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# Addiction, Choice and Criminal Law

By

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## Introduction

There is a debate among addiction specialists about the degree to which addicts can exert choice about seeking and using substances and about other behaviors related to addiction. All agree, as they must, that seeking and using and related actions are human actions, but there the agreement largely ends. Some, especially those who believe that addiction is a chronic and relapsing brain disease, think that seeking and using are solely or almost solely signs of a disease and that addicts have little choice about whether to seek and use. In contrast are those who believe that seeking and using are constrained choices but considerably less constrained on average than the first group suggests. This group is also more cautious about, but does not reject, characterizing addiction as a disorder. There is evidence to support both positions. There is a third group who believe that addiction is simply a consequence of moral weakness of will and that addicts simply need to and can pull themselves up by their bootstraps. The empirical evidence for the moralizing third view seems weak, although such attitudes play a role in explaining the limited role the criminal law accords to addiction. The Nobel-prize winning economist, Gary Becker, famously argued that addiction can be rational (1996).

This chapter demonstrates that, despite the debate and claims based on psychological, genetic and neuroscientific research to expand the mitigating and excusing

force of addiction in evaluating criminal responsibility, existing Anglo-American criminal law is most consistent with the choice position. It also argues that this is a defensible approach that is consistent with current science and with traditional justifications of criminal blame and punishment.

The chapter first discusses preliminary issues to avoid potential objections that the discussion adopts an unrealistic view of addiction. It then provides a general explanation of the responsibility criteria of the criminal law and addresses false or distracting claims about lack of responsibility. Then it turns to analysis of the criminal law's doctrines about addiction to confirm that the criminal law primarily adopts a choice model and that addiction *per se* plays almost no role in responsibility ascriptions. It concludes with a general defense of present doctrine and practice, but suggests beneficial liberalizing reforms.

### Preliminary Assumptions About Addiction

Virtually every factual or normative statement that can be made about addiction, is contestable. This section tries to be neutral.

The primary criteria of addiction commonly employed at present are behavioral, namely, persistent drug seeking and using, especially compulsively or with craving, in the face of negative consequences (Morse 2009). The neural mechanisms of addiction are debatable, but are being intensively investigated (Hyman 2007), and environmental variables play an important role in explaining addictive behavior (Kalant 2010). It is unsurprising that persistent use of brain altering substances changes both the brain and

behavior. For example, there are effects on the brain's reward circuits, memory, perception and motivation, all of which contribute to the maintenance of addictive behavior.

The most important terms for criminal law purposes are “compulsive” and “negative consequences.” The concept of compulsion or something like it is crucial to the no-choice model because without it addiction is just a very bad habit that is difficult to break. Despite the current biologizing within the medical approach and scientific advances (e.g., Kasanetz et al. 2010), there is still no clear understanding of the biology of compulsively and persistently seeking and using substances. Seeking and using are actions, not mechanisms. There is no gold standard definition of or psychological or biological test for compulsivity, which must be demonstrated behaviorally. There are extremely suggestive laboratory findings, especially with non-human animals (e.g., Everitt and Robbins 2005), but none is yet diagnostic for humans. We still lack an adequate definition of compulsion that applies to actions rather than to mechanisms to explore compelled action's biological basis.

The usual behavioral criteria for compulsion are both subjective and objective. Addicts commonly report feelings of craving or that they have lost control or cannot help themselves. If the agent persists in seeking and using despite ruinous medical, social, and legal consequences and despite an alleged desire to stop, we infer based on common sense that the person must be acting under compulsion. It seems that there is no other way to explain the behavior, but it is not based on rigorous tests of a well-validated concept.

Negative consequences, both internalities and externalities, are not necessarily part of the definition of addiction because, depending on the circumstances, it is possible to be a high functioning addict who does not suffer or impose substantial negative consequences.

Contingent social norms and expectations play a role in explaining how negative the consequences are, but addiction often has severely negative consequences (e.g., overdose, cancer, psychosis) independent of social norms and expectations.

