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ARTICLE

Transferred Culpability and the Problem of Voluntary Intoxication

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Abstract

This paper seeks to challenge principles of culpability transfer as they appear in both criminal law and moral philosophy. I begin by discussing the legal doctrine of substituted mens rea, focusing on Section 33.1 of Canada's Criminal Code. I argue that this doctrine violates the principle of contemporaneity, which there are sound philosophical reasons to accept. I then argue that the same reasons apply to tracing accounts of moral responsibility. Finally, drawing on the moral luck literature, I argue that cases of extreme intoxication are better analyzed in terms of harm-causation than culpability-transfer.

Keywords: intoxication; moral responsibility; criminal culpability; mens rea; criminal law; moral luck

In May of 2022, the Supreme Court of Canada unanimously struck down Section 33.1 of Canada's Criminal Code, which held that defendants could not claim a defense of "non-mental disorder automatism" if their automatism was the result of voluntary intoxication. The Court found that Section 33.1 violated "fundamental principles of justice" by allowing defendants to be liable for criminal punishment even if they did not possess the minimum requirements of culpability. This section had been rationalized by a principle of "substituted *mens rea*," whereby the intention to become intoxicated may be substituted for the intention to commit the *actus reus* of the offence.[1] Since the *mens rea* element of a criminal offence is typically conceptualized as a culpable mental state, this doctrine is essentially a culpability-transfer principle. As such, I think that careful analysis of this doctrine can provide an interesting and novel perspective on the philosophical debate over responsibility-tracing.

The Supreme Court did not rule that the doctrine of substituted *mens rea* was necessarily unconstitutional, only that the particular version codified in Section 33.1 was. Parliament has since amended that Section of the Criminal Code to preserve the possibility of transferring culpability in cases of voluntary intoxication while attempting to avoid the problems raised by the Court. I argue here that while the revised Section 33.1 may not violate fundamental principles of justice, it still relies on the morally problematic doctrine of substituted *mens rea* and thus ought to be rejected. Specifically, I argue that substituted *mens rea* violates the principle of contemporaneity——which holds that the *mens rea* element must co-occur with the *actus reus* element——and that there are cogent reasons to accept this principle. I further argue that the same reasons apply to tracing

[1]This doctrine is also referred as the "*Leary* rule," as it was first articulated in *Leary v. The Queen* [1978] 1 SCR 29, though not under the description "substituted *mens rea*"; that moniker first appears in *R v. Bernard* [1988] 2 SCR 833 and again in *R v. Daviault* [1994] 3 SCR 63.

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accounts of moral responsibility defended in the philosophical literature. I agree with proponents of transfer principles that one can be culpable for what happens at a later time in virtue of what one does at an earlier time. However, I conceive of the relevant relation connecting the earlier and later times in terms of harm-causation rather than culpability-transfer. This provides the conceptual resources to hold people morally and legally culpable for what they do while in a state of extreme intoxication; however, doing so requires reconceptualizing the fundamental moral wrong or criminal offense as that of becoming dangerously intoxicated and any assault that occurs while intoxicated as a causal consequence of that offense.[2] I argue that the causal analysis is not only conceptually preferable vis-à-vis the principle of contemporaneity and its moral analog but that it coheres more plausibly with reflection on the nature of resultant moral luck.

1. The Problem of Voluntary Intoxication

In order to introduce the challenge that intoxication poses with respect to blameworthiness, consider the following three cases:

> EXTREME INTOXICATION:[3] Henri Daviault spent the day at a bar where he consumed seven or eight bottles of beer. Later that evening, at the victim's request, he delivered a bottle of brandy to her home. The two each had a glass of the brandy, and the woman fell asleep in her wheelchair shortly after drinking about half of her glass. Daviault proceeded to consume the remainder of the bottle. When the woman awoke in the night to go to the bathroom, Daviault grabbed her, wheeled her into the bedroom, threw her on the bed, and sexually assaulted her. Daviault testified that he had no recollection of the events that occurred between consuming the first glass of brandy and waking nude in the victim's bed. A pharmacologist testified that when in a state with the hypothesized blood-alcohol level, an "individual loses contact with reality and the brain is temporarily dissociated from normal functioning," that "the individual has no awareness of his actions when he is in such a state and will likely have no memory of them the next day" (*Daviault* at 64).

> SPIKED PUNCH.[4] Cindy Talock attended a party where, over the course of four hours, she voluntarily consumed three cups of a punch mixed with vodka. Unbeknownst to Talock, the vodka punch had been spiked with a date-rape drug that produced amnesia and caused Talock to enter a state akin to automatism whereby her conduct was no longer under her agential control. While in this state, Talock attempted to drive home; she was stopped by police officers and charged with driving under the influence.

> INVOLUNTARY DISINHIBITION:[5] Barry Kingston was involved in a business dispute with a couple who employed Kevin Penn to obtain damaging information on Kingston which they planned to use as leverage in the dispute. Kingston had pedophilic tendencies, but no prior instances of having acted on those tendencies. One evening Penn invited Kingston to his flat and served him a beverage that had been surreptitiously drugged with a substance known to have a disinhibiting effect. After unwittingly consuming the intoxicant, Kingston was led to a bedroom where a naked 15-year-old boy was lying on the bed,

[2]To clarity: I am not arguing that that it is possible to interpret or reconceptualize the revised Section 33.1 on the causal model. Rather, I argue that we should eliminate that Section altogether and craft a novel offence of dangerous intoxication, or dangerous intoxication causing harm.

[3]*R v. Daviault* [1994] 3 SCR 63.

[4]*R* v. *Talock* [2003] SKCA 69.

[5]*R* v. *Kingston* [1995] 2 AC 355.

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> unconscious from having also been drugged by Penn. Under the influence of the substance he unwittingly consumed, Kingston proceeded to engage in sexual acts with the boy.

The first two cases involve instances of extreme intoxication in which the defendant entered a state akin to automatism, meaning that they no longer had basic agential control over their conduct. In contrast, Kingston did have sufficient control to count as acting voluntarily, and he was fully aware of his actions. There is, however, a question as to whether Kingston was adequately reasons-responsive, whether the effect of the substance surreptitiously administered sufficiently compromised his volitional control as to undermine or significantly diminish his blameworthiness. Thus, all three cases seem to be instances in which the following condition holds:

> NO CONTROL: A defendant *D* does not satisfy the kind of control necessary for culpability at the time that *D* engages in wrongful conduct that causes or constitutes a harm to some victim.[6]

For the purposes of this paper, when I speak of "intoxicated offenders" I am referring to cases that satisfy this condition. That is, I intend the description "intoxicated offender" as a shorthand for the more accurate but more cumbersome, "offenders who are intoxicated to such an extent that they no longer possess the kind of control required for culpability." I do not mean to imply that NO CONTROL is true of all cases of intoxicated wrongdoing. Douglas Husak (2012) has persuasively argued that in many cases, intoxication neither incapacitates nor causes one to be unaware of morally relevant facts about one's situation, but rather "alters the degree of care we exhibit for the interests of others" (373). I agree with Husak that even if intoxication is the cause of a person's lack of concern for the rights and interests of others—even if one would have manifested sufficient concern but for one's intoxication—that merely identifies a cause, not an excuse. However, the cases I am interested in are either, like Daviault and Talock, cases of extreme intoxication akin to automatism, or cases like Kingston in which there is sufficient reason to doubt the agent's reasons-responsiveness or normative competence.[7]

While all three cases may be instances of NO CONTROL, the Talock and Kingston cases differ from the Daviault case in that Daviault seems to be responsible for putting himself in the culpability-undermining condition. That is, Daviault arguably also satisfies the following condition:

> CULPABLE PAST: *D* culpably brought about the conditions which would ordinarily excuse *D* from culpability for the wrong committed at *t*.

