426.

³¹² See *Overton*, 815 A.2d at 522.

³¹³ See Morse, *supra* note 63, at 1651–52.

³¹⁴ See *id.*

³¹⁵ See *id.*

³¹⁶ See *id.*

³¹⁷ See Davidson & Walters, *supra* note 143, at 19–20.

³¹⁸ See *id.*

³¹⁹ See HART, *supra* note 73, at 153; Saks, *supra* note 62, at 434.

knowledge of sleepwalking, which suggests that sleepwalking is a unique physiological disorder. In response, there should be a new, separate sleepwalking defense, which takes into account the available medical information on sleepwalking. The sleepwalking defense should be a balancing test designed to provide juries with a consistent formula for determining if the defendant was sleepwalking at the time of the crime. It should be an affirmative defense, and the judge should instruct the jury to acquit if they believe the defendant was sleepwalking.

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