There are many findings about the biology and psychology of addicts that differentiate this group from non-addicts, but none of these findings is independently diagnostic. Addiction must be demonstrated behaviorally. Although the characterization of addiction as a “chronic and relapsing brain disease” is widely used, the characterization, “chronic and relapsing,” is not justified by the data (Heyman 2009, 2013). Brain causation and brain differences do not *per se* make associated behaviors the signs or symptoms of a disease. All behavior has brain causes and one would expect brain differences between any two groups exhibiting different behaviors. Moreover, the relapse data were not gathered on random samples of addicts. They have been largely gathered from addicts in treatment and this population is disproportionately co-morbid with other psychiatric disorders (Heyman 2009). Characterizing a return to maladaptive behavior as a “relapse” begs the question of whether the behavior is the sign or a symptom of a disease. The latter must be established first in order properly to refer to the return as a “relapse” (Fingarette and Hasse 1979). Whether addiction should be considered a disease like any other is still an open question. Even if addicts have difficulty controlling their behavior, they are not zombies or automatons; they act intentionally to satisfy their desire to seek and to use drugs (Hyman 2007; Morse 2000, 2007a, 2009).

Most users of even the most allegedly addictive substances do not become addicts, but some substances increase the risk. Whether one moves from casual recreational use or medical use to addiction is influenced by the agent’s set (psychological expectations) and

by the setting (the environment and its cues) (Zinberg 1984). The substance itself does not account for all the variance in explaining addiction. Some substances appear to be particularly addictive, but it is extremely difficult empirically to disentangle the causal variables. It is nonetheless clear that the psychoactive properties of the drug alone do not turn people into helpless puppets.

A debated question is whether addiction should be limited to substances. Large numbers of people engage persistently and apparently compulsively in various activities, often with negative consequences. Gambling is an example. If there are some activities or non-drug substances that can produce the same “addictive behavior” as drugs, then the criminal law response should perhaps be similar by analogy. I believe that the concept of addiction should be expanded beyond drugs, but for this chapter will confine the analysis to drug-related addictions.

### The Concept of The Person and Responsibility in Criminal Law

This section offers a “goodness of fit” interpretation of current Anglo-American criminal law. It does not suggest or imply that the law is optimal “as is,” but it provides a framework for thinking about the role addiction does and *should* play in a fair system of criminal justice.

Criminal law presupposes the “folk psychological” view of the person and behavior. This psychological theory, which has many variants, causally explains behavior in part by mental states such as desires, beliefs, intentions, willings, and plans (Ravenscroft 2010). Biological, sociological and other psychological variables also play a role, but folk psychology considers mental states fundamental to a full explanation of human action.

Lawyers, philosophers and scientists argue about the definitions of mental states and theories of action, but that does not undermine the general claim that mental states are fundamental. The arguments and evidence disputants use to convince others itself presupposes the folk psychological view of the person. Brains don't convince each other; people do.

For example, the folk psychological explanation for why you are reading this chapter is, roughly, that you desire to understand the relation of addiction to agency and responsibility in criminal law, you believe that reading the chapter will help fulfill that desire, and thus you formed the intention to read it. This is a "practical" explanation rather than a deductive syllogism.

Folk psychology does not presuppose the truth of free will, it is consistent with the truth of determinism, it does not hold that we have minds that are independent of our bodies (although it, and ordinary speech, sound that way), and it presupposes no particular moral or political view. It does not claim that all mental states are conscious or that people go through a conscious decision-making process each time that they act. It allows for "thoughtless," automatic, and habitual actions and for non-conscious intentions. It does presuppose that human action will at least be rationalizable by mental state explanations or that it will be responsive to reasons under the right conditions. The definition of folk psychology being used does not depend on any particular bit of folk wisdom about how people are motivated, feel, or act. Any of these bits, such as that people intend the natural and probable consequences of their actions, may be wrong. The definition insists only that human action is in part causally explained by mental states.