To many, this fact makes a difference to Daviault's blameworthiness for what he did while in a state of intoxication. That is, many find it problematic that a person should be able to escape blameworthiness or (desert-based) criminal liability by culpably creating the conditions of their own defense. As one U.S. state court put the worry:

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[6]It is commonly accepted that there are (at least) two fundamental conditions on moral responsibility: a control condition and a knowledge condition (see Fischer & Ravizza, 1998, 12–14), though there is disagreement on how to understand these conditions. While it is (nearly) universally accepted that the kind of basic agential control that is absent in the case of automatism is necessary for responsibility, proponents of a "quality of will" analysis of moral responsibility may reject the kind of reasons-responsiveness that is at question in the Kingston case.

[7]Following Brink and Nelkin (2013), I prefer the term "normative competence" to "reasons-responsiveness." As Brink and Nelkin characterize it: "Normative competence…involves two forms of reasons-responsiveness: ability to recognize wrongdoing and an ability to conform one's will to this normative understanding," where "[b]oth dimensions of normative competence involve norm-responsiveness," which allows us to "distinguish moral and criminal responsibility at least in part based on the kinds of norms to which agents must be responsive" (2013, 293).

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> [T]he defense of insanity should never be extended to apply to voluntary intoxication in a murder case. It would not only open wide the door to defenses built on frauds and perjuries, but would build a broad, easy turnpike for escape. All that the crafty criminal would require for a well-planned murder…would be a revolver in one hand to commit the deed, and a quart of intoxicating liquor in the other with which to build his excusable defence.[8]

While this specifically references the insanity defense, the same reasoning would seem to apply to any defense, the conditions of which are culpably created by the defendant. That is, there is strong intuitive support for a general principle along the following lines:

> NO CULPABLY-CREATED EXCUSE: *D* ought not escape accountability by appealing to some excusing condition(s) which *D* culpably brought about.

I think that something like this principle explains the widespread view that it is unjust for a person in Daviault's circumstances to escape liability for rape.

One common way to accommodate NO CULPABLY-CREATED EXCUSE is by a tracing or transfer principle, whereby one's culpability for a wrong committed at some later time *t2* is traced back to some earlier time *t1*. For example, Daviault's culpability for sexual assault at *t2* can be traced back to his culpability for becoming extremely intoxicated at *t1*. In this essay, my aim is to defend an alternative approach, which I call the causal model, as it conceives of the relationship between *t1* and *t2* as a matter of harm-causation rather than culpability-transfer.[9] In broad outline, we can characterize the two approaches as follows:

> TRANSFER ANALYSIS: If *D* culpably performs an action at *t1* that leads to *D*'s committing a wrong at *t2*, then even if *D* fails to satisfy the conditions of culpability at *t2*, *D*'s culpability at *t1* may transfer to *t2*, such that *D* counts as culpable at *t2*.

> CAUSAL ANALYSIS: If *D* culpably performs an action at *t1* that leads to *D's* doing something at *t2* that causes or constitutes a harm, then *D* may be held culpable for the harm at *t2* as a causal consequence of the action performed at *t1*.

When I say that *D* "counts as" culpable in the transfer analysis, I mean this to be neutral between the view that *D* actually *is* culpable at *t2* (that the culpability literally transfers) and the view that we are justified in treating *D as if* they are culpable at *t2* (as a moral or legal fiction). Like the transfer analysis, the causal analysis has the resources to hold Daviault culpable for the harm he causes to his victim. However, the case is complicated, and I argue in this paper that the causal analysis provides a superior way of conceptualizing Daviault's wrongdoing and of framing the fundamental question that the trier of fact must decide in order to determine his culpability.

2. Criminal Culpability and the Doctrine of Substituted *Mens Rea*

While the ultimate goal of this paper is to make a contribution to the literature on moral responsibility, I think that insight into the nature and significance of moral culpability can be gleaned by looking at the conceptual architecture and substantive doctrines of criminal law. Criminal offenses are generally comprised of both an *actus reus* and *mens rea* element. The *actus reus* fundamentally consists of a voluntary act, though it can and often does include the causation of certain specified harms. For example, the *actus reus* of a homicide offense is a voluntary act causing

[8] *State v. Arsenault* 152 Me. 121, 124 A.2d 741 (Maine 1956).

[9] The account offered here is similar to that defended by Matt King (2014, 2017) and Craig Agule (2016), whom I read as defending the causal analysis.

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the death of another human being. The *mens rea* element is generally understood as referring to a culpable mental state, but this can be misleading as it is important to distinguish two senses of culpability at work in the criminal law: narrow culpability and broad culpability (Brink, 2019, 2021). In modern jurisprudence, the term "*mens rea*" generally refers to the mental element of an offence—whether one was purposive, knowing, reckless, or negligent in causing some harm. Narrow culpability is an ingredient in the wrongdoing—together with *actus reus*, it constitutes the specific wrong for which one is being blamed. Broad culpability, by contrast, is "the responsibility condition that makes wrongdoing blameworthy and without which wrongdoing is excused" (Brink, 2019, 361). If a person intentionally causes some harm, they are narrowly culpable for the harm; the harm may be attributed to their agency as something for which they may be rightly called to answer. Narrow culpability, however, does not suffice for blameworthiness, as a person may have a valid excuse; for example, they may lack normative competence or have acted under duress.[10] Offenses are concerned with narrow culpability; defences are concerned with broad culpability or the lack thereof. Given this distinction, it is important to clarify whether it is narrow or broad culpability that is being transferred. In this section, I shall focus on the doctrine of substituted *mens rea*, which can be understood as a narrow culpability transfer principle. I use Section 33.1 of Canada's Criminal Code as a case study for discussing this doctrine.

In the EXTREME INTOXICATION case, Henri Daviault voluntarily consumed an excessive quantity of alcohol, which caused his brain to dissociate from normal agential functioning. He then raped a woman while in this state of extreme intoxication. The question before the court was whether Daviault could avail himself of the "non-mental disorder automatism" defence, given that the automaton-like state was caused by his own voluntary intoxication. At the time of this case, the Criminal Code was silent on this question. While the trial judge allowed the defence, the Appeals Court, disallowed the defence, relying on past precedent. Overturning the precent on which the Appeals Court relied, the Supreme Court ruled that disallowing the defence of non-mental disorder automatism violated fundamental principles of justice by essentially "deny[ing] that even a very minimal mental element is required for sexual assault" (*Daviault* at p. 65). This decision led to public outcry and prompted the Canadian Parliament to amend the Criminal Code to explicitly rule out the defence in cases of voluntary intoxication by adding the following section:

> **33.1** It is not a defence to an offence … that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence.