Responsibility concepts involve acting agents and not social structures, underlying psychological variables, brains, or nervous systems. The latter types of variables may shed light on whether the folk psychological responsibility criteria are met, but they must always be translated into the law's folk psychological criteria. For example, demonstrating that an addict has a genetic vulnerability or a neurotransmitter defect tells the law nothing *per se* about whether an addict is responsible. Such scientific evidence must be probative of the law's criteria and demonstrating this requires an argument about how it is probative.

The criminal law's criteria for responsibility, like the criteria for addiction, are acts and mental states. Thus, the criminal law is a folk-psychological institution (Sifferd 2006). First, the agent must perform a prohibited intentional act (or omission) in a state of reasonably integrated consciousness (the so-called "act" requirement, sometimes misleadingly termed the "voluntary act"). Second, virtually all serious crimes require that the person had a further mental state, the *mens rea*, regarding the prohibited harm. Lawyers term these definitional criteria for *prima facie* culpability the "elements" of the crime. They are the criteria that the prosecution must prove beyond a reasonable doubt. For example, one definition of murder is the intentional killing of another human being. To be *prima facie* guilty of murder, the person must have intentionally performed some act that kills, such as shooting or knifing, and it must have been his intent to kill when he shot or knifed. If the agent does not act at all because his bodily movement is not intentional—for example, a reflex or spasmodic movement—then there is no violation of the prohibition. There is also no violation in cases in which the further mental state required by the definition is lacking. For example, if the defendant's intentional killing action kills only because the

defendant was careless, then the defendant may be guilty of some homicide crime, but not of intentional homicide.

Criminal responsibility is not necessarily complete if the defendant's behavior satisfies the definition of the crime. The criminal law provides for so-called affirmative defenses that negate responsibility even if the prima facie case has been proven. Affirmative defenses are either justifications or excuses. The former obtain if behavior otherwise unlawful is right or at least permissible under the specific circumstances. For example, intentionally killing someone who is wrongfully trying to kill you, acting in self-defense, is certainly legally permissible and many think it is right. Excuses exist when the defendant has done wrong but is not responsible for his behavior. Using generic descriptive language, the excusing conditions are lack of reasonable capacity for rationality and lack of reasonable capacity for self-control (although the latter is more controversial than the former). The so-called cognitive and control tests for legal insanity are examples of these excusing conditions. Note that these excusing conditions are expressed as capacities. If an agent possessed a legally relevant capacity but simply did not exercise it at the time of committing the crime or was responsible for undermining his capacity, no defense will be allowed. Finally, the defendant will be excused if he was acting under duress, coercion or compulsion. The degree of incapacity or coercion required for an excuse is a normative question that can have different legal responses depending on a culture's moral conceptions and material circumstances. Addiction is always considered the potential basis for an excusing or mitigating condition.

It may appear that the capacity for self-control and the absence of coercion are the same, but for purposes of addressing the relation between addiction and responsibility, it

is helpful to distinguish them. The capacity for self-control or “will power,” is conceived of as a relatively stable, enduring trait or congeries of abilities possessed by the individual that can be influenced by external events (Holton 2009). This capacity is at issue in “one-party” cases, in which the agent claims that he could not help himself in the absence of external threat. In some cases, the capacity for control is poor characterologically; in other cases it may be undermined by variables that are not the defendant’s fault, such as mental disorder. The meaning of this capacity is fraught. Many investigators around the world are studying “self-control,” but there is no conceptual or empirical consensus. Indeed, such conceptual and operational problems motivated both the American Psychiatric Association Insanity Defense Work Group (1983) and the American Bar Association (1989) to reject control tests for legal insanity during the 1980s wave of insanity defense reform in the United States. In all cases in which such issues are raised, the defendant does act to satisfy the allegedly overpowering desire. In contrast, compulsion exists if the defendant was compelled to act by being placed in a “do-it-or-else,” hard-choice situation. For example, suppose that a miscreant gunslinger threatens to kill me unless I kill another entirely innocent agent. I have no right to kill the third person, but if I do it to save my own life, I may be granted the excuse of duress. Note that in cases of external compulsion, unlike cases of no action, the agent does act intentionally. Also, note that there is no characterological self-control problem in these cases. The excuse is premised on external threats, not on/ internal drives and deficient control mechanisms.