This section essentially expresses an inculpating principle, or, more accurately, a defeater-defeater. It is generally taken to be a fundamental principle of justice that (desert-based) criminal liability requires a voluntary act performed from a culpable mental state or *mens rea.* Thus, the absence of voluntariness or *mens rea* would ordinarily be taken as defeating culpability. Section 33.1 essentially states that when the absence of such a mental element is the result of voluntary intoxication, it no longer functions as a defeating condition—the voluntariness of the intoxication defeats the defeating force of the fact that *D* lacks voluntariness or a culpable mental state at the time of the offence.

The objective of the statute is certainly pressing. As Parliament noted in the preamble to Bill C-72, proposing the amendment to the Criminal Code:

> [V]iolence has a particularly disadvantaging impact on the equal participation of women and children in society and on the rights of women and children to security of the person and to the equal protection and benefit of the law as guaranteed by sections 7, 15 and 28 of the Canadian Charter of Rights and Freedoms…[T]he Parliament of Canada recognizes that there is a close association between violence and intoxication and is concerned that self-

[10]In Anglo-American criminal law, there is no general defence of "normative incompetence," but rather the more constrained defence of "insanity" or "mental disorder." There is disagreement among scholars about whether the insanity defence should be broadened to include a general defence of normative incompetence. See David Brink (2013) for discussion.

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> induced intoxication may be used socially and legally to excuse violence, particularly violence against women and children.[11]

Bodily autonomy is one of the most sacred interests and most stringent rights that we have, and special concern is owed to those groups who are particularly vulnerable to having these rights and interests violated. However, it is also important that we do not protect these interests at the expense of fundamental principles of justice with respect to criminal liability.

According to Canadian law, one such fundamental principle of justice is that criminal liability requires moral fault.[12] Since the *mens rea* element of an offence is understood as necessary for fault, this means that there cannot be strict criminal liability, that is liability in the absence of elemental *mens rea.* One pressing worry is that, by removing the need for a culpable mental state, Section 33.1 appears to turn the serious criminal offence of assault or sexual assault into the functional equivalent of a strict liability offence. In order to avoid this conclusion, courts have created the legal fiction of "substituted *mens rea*":

> In such a situation, self-induced intoxication is substituted for the mental element of the crime… [T]he intentional act of the accused to voluntarily become intoxicated is substituted for the intention to commit the sexual assault or for the recklessness of the accused with regard to the assault. (*Daviault*, at p. 87).

The fiction consists in the fact that the court is treating *D as if* they acted with the necessary volition and intent in committing the offence at time *t2*, despite the fact that *D* lacked these mental elements. The fiction is putatively justified by the fact that *D* did possess these mental elements when they became intoxicated at the earlier time *t1*.

The doctrine of substituted *mens rea* expresses a general permission to substitute one *mens rea* for another under certain circumstances, and particular instantiations will differ depending on how one specifies the conditions that license the substitution. The original formulation of Section 33.1 is particularly problematic because it does not add any conditions on what must be true at *t1* to license the substitution of *mens rea* beyond the mere fact that *D* intended to become intoxicated to any degree.[13] That is, it gives rise to an unrestricted version of the doctrine:

> UNRESTRICTED MENS REA SUBSTITUTION: If *D* voluntarily acts at *t1* with the intention of becoming intoxicated to any degree, then *D*'s intention to become intoxicated may be substituted for the intention to commit the *actus reus* of the offence at *t2.*

[11] https://www.parl.ca/DocumentViewer/en/35-1/bill/C-72/royal-assent/

[12] See *R v. Hundal*: "Certainly every crime requires proof of an act or failure to act, coupled with an element of fault which is termed the *mens rea*" [1993] 1 SCR 867, at 882; *R v. Cribbin*: "The principle of fundamental justice which is at stake in the jurisprudence dealing with the fault element in crime is the rule that the morally innocent should not be punished" [1994] 89 CCC (3d) 67, at 87; *R v. ADH*: "An important part of the context…is the presumption that Parliament intends crimes to have a subjective fault element" [2013] 2 SCR 269, at para. 23.

[13] The full text of the original statute is as follows: "**33.1** (1) It is not a defence to an offence … that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused departed markedly from the standard of care as described in subsection (2). (2) For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person, *while in a state of self-induced intoxication* that renders the person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person." (https://laws-lois.justice.gc.ca/eng/acts/c-46/section-33.1-20030101.html, added emphasis) The appeal to a standard of care in this subsection is reasonable, but by defining that standard in terms of *D*'s conduct while in a state of extreme intoxication, it ends up essentially placing no restrictions on what must be true at *t1* other than an intention to become intoxicated to any degree.

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This means that even if the nature and degree of intoxication is vastly different from what one intended or was even foreseeable, the intention to become intoxicated may be substituted for the intention to commit the later offense. Thus, even Cindy Talock's intention to become mildly intoxicated may be substituted for the intention to drive while intoxicated, despite the fact that she had no idea that she was ingesting a substance that would cause her to enter a state akin to automatism. In another case,[14] a man voluntarily smoked marijuana with the intention of relaxing and falling asleep but ended up in a state akin to automatism in which he assaulted his roommate, caused extensive property damage, and had to be subdued by four police officers. Given how extraordinary and unforeseeable his reaction was to marijuana, it seems unfair to infer an intent to engage in assault from the intent to smoke marijuana for the purpose of relaxing.

In 2022, the Supreme Court of Canada struck down the unrestricted version of the doctrine of substituted *mens rea* as unconstitutional. Concurrently ruling on three different cases involving defendants who experienced psychotic breaks from reality resulting from an overdose of prescription medication (*Sullivan*), psilocybin-containing magic mushrooms (*Chan*), and a combination of alcohol and psilocybin (*Brown*), the Supreme Court found that the unrestricted version of substituted *mens rea* "amounts to a constitutionally improper substitution,"[15] because it violates fundamental principles of justice by allowing for criminal liability even where there exists "reasonable doubt as to the essential elements of the offence" (*Brown*, para. 99). The Supreme Court did not, however, rule that it is always improper to substitute "the fault and voluntariness of intoxication…for the fault and voluntariness to commit the offence" (*Brown*, para. 103). Instead, it held that such a substitution would be proper only if "the fault attaching to the intoxication is such that the person can fairly be held accountable for their violent conduct" (*Brown*, para. 103). That is, while the Court ruled that being criminally at fault for becoming intoxicated, say by consuming an illegal substance, is not sufficient to make one criminally at fault for the harm caused as a result of that intoxication, it left the door open for a different substitution principle that could allow one to infer fault for wrongdoing performed while intoxicated from fault for becoming intoxicated in the first place.

The Canadian Parliament responded to these rulings by amending Section 33.1 of the Criminal Code to include an "objective foreseeability" constraint on the permissibility of *mens rea* transfer, along the following lines:[16]

> RESTRICTED MENS REA SUBSTITUTION: If *D* voluntarily consumes a substance at *t1* with the intention of becoming intoxicated and it is objectively foreseeable to a person in *D*'s circumstances that consuming that substance imposes a risk of causing extreme intoxication and/or causing *D* to harm another person, then *D*'s intention to become intoxicated may be substituted for the intention to commit the *actus reus* of the offence at *t2*.