This account of criminal responsibility is most tightly linked to traditional retributive justifications of punishment, which hold that punishment is not justified unless

the offender morally deserves it because the offender was responsible. With exceptions that need not detain us and prove the point, desert is at least a necessary precondition for blame and punishment in Anglo-American law. The account is also consistent with traditional consequential justifications for punishment, such as general deterrence. No offender should be punished unless he at least deserves such punishment. Even if good consequences might be achieved by punishing non-responsible addicts or by punishing responsible addicts more than they deserve, such punishment would require very weighty justification in a system that takes desert seriously.

#### False Starts and Dangerous Distractions

This section considers four false and distracting claims that are sometimes made about the responsibility of addicts (and others): 1) the truth of determinism undermines genuine responsibility; 2) causation, and especially abnormal causation, of behavior entails that the behavior must be excused; 3) causation is the equivalent of compulsion, and 4) addicts are automatons.

The alleged incompatibility of determinism and responsibility is foundational. Determinism is not a continuum concept that applies to various individuals in various degrees. There is no partial or selective determinism. If the universe is deterministic or something quite like it, responsibility is possible or it is not. If human beings are fully subject to the causal laws of the universe, as a thoroughly physicalist, naturalist worldview holds, then many philosophers claim that “ultimate” responsibility is impossible (e.g., Pereboom 2001; Strawson 1989). On the other hand, plausible “compatibilist” theories suggest that responsibility is possible in a deterministic universe (Vihvelin 2013; Wallace 1994).

There seems no resolution to this debate in sight, but our moral and legal practices do not treat everyone or no one as responsible. Determinism cannot be guiding our practices. If one wants to excuse addicts because they are genetically and neurally determined or determined for any other reason to be addicts or to commit crimes related to their addictions, one is committed to negating the possibility of responsibility for everyone.

Our criminal responsibility criteria and practices have nothing to do with determinism or with the necessity of having so-called “free will” (Morse, 2007b). Free will, the metaphysical libertarian capacity to cause one’s own behavior uncaused by anything other than oneself, is neither a criterion for any criminal law doctrine nor foundational for criminal responsibility. Criminal responsibility involves evaluation of intentional, conscious, and potentially rational human action. And few participants in the debate about determinism and free will or responsibility argue that we are not conscious, intentional, potentially rational creatures when we act. The truth of determinism does not entail that actions and non-actions are indistinguishable and that there is no distinction between rational and non-rational actions or compelled and uncompelled actions. Our current responsibility concepts and practices use criteria consistent with and independent of the truth of determinism.

A related confusion is that, once a non-intentional causal explanation has been identified for action, the person must be excused. In other words, the claim is that causation *per se* is an excusing condition. This is sometimes called the “causal theory of excuse.” Thus, if one identifies genetic, neurophysiological, or other causes for behavior, then allegedly the person is not responsible. In a thoroughly physical world, however, this

claim is either identical to the determinist critique of responsibility and furnishes a foundational challenge all responsibility, or it is simply an error. I term this the “fundamental psycholegal error” because it is erroneous and incoherent as a description of our actual doctrines and practices (Morse 1994). Non-causation of behavior is not and could not be a criterion for responsibility because all behaviors, like all other phenomena, are caused. Causation, even by abnormal physical variables, is not *per se* an excusing condition. Abnormal physical variables, such as neurotransmitter deficiencies, may cause a genuine excusing condition, such as the lack of rational capacity, but then the lack of rational capacity, not causation, is doing the excusing work. If causation were an excuse, no one would be responsible for any action. Unless proponents of the causal theory of excuse can furnish a convincing reason why causation *per se* excuses, we have no reason to jettison the criminal law’s responsibility doctrines and practices.