[14] *R v. Brenton* [1999] 28 CR (5th) 308 (NWTSC).

[15] *R. v. Brown*, 2022 SCC 18 (CanLII), <https://canlii.ca/t/jp648>, retrieved on 2023-06-03, at p. 9.

[16] The full text of the relevant portion of the revised 33.1 is: "(1) A person who, by reason of self-induced extreme intoxication, lacks the general intent or voluntariness ordinarily required to commit an offence…nonetheless commits the offence if (a) all the other elements of the offence are present; and (b) before they were in a state of extreme intoxication, they departed markedly from the standard of care expected of a reasonable person in the circumstances with respect to the consumption of intoxicating substances. (2) For the purposes of determining whether the person departed markedly from the standard of care, the court must consider the *objective foreseeability* of the risk that the consumption of the intoxicating substances could cause extreme intoxication and lead the person to harm another person." (https://laws-lois.justice.gc.ca/eng/acts/C-46/section-33.1.html; added emphasis). The essential difference between this and the original version of 33.1 is that the revised version defines the "standard of care" in terms of *D*'s epistemic circumstances *prior* to becoming intoxicated. The reference to objective foreseeability of the risk posed by one's intoxication may lead one to think that Parliament adopted the causal analysis in its revised version of 33.1 (as suggested by an anonymous referee). However, even in the revised 33.1, that condition is used to license a transfer of *mens rea* from *t1* to *t2* in order to establish the elements of the offence of assault at *t2*. In contrast, the causal analysis, as I articulate in the final section, conceptualizes the assault as a causal consequence of the offence, not the offence itself.

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This version of the principle is far more plausible, as the objective foreseeability condition does ensure some type of moral fault not just for the intoxication but for the resulting harm.[17] Thus, it no longer appears to violate fundamental principles of justice.[18] However, I argue that we ought to reject even the restricted version of the doctrine and thus the revised s. 33.1, as the restricted version violates another plausible principle of criminal liability.

It is commonly taken to be a foundational principle of criminal liability that "an act cannot be guilty unless accompanied by a guilty mind" (*actus non facit reum nisi mens sit rea*). This dictum is often referred as the *principle of contemporaneity*,[19] which holds that criminal liability requires not only the existence of moral fault but also that the guilty mind literally accompany or co-occur with the guilty act:

> Contemporaneity: Desert-based criminal liability requires that the *mens rea* element co-occur with the (voluntary act component of the) *actus reus* element of the offence for which one is being called to account.

While proponents of transfer or substitution principles may be inclined to reject contemporaneity, I think the principle can be supported by reflection on the role that elemental *mens rea* plays in establishing desert-based liability.

According to an independently plausible view, the *mens rea* element of a criminal offense essentially functions to indicate the quality of will manifested by one's volitional action (Westen, 2006; Alexander & Ferzan, 2009). When it comes to criminal liability, I take the relevant "quality" to be the degree of concern one displays for others' rights and protected interests. I further understand the relevant will as referring to that which constitutes or gives rise to the voluntariness of the voluntary act component of *actus reus*. Putting these together, I take the moral quality of an action to be a matter of the quality of will manifested by the will that constitutes or gives rise to that action. Another way to put this point is that what makes something a moral *wrong* is not just the particular voluntary movement of the body, but the quality of will (i.e. concern for others) manifested by that movement. Picking up a book is not an offense; picking up a book in order to deprive the owner of it is. Purposefully killing a person is a distinct offense from and manifests a worse quality of will than recklessly killing a person. The *mens rea* element is not an independent condition of culpability, like being reasons-responsive, that is separable from the wrongful act. Rather, it is a constituent component of the wrongful action itself.[20] Thus, one reason for thinking that elemental *mens rea* must co-occur with the *actus reus* is that these two elements together constitute the moral quality of the particular wrong for which one is being called to answer. When one combines the *mens rea* from *t1* with the *actus reus* at *t2*, one is changing the moral quality of the action—one is not just supposing the defendant to have a particular *mens rea* at a different time from when they actually possessed it but holding a defendant liable for a specific action that they never performed.

[17]That is, assuming one accepts negligence as a basis for moral fault. For scepticism of negligence as a basis for criminal liability, see Alexander and Ferzan (2009, ch. 3).

[18]Whether this is right depends on how one distinguishes violations of *fundamental* justice from other instances of injustice. I take the relevant principle of fundamental justice here to be the requirement of moral fault; since the revised s. 33.1 does require moral fault, it does not violate that principle. However, as I argue in this section, the revised s. 33.1 is still morally problematic or unjust because it punishes as if the defendant satisfies a standard of subjective fault (e.g. intention or knowledge) in virtue of establishing objective fault (failing to observe a reasonable standard care). It is not germane to the central argument whether this counts as a violation of *fundamental* justice.

[19]See Simester & Sullivan: "As a general rule, the actus reus and mens rea of a crime must coincide in time" (2007, 159); Dimock: "The *actus reus* and *mens rea* must be related in various ways, so that the *mens rea* is directed to the *actus reus* and occurs more or less simultaneously; this is often referred to as the principle of contemporaneity. Together these requirements find expression in the principle that '*actus non facit reum nisi mens sit rea*,' roughly, that no act can be criminal unless it is the product of a guilty mind" (2009, 340).

[20]Following David Brink: "one kind of culpability is an ingredient in wrongdoing itself, describing the agent's element *mens rea*…[w]e might call this *narrow culpability*" (2019, 348).

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The idea that the *mens rea* and *actus reus* elements jointly constitute the particular wrong or offence for which one is being called to answer I think not only supports the principle of contemporaneity, but the following plausible corollary:

> CONTEMPORANEITY-COROLLARY: Desert-based criminal liability cannot depend on ascribing a *mens rea* to a defendant that reflects a worse quality of will than what they actually manifested in committing the *actus reus* of the offence.

The doctrine of substituted *mens rea*, even in its restricted form, violates this principle, because one can intend to become intoxicated while merely being negligent with respect to the resulting harm. To illustrate, consider the following fictional variations on Kingston case introduced in Section 1:

> PURPOSEFUL INTOXICATION: Purposeful-Kingston knowingly consumes an intoxicating beverage in order to lower his inhabitation for the purpose of realizing his goal of having sexual relations with an unconscious boy.

> NEGLIGENT INTOXICATION: Negligent-Kingston consumes a beverage that he knows to contain a substance that can have a disinhibiting effect. Given Kingston's pedophilic tendencies, consuming such a substance violates a reasonable standard of care, even if he lacks knowledge of any specific risk such as the presence of an unconscious boy in the next room.

In PURPOSEFUL INTOXICATION, the causal and transfer analyses are functionally equivalent, as both views hold Purposeful-Kingston to be equally blameworthy as a person who knowingly committed sexual assault without being intoxicated. In this scenario, it makes no difference whether one takes the particular *mens rea*/*actus reus* pair that occurs at *t1* or *t2*—or the combination of the *t1 mens rea* and the *t2 actus reus*—to constitute the blameworthy offense, because the *mens rea* of purposefully violating a person's bodily autonomy is present at both times. The quality of will manifested at *t1* is just as morally bad as that manifested at *t2*, thus Purposeful-Kingston is equally blameworthy whether we focus on *t1* or *t2*.

The two analyses differ with respect to NEGLIGENT INTOXICATION. According to RESTRICTED SUBSTITUTED MENS REA, Negligent-Kingston is equally blameworthy as Purposeful-Kingston. Because Negligent-Kingston fails to satisfy a standard of reasonable care at *t1*, the *intent* to become intoxicated at *t1* gets substituted for the *intent* to commit sexual assault at *t2*. By contrast, on the view that takes the wrongful action as occurring at *t1*, Negligent-Kingston and Purposeful-Kingston are not equally blameworthy, because the quality of will manifested at *t1* is importantly different in the two cases. Purposeful-Kingston engages in intentional wrongdoing, which is morally worse—displays less concern for the rights and interests of others—than what is manifested by Negligent-Kingston's negligent wrongdoing. The causal analysis does allow for Negligent-Kingston to be blameworthy for the violation of the boy's rights and interests as a causal result of his becoming dangerously intoxicated. However, in contrast to the transfer analysis, he is liable for this as a negligence offense, not an instance of intentional wrongdoing.

Returning to Section 33.1, the fundamental problem is that it violates the CONTEMPORANEITY-COROLLARY in precisely this manner. For example, even if we accept that Daviault does violate a reasonable standard of care with respect to the excessiveness of his alcohol consumption, that would only establish a negligent *mens rea* (or "objective fault" as it is conceptualized in Canadian law). However, he is charged with sexual assault, which requires a *mens rea* of intention (or "subjective fault").[21] Thus, the revised s. 33.1 allows the Court to find defendants criminally

[21]On the distinction between objective and subjective fault, see *R v. Hundal*: "The constitutional requirement of *mens rea*… can require proof of a positive state of mind such as intent, recklessness or wilful blindness…[a]lternatively, the *mens rea* or

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liable for an offences that ascribe a morally worse *mens rea* than what was actually manifested in committing the *actus reus* of the offence for which they are charged. For this reason, we should reject even the revised s. 33.1 and the restricted doctrine of substituted *mens rea* on which it relies. In the final section, I argue that we should instead adopt a novel offence of dangerous intoxication defined in terms of the *mens rea* manifested by the voluntary act of becoming dangerously intoxicated.

3. Broad Culpability Transfer and the Foreseeability Constraint

One way to think of the difference between the legal doctrine of substituted *mens rea* and tracing or transfer views of moral responsibility is in terms of the distinction between narrow and broad culpability introduced in the previous section. The doctrine of substituted *mens rea* was an instance of a narrow culpability transfer principle. In the previous section, I argued that this doctrine is problematic because elemental *mens rea* is a constitutive part of the wrongful action for which one is being called to account. By contrast, broad culpability—that is the responsibility condition that makes wrongdoing blameworthy—is separable from the wrongful action, as illustrated by the Kingston case. Kingston was not in a state akin to automatism, nor did he deny awareness of his actions. As such, he seems to satisfy both the *mens rea* and *actus reus* elements of the offence of sexual assault—he intentionally and voluntarily engaged in sexual activity with a person he knew was unable to consent. There is no need to substitute *mens rea*, because the *mens rea* which partly constitutes the offence of rape is in fact present at *t2*. What is (arguably) missing at *t2* is broad culpability, specifically the volitional ability to conform one's will to the recognition of the reasons not to perform sexual acts on an unconscious person. It might seem that a principle by which broad culpability may be transferred from *t1* to *t2* is less problematic than a principle of substituted *mens rea*, because the former does not rely on attributing fictional actions or mental states to defendants. Rather, it establishes a historical condition on blameworthiness for a wrong that the defendant in fact has committed. Despite this difference, I argue in this section that similar considerations that spoke against narrow culpability transfer also apply to broad culpability transfer.

To begin, we can formulate a principle of broad culpability transfer along the following lines, where I use the term "control condition" to refer to the kind of control required for culpability while remaining neutral on how precisely to specify such control:

> BROAD CULPABILITY TRANSFER: if there is some time *t1* such that (i) *D* satisfies the control condition with respect to performing C1 at *t1* and (ii) it is reasonably foreseeable to *D* at *t1* that performing C1 will result in (or unjustifiably risk) *D* doing something that causes or constitutes a harm at some later time *t2*, then *D* may be held culpable for what *D* does at *t2* (whether or not *D* satisfies the control condition at *t2*).

In this section, I argue that this principle gets both the scope and degree of culpability wrong. I argue that, on a plausibly restricted version of the foreseeability condition in BROAD CULPABILITY TRANSFER, the transfer analysis essentially collapses into the causal analysis in a way that deprives the former of its principle selling point. I then argue that, even when the two analyses agree on the scope of a person's culpability, the transfer analysis gets the degree of culpability wrong.

The scope problem for the transfer analysis can be illustrated by looking at the debate between Manuel Vargas (2005) and John Martin Fischer and Neal Tognazinni (2009) regarding foreseeability and tracing. Vargas challenges tracing accounts of responsibility by presenting a series of examples which purport to have the following structure: intuitively, *D* is culpable for doing something that causes or constitutes a harm at time *t2*, *D* does not satisfy the conditions for culpability at *t2* (by failing to be appropriately reasons-responsive at *t2*), and there is no prior time *t1*

element of fault can be satisfied by proof of negligence whereby the conduct of the accused is measured on the basis of an objective standard without establishing the subjective mental state of the particular accused" [1993] 1 SCR 867, at 882.

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which satisfies BROAD CULPABILITY TRANSFER with respect to the wrongful act performed at *t2*. In one of these scenarios, Vargas presents the reader with the case of Jeff, a middle-aged man who is habitually "rude and inconsiderate about the feelings of others" (2005, 271). Part of Jeff's job is to inform employees when they have been laid off, and he does so "in an altogether rude and insensitive fashion" (2005, 271). The case is described in such a way that Jeff seems clearly blameworthy for the callous way in which he fires employees and the psychological harm caused by his insensitivity. However, Vargas intends the case to be one in which Jeff does not satisfy the control condition because he is incapable of appreciating the reasons there are not to be rude and insensitive to others' feelings. Vargas's description of the case does not spell out the grounds for thinking that Jeff is not appropriately reasons-responsive, other than to note that he is completely "unreflective" about his lack of regard for the feelings of others. We are, however, told that this insensitivity is the result of a "hormone-ridden" plan undertaken by 15-year-old Jeff to cultivate the kind of "jerky" character that would be attractive to his female classmates. We are also told that the plan worked and Jeff ended up fully internalizing the jerk-like character-traits including a lack of sensitivity to the normative force of others' feelings.

For this paper, I shall grant, *arguendo*, that Jeff is not appropriately reasons-responsive at the time that he fires his employees. The question, for present purposes, is whether Jeff's blameworthiness for the behaviour toward the people he fired can be traced back to his adolescent plan. According to Vargas, it cannot because, "nothing in *this* decision satisfies the knowledge condition for his subsequent uncouth approach to employee termination" (Vargas, 2005, 277). In response, Fischer and Tognazzini (2009) argue that Jeff does satisfy the foreseeability condition.[22] They begin by distinguishing three different ways of describing the relevant outcome: (537).