Third, causation is not the equivalent of lack of self-control capacity or compulsion. All behavior is caused, but only some defendants lack control capacity or act under compulsion. If causation were the equivalent of lack of self-control or compulsion, no one would be responsible for any criminal behavior. This is clearly not the criminal law’s view.

A last confusion is that addicts are automatons whose behavioral signs are not human actions. We have addressed this issue before, but it is worth re-emphasizing that even if compulsive seeking and using substances are the signs of a disease, they are nonetheless human actions and thus distinguishable from purely mechanical signs and symptoms, such as spasms. Moreover, actions can always be evaluated morally (Morse 2007a).

Now, with a description of addiction and responsibility criteria in place and with an understanding of false starts, let us turn to the relation of addiction to criminal responsibility, beginning with the law's doctrines.

### Criminal Law Doctrine and Addiction: Background

The introduction to this chapter suggested that the law's approach to addiction is most consistent with the choice model. The ancient criminal law treated the "habitual" or "common" drunkard as guilty of a status offense and drunkenness was considered wrong in itself. The choice model is older than Blackstone, the great 18<sup>th</sup> C. judge best known for his Commentaries, which tried to systematize English law. Although the legal landscape has altered, the choice model is still dominant.

To provide background, the section discussed three illustrative, iconic cases concerning addiction: *Robinson v. California* (1962), *Powell v. Texas* (1968) and *United States v. Moore* (1973). Although these cases are older, their holdings and reasoning continue to be robustly emblematic of the criminal law's response to addiction and to a compulsion defense based on addiction. The next section canvasses current doctrine.

Walter Lawrence Robinson was a needle-injecting drug addict who was convicted of a California statute that made it a crime to "be addicted to the use of narcotics" and he was sentenced to ninety days in jail. The only evidence that he was an addict was needle marks. Robinson appealed to the Supreme Court on the ground that punishing him for being an addict was a violation of the 8<sup>th</sup> and 14<sup>th</sup> Amendment's prohibition of cruel and unusual punishment. There were many different opinions written in the case, but a

majority agreed that punishing for addiction was unconstitutional. (As a sad footnote, Robinson died of an overdose before the case was decided.)

It is difficult to determine precisely what reasoning was the foundation for the Court's constitutional conclusion, but for our purposes three stand out: it is unconstitutional to punish for status alone or because addiction is a disease or because addiction is "involuntary." Herbert Fingarette and Anne Fingarette Hasse demonstrated conclusively decades ago that the disease rationale collapses into either the status rationale or the involuntariness rationale (1979), so let us examine what implications follow from each of the two. The status rationale is far more modest and simply builds on the general criminal law requirement that criminal liability generally requires action (or intentional omission in appropriate cases). Robinson was not charged with possession or use, but simply with the status of being an addict. In dissent, Justice White pointed out that if it was unfair to punish an addict for his status, why would it not be equally unfair to punish him for the actions that are signs of that status. It is a clever question, but ignores the view of addiction as a chronic and relapsing disorder. On this view, one can be an addict even if one is not using at the moment. Again, the status argument is modest because it betokens no genuine widening of non-responsibility conditions. Indeed, it is a narrowing holding because the older common law permitted punishment for prohibited statuses.

The "involuntariness" claim more extensively suggests that punishing people for conditions and their associated behaviors that they are helpless to prevent is also unconstitutional. Adopting the involuntariness position would be an invitation to undermining the choice model in light of some strains of thought about addiction.