> (Outcome 1) Jeff fires *those* employees who work for *that* company on *that* precise day in *that* precise manner.
>
> (Outcome 2) Jeff fires some of his employees at some company or other at some point in the future in a despicable manner as a result of his jerky character.
>
> (Outcome 3) Jeff treats some people poorly at some point in the future as a result of his jerky character.

Fischer and Tognazzini note that as the description of the outcome becomes much more general, "it becomes much more plausible to suppose that they are reasonably foreseeable to Jeff's younger self" (2009, 537). They concede that it would be highly implausible to suppose that the teenage Jeff could have foreseen Outcome 1, but that Outcome 3 was reasonably foreseeable (even if he did not actually foresee or consider it at the time). Importantly, Fischer and Tognazzini take this to be sufficient for Jeff to be culpable *for firing those particular employees*:

> Why do we hold Jeff responsible for unreflectively firing his employees in such a despicable manner? We hold him responsible partly because he freely decided to become a jerk at some point in the past, and it is reasonable to expect Jeff's younger self to have known that becoming a jerk would in all probability lead him to perform jerky actions. Need Jeff have known that his becoming a jerk would specifically lead to the firing of *those particular employees* on *that particular day* in the future in order to be morally responsible for firing them in the way he did? Surely not. (2009, 538).

[22]Fischer and Tognazzini also challenge the claim that Jeff is not reasons-responsive, that "Insofar as it is plausible to suppose that there is a mechanism of *nondeliberative habit*, there seems to be no problem in supposing that this mechanism might be both moderately reasons-responsive and also one for which the agent has taken responsibility" (2009, 536). I am inclined to agree. Here my goal is to challenge their view regarding the foreseeability condition.

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The problem with this line of thought is that it ignores the lesson drawn in the previous section regarding the principle of CONTEMPORANEITY and the way in which the *mens rea* and *actus reus* elements jointly constitute the specific offence for which one is being held to account. I take action-descriptions to be the moral counterpart to criminal offences in the sense that they constitute the specific wrong for which one is being blamed.

I take the three descriptions of the outcome of Jeff's self-induced jerkiness to pick out three distinct wrongs for which one could be holding Jeff to account. The fact that Outcome 3 is reasonably foreseeable may suffice to make Jeff culpable for Outcome 3, but it is not clear why the scope of things for which Jeff is culpable should also include Outcome 1. Fischer and Tognazzini's reasoning seems to presuppose something like the following principle:

> SCOPE-ADDITION: For any outcome O and descriptions *d1* and *d2*, if *D* is culpable for O under *d1*, then *D* is also culpable for O under *d2*.

I take this principle to be false. Consider, for example, the following descriptions:

> (Outcome 4) Talock attempts to drive home while in a state akin to automatism.
>
> (Outcome 5) Talock tells an off-colour joke that makes many of the party-goers uncomfortable.
>
> (Outcome 6) Talock does something ill-advised.

In the same way that Outcome 3 (treating some people poorly) describes a general type of behavior that is multiply realized through several distinct more specific actions, occurring at different times and places, Outcome 6 (doing something ill-advised) also describes a general type of behavior that is multiply realized through more specific actions, including Outcomes 4 (intoxicated driving) and 5 (telling off-colour jokes). Even if Talock is culpable for Outcome 6, it does not follow that Talock is also culpable for the specific manifestation of that outcome as described in Outcome 4. Rather than SCOPE-ADDITION, we should accept:

> SCOPE-RESTRICTION: A person is culpable for some outcome only if that outcome is reasonably foreseeable under the same description under which one is being blamed.

If Jeff is being blamed for his general jerkiness, then it suffices that Outcome 1 is foreseeable. However, if Jeff is being blamed not just for generally jerky behaviour, but for wronging the specific people that he wronged, then that specific outcome must be foreseeable. The reason it is important to distinguish these is that they represent two distinct types of wrong—one is a general wrong that is not directed at anyone in particular and the other is a *directed* wrong done specifically *to* another person.[23] It is not just that the second type causes harm to a specific person, but that the wrongdoer's ill-will was directed specifically at that person. One way to think of this contrast is in terms of the kind of recompense or apology that would be owed:[24]

> (Apology 1) I apologize for being such a jerk to *you* and for the hurt that I caused *you* by firing *you* in such a cruel manner.
>
> (Apology 2) I apologize for my general jerky demeanor and to anyone who may have been harmed as a result of this jerkiness.

[23]I borrow the term "directed" wrong from the literature on "directed duties." See, e.g., May (2015), Zylberman (2014).

[24]This intuition is supported by the practice in Alcoholics Anonymous of making amends, where Step 9 specifically calls for members to make "*direct* amends to…people wherever possible, except when to do so would injure them or others." (https://alcoholicsanonymous.com/4-ways-to-make-amends-in-recovery/)

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The force of the example depends on eliciting the intuition that Jeff is blameworthy *for* the directed wrong done to the specific individuals and that he owes the personal and directed Apology 1 to those wronged individuals. A quality of will view of moral blameworthiness can account for this intuition by appealing to the ill quality of will manifested by that directed wrong (independently of whether Jeff satisfies the control condition). The transfer analysis purports to account for this intuition while preserving the control condition by tracing Jeff's ill-will back to his prior decision to cultivate a certain type of character. However, if I am right about how to understand the foreseeability constraint, either the transfer analysis must hold people culpable for things that are unforeseeable or it fails to account for Jeff's blameworthiness for wronging the employees in the way that he did.

A proponent of the transfer analysis may concede that they cannot account for the directed wrong, but maintain that Jeff is culpable for the psychological harm that he caused to those specific employees by acting toward them in the way that he did in the same way that an arsonist might be culpable for the harm he caused by setting fire to a building whether he intended that specific harm or not. The problem with this response is that it collapses the transfer analysis into the causal analysis in a way that deprives the former of its primary selling point. On the causal analysis, Jeff's treatment of his employees is conceptualized as a mere causal event (assuming that he lacks normative competence), morally on a par with any other purely physical event, such as a malfunctioning piece of machinery. One might think that this fails to capture what is most morally salient about the example, namely, the despicable quality of will manifested by Jeff. It is not just that the employees were harmed—or even that they were harmed by something that Jeff did—but that Jeff demonstrated a particularly deplorable quality of will in treating them in the particular way that he did. A putative selling point of the transfer analysis is that it promises to capture this intuition by allowing us to treat Jeff as a responsible agent at the time of his callous treatment. However, by focusing exclusively on the harm caused, and not on the quality of the will that caused that harm, the transfer analysis loses this putative advantage.

Given an appropriately restricted version of the foreseeability condition, both the transfer and causal analysis hold that Jeff can only be blameworthy for harm under a general description such as "causing unnecessary emotional pain to some people." However, just as with the doctrine of substituted *mens rea*, the transfer analysis gets the degree of culpability wrong. A plausible moral analogue of CONTEMPORANEITY-COROLLARY is:

> MORAL CONTEMPORANEITY-COROLLARY: A person's degree of blameworthiness should reflect the quality of will that is manifested by the locus of their blameworthiness.

Whether we think of Jeff's wrongdoing as directed in nature, arguably an important part of what Jeff is intuitively blameworthy for is the particularly cruel will that he manifests toward his employees. The transfer analysis aims to account for this by tracing Jeff's culpability for that act back to his prior act of cultivating a callous demeanor in order to attract romantic partners. The problem is that the quality of will manifested by the former is significantly worse than what was manifested by the latter. Thus, either we temper the degree of blame and resentment directed at Jeff to that which is appropriate for the younger Jeff's short-sighted and ill-conceived plan, or we hold him accountable to a much greater degree than what would be appropriate for the quality of will manifested by the culpability-conferring act. The former option seems to get the degree of blame wrong, at least if one is attempting to accommodate the intuition that Jeff was blameworthy not just for the harm he causes to those workers but the malicious quality of will manifested by his action. The latter option is essentially a moral analogue of "substituted *mens rea*," and thus inherits the problems for that doctrine discussed in the previous section. Specifically, it violates MORAL CONTEMPORANEITY-COROLLARY by holding Jeff culpable for a wrong that manifests an egregious quality of will based on the fact that he committed a wrong that manifests a more benign quality of will.

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4. The Causal Analysis and Resultant Moral Luck

The cases I have been focusing on in this paper have the following two features: (1) a defendant *D* performs a voluntary act at time *t1* which causes *D* to lack the control or capacities required for culpability at some later time *t2*, and (2) *D* then does something at *t2* which causes or constitutes a wrong or harm to some victim *V*. The fundamental difference between the causal and the transfer analysis concerns which of these constitutes the fundamental blameworthy act. According to the transfer view, the thing one is blameworthy *for* is the violent conduct performed at *t2*, even if one's responsibility for that conduct is traced back to what *D* did at *t1*. In contrast, the causal view holds that what one is fundamentally blameworthy *for* is the act of becoming dangerously intoxicated at *t1*; what the defendant does at *t2*, while in a state of extreme intoxication, is conceptualized as a downstream causal consequence of the initial decision in the same way that a person's death can be a downstream causal consequence of a voluntary act. This means that, on the causal analysis, a person like Daviault can be blameworthy for the sexual assault committed while in a state of extreme intoxication only if there exists resultant moral luck.[25] After further clarifying the structure of the causal view and illustrating its application to the cases discussed in this paper, I argue that this is the correct result. To be clear, my aim is neither to argue for nor against resultant moral luck; rather, it is to show that the causal analysis provides a better analysis of intoxicated wrongdoing, however one comes down on that question.[26]

Consider *Brown*, one of the cases that lead the Supreme Court to strike down the original version of Section 33.1, in which Matthew Brown consumed alcohol and psilocybin-containing "magic" mushrooms which caused him to enter a state of "substance intoxication delirium" so extreme as to be "akin to automatism," and then violently attacked a stranger while in that state. According to the transfer view, "the gravamen of [the offence] is the violent conduct for which an accused person is charged—in the case of Brown, aggravated assault—and not the act of voluntarily consuming intoxicants" (*Brown*, para. 97). That is, the offence for which Brown is being called to account is violent assault as constituted by the *actus reus* and *mens rea* elements which define that offence. In contrast, the causal analysis holds that the proper way to conceive of the offence committed by a person like Brown is that of "dangerous intoxication or intoxication causing harm that incorporates voluntary intoxication as an essential element," where "the gravamen of the offence is the voluntary intoxication, not the involuntary conduct that follows" (*Brown*, para. 98). Rather than conceive of the moral and criminal offence as 'assaulting *V*', one should conceive of it as 'causing harm to *V* by volitionally becoming dangerously intoxicated'. In terms of criminal law, this would mean replacing s. 33.1 with a new offence of dangerous intoxication or dangerous intoxication causing harm.

Compare an ordinary case of impaired driving in which the driver is not so intoxicated as to no longer be acting volitionally when they choose to get behind the wheel. Now suppose that the intoxicated driver ends up causing a fatal accident due to their impaired cognitive functioning. The gravamen of the offence—the action that manifests a lack of concern for the rights and interests of others—is the decision to drive while impaired; the accident and death are causal consequences of that decision. If one accepts resultant moral luck, those consequences can increase the driver's degree of blameworthiness, but the fundamental act for which they are being called to account is that of driving while intoxicated. The impaired driver does not will themselves to cause a crash, much less a death; *a fortiori*, they do not manifest an ill *quality* of will in causing the accident or the death. Rather, they manifest an ill quality of will in deciding to put others at risk by driving while intoxicated. In the same way, if a person like Daviault or Brown is in a state of extreme intoxication

[25]Moral luck may be characterized as occurring "when an agent can be correctly treated as an object of moral judgment despite the fact that a significant aspect of what she is assessed for depends on factors beyond her control" (Nelkin, 2023). Resultant moral luck occurs when there is moral luck with respect to the causal consequences of one's actions.

[26]See Khoury (2012) for an argument against both tracing and resultant moral luck. I argue in favour of resultant moral luck in Tiffany (2023).

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akin to automatism, then they are not in possession of the basic agential capacities needed for their actions to count as volitional, that is, for their actions to count as "willed." If their conduct in that state is not willed, then *a fortiori* it does not manifest an ill *quality* of will. If there is an ill quality of will, it is that which is manifested by the decision to put others at risk by becoming dangerously intoxicated. On the plausible assumption that a person can be morally culpable for an action *qua* action only if it manifests some ill quality of will, it follows that the act for which an intoxicated offender is culpable is the decision to become dangerously intoxicated.[27] If there is also culpability for conduct performed while intoxicated, it is as a causal consequence of that initial act. This is significant for two reasons. First, it means that culpability for violent conduct performed in a state of intoxication depends on whether that conduct is appropriately related to the quality of will manifested by the decision to become intoxicated. Second, it means that culpability for intoxicated conduct is a matter of resultant moral luck.

Consider the Talock case. The potentially culpable act is that of consuming the intoxicating beverages. Talock knew she was consuming alcohol, which she knew to be an intoxicant. However, she reasonably believed that she was merely drinking a modest amount of alcohol (three cups of vodka punch) over a reasonable amount of time (3 hours). Given that she had no reason to believe that she was putting herself at risk either of entering a state akin to automatism or of putting herself at risk of attempting to drive while in a state of extreme intoxication, there was no ill will manifested by the decision to consume the three beverages. The Brown case differs from Talock in that Brown knew he was consuming an illicit substance, which makes him legally culpable for the act of consuming the magic mushrooms. However, he is culpable only under the description 'consuming an illicit substance', which may manifest insufficient regard for the authority of the law but says nothing about his regard for the rights and interests of others. Whether he is also culpable for the (hypothetical) offence of dangerous intoxication, which would manifest insufficient regard for others, depends on whether it is foreseeable that consuming that substance would put him at risk of entering a state akin to automatism and that being in such a state would put him at risk of violent conduct. Whether he is culpable for dangerous intoxication *causing harm* further depends on whether he in fact does something while intoxicated that causes or constitutes a harm and whether that specific type of harm is reasonably foreseeable. Given that "the trial judge found, based on expert evidence, that his reaction to the drug was not reasonably foreseeable," (*Brown*, para. 157) the causal analysis would not hold Brown culpable for the violent assault performed while in a state of intoxication-induced delirium.

The Daviault case is more complicated. Whether Daviault is culpable, on the causal analysis, depends on whether committing violent assault, including rape, is a foreseeable risk of consuming an excessive amount of alcohol. Start with what seems uncontroversially foreseeable: that drinking excessively will cause one to lose control over one's conduct. It might not be foreseeable exactly how one loses control, whether one enters a state literally akin to automatism or merely loses control in a way that undermines broad culpability without negating basic agency. However, there is sufficient evidence that consuming an excessive amount of alcohol foreseeably leads to a substantial and potentially dangerous loss of volitional control. The next question concerns the range of harm that could reasonably be expected to be caused by that lack of control, which is likely to be sensitive to context. For example, in the context of a fraternity party, which is a testosterone-driven and sexually charged environment, a reasonable case could be made that a loss of control resulting in assault or sexual assault is a reasonably foreseeable risk of excessive alcohol consumption in such an environment. Thus, if a fraternity member were to consume so much alcohol that his brain becomes

[27]In intend this claim to be neutral between "quality of will" and "reasons-responsive" theories of moral responsibility. In saying that an ill quality of will is necessary, this leave open the possibility that reasons-responsiveness is also necessary. Further, I take culpability to be responsibility for *wrongful* actions; thus, the claim that an ill quality of will is necessary for culpability is neutral between whether it is necessary for responsibility or wrongfulness. Legally, I take the quality of will requirement to apply only to *mala in se* offences, not to *mala prohibita* offences.

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dissociated from normal functioning and were to commit sexual assault while in that state, a reasonable case could be made that he is criminally negligent with respect to the harm caused or constituted by that assault. Likewise, I think it would be reasonably foreseeable that excessive alcohol consumption could cause a person with a history of abusive behavior to engage in violent conduct, making such an individual criminally liable for violent assault committed in a state of extreme intoxication.

In order to judge whether Daviault is culpable for the hypothetical offense of dangerous intoxication causing harm, we would need to know more details about his personal history than are provided in the Supreme Court decision.[28] This leaves open the possibility that a trier of fact could conclude that the risk of engaging in conduct like rape that violates the bodily integrity and autonomy of another was unforeseeable to a person in Daviault's circumstances, and hence that Daviault is not criminally liable for the harm constituted by the sexual assault. While I am not entirely comfortable with that conclusion, there are two points worth keeping in mind. First, this conclusion is also a problem for the transfer analysis, for, as I argued in Sections 2 and 3, transfer principles also require foreseeability. Second, this applies only to those extreme cases in which an agent is so intoxicated that they lack basic agential control or reasons-responsiveness; thus, it "has no impact on the rule that intoxication short of automatism is not a defence to violent crimes of general intent" (*Brown*, para. 5). In those cases that fall short of automatism, the defendant is likely to possess sufficient volitional control as to lack an excuse for acting in ways that fail to manifest sufficient concern for the rights and interests of others.

This last point also highlights the way in which violence committed while in a state of extreme intoxication is a matter of resultant moral luck. The debate over the relevance of resulting harm to degree of blameworthiness arises because agents lack the kind of direct agential control over outcomes that they possess over their actions and intentions. One's intentions and actions are capable of being guided by reasons and as such are under one's rational agential control in a way that downstream consequences are not. Thus, the harm one causes is subject to luck—specifically, resultant luck—in a way that one's actions and intentions are not. In cases of extreme intoxication akin to automatism, one's conduct is also not in one's direct agential control; such conduct is not capable of being guided by reasons. Thus, the same ground that rules out consequences as increasing degree of blameworthiness would also rule out conduct performed in a state of extreme intoxication akin to automatism as increasing degree of blameworthiness. To illustrate, consider the following three variations on the *Talock* case:

> UNCONSCIOUS-TALOCK. The facts are the same as in SPIKED PUNCH, except that Cindy Talock ends up passing out in the house where the party is being held.
>
> DUI-TALOCK. The facts are exactly as in SPIKED PUNCH, where Talock attempts to drive home, but is stopped by police before she causes any harm.
>
> FATAL-TALOCK. The facts are as in SPIKED PUNCH, except that Talock causes a fatal accident while driving in a state of extreme intoxication.

Talock lacks control over which of these outcomes occurs. The difference between the DUI and FATAL versions is the paradigmatic case of resultant moral luck, as they differ only in the consequence caused by Talock's conduct. Since that difference is not something Talock has control over, sceptics about resultant moral luck hold that it should not determine Talock's degree of blameworthiness. The point that I am highlighting here is that, once Talock is in a state of extreme intoxication, she also lacks control over whether she attempts to drive home or passes out at the party. If sceptics about resultant moral luck are correct that outcomes cannot increase

[28]The background facts do mention Daviault's struggle with alcoholism, which further complicates his broad culpability for becoming intoxicated in the first place.

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blameworthiness due to the lack direct agential control over outcomes, then conduct performed in a state of extreme intoxication should also not increase blameworthiness. Call this the RESULTANT MORAL LUCK CONSTRAINT:

> RESULTANT MORAL LUCK CONSTRAINT: conduct performed in a state of extreme intoxication akin to automatism should affect a person's degree of blameworthiness only if the causal consequences of actions can affect a person's degree of blameworthiness.

The causal analysis offers a straightforward explanation for this constraint: intoxicated conduct just is a downstream causal consequence of prior action in the same way that a bullet fatally striking a person is a downstream causal consequence of the act of firing a gun. By contrast, this constraint is puzzling on the transfer analysis, given that it treats intoxicated conduct as if it were responsible action. Thus, the transfer analysis either owes an explanation for this constraint, or it owes an explanation for why we should reject the constraint, that is, for why we should treat *D*'s lack of control over their conduct at *t2* differently from their lack of control over the foreseeable consequences they cause to occur.

I take the upshot of this to be that the causal analysis should be preferred by both sceptics and advocates of resultant moral luck who will differ only on whether what one does in a state of extreme intoxication can increase a person's degree of blameworthiness, whether the actual Daviault is deserving of greater punishment than a hypothetical Daviault who consumed an equal amount of alcohol but did not commit rape or violent assault while in an alcohol-induced state of automatism. In practice, cases like Daviault are difficult to decide due to the difficulty of assessing the reasonable foreseeability of entering a state akin to automatism and committing rape or violent assault while in such a state. However, this is equally a problem for both skeptics and advocates of resultant moral luck, for, as I illustrated earlier in this section through the discussion of the various cases, what makes something not just voluntary, but *dangerous*, intoxication is the reasonable foreseeability of the risk of harm.[29] In the end, the causal view correctly locates the gravamen of the offense as the act of becoming dangerously intoxicated, as that is the act that is under the defendant's agential control and which manifests their respect (or lack thereof) for the rights and interests of others.[30]

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[29]Some sceptics about resultant moral luck are also sceptics about negligence, and thus would consider reasonably foreseeability of harm as insufficient to ground culpability. On this view, culpability attaches only when "an actor *knowingly* risks harm to others" (Alexander & Ferzan, 2009, 171); hence, only persons who are consciously aware of the risk they are imposing when becoming extremely intoxicated could be culpable for an offence of dangerous intoxication.

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