Those who wanted to test the meaning of *Robinson* did not have long to wait. The defendant-appellant in *Powell*, Mr. Leroy Powell, was a chronic alcoholic who spent all his money on wine and who had been frequently arrested and convicted for public drunkenness. In the present case, his defense counsel argued that because Mr. Powell was afflicted with "the disease of chronic alcoholism,...his appearance in public [while drunk] was not of his own volition," (p. 517) and thus to punish Mr. Powell for this symptomatic behavior would be a violation of the Eighth Amendment prohibition of cruel and unusual punishment. Powell appealed his conviction to the Supreme Court. The Court was asked to hold that it was unconstitutional to punish a person if a condition essential to the definition of the crime charged is "part of the pattern of his disease and is occasioned by a compulsion symptomatic of the disease." Note that this is an extremely sympathetic case for a compulsion excuse. The crime was not serious and the criminal behavior, public intoxication, was a typical manifestation of his alcoholism.

The Supreme Court rejected Mr. Powell's claim for many reasons, including that it went too far on the basis of too little knowledge and that it was unclear that providing a defense in such cases would improve the condition of people suffering from alcoholism. But Justice Marshall's plurality opinion was also skeptical of the underlying compulsion claim and in the course of the opinion quoted the expert testimony extensively and part of Mr. Powell's testimony in full. Mr. Powell's proposed defense was supported by the testimony of an expert psychiatrist, Dr. David Wade, who testified that,

a "chronic alcoholic" is an "involuntary drinker," who is "powerless not to drink," and who "loses his self-control over his drinking" (p. 518).

Based on his examination of Mr. Powell, Dr. Wade concluded that Powell was,

a "chronic alcoholic," who "by the time he has reached [the state of intoxication]...is not able to control his behavior, and...has reached this point because he has an uncontrollable compulsion to drink (p. 518).

Dr. Wade also opined that Powell lacked "the willpower to resist the constant excessive consumption of alcohol." The doctor admitted that Powell's first drink when sober was a "voluntary exercise of will," but qualified this answer by claiming that alcoholics have a compulsion that is a "very strong influence, an exceedingly strong influence," that clouds their judgment. Finally, Dr. Wade suggested that jailing Powell without treatment would fail to discourage Powell's consumption of alcohol and related problems. One could not find a more clear expression of the medicalized, disease concept of addiction to ethanol.

Powell himself testified about his undisputed chronic alcoholism. He also testified that he could not stop drinking. Powell's cross-examination concerning the events of the day of his trial is worth quoting in full.

Q: You took that one [drink] at eight o'clock [a.m.] because you wanted to drink?

A: Yes, sir.

Q: And you knew that if you drank it, you could keep on drinking and get drunk?

A: Well, I was supposed to be here on trial, and I didn't take but that one drink.

Q: You knew you had to be here this afternoon, but this morning you took one drink and then you knew that you couldn't afford to drink anymore and come to court; is that right?

A: Yes, sir, that's right.

Q: Because you knew what you would do if you kept drinking, that you would finally pass out or be picked up?

A: Yes, sir.

Q: And you didn't want that to happen to you today?

A: No, sir.

Q: Not today?

A: No, sir.

Q: So you only had one drink today?

A: Yes, sir (pp. 519-520).

On redirect examination, Powell's attorney elicited further explanation.

Q: Leroy, isn't the real reason why you just had one drink today because you just had enough money to buy one drink?

A: Well, that was just give to me.

Q: In other words, you didn't have any money with which you could buy drinks yourself?

A: No, sir, that was give to me.

Q: And that's really what controlled the amount you drank this morning, isn't it?

A: Yes, sir.

Q: Leroy, when you start drinking, do you have any control over how many drinks you can take?

A: No, sir (p. 520).

Powell wanted to drink and had that first drink, but despite that last answer his compulsion did not cause him to engage in the myriad lawful and unlawful means he might easily have used to obtain more alcohol if his craving was desperately compulsive.

Although Powell was a core case of an addict, he could refrain from using if he had a good enough reason to do so.

Although this was a sympathetic case, the Justice Marshall for a plurality was simply unwilling to abandon the choice model that guides legal policy and to impose a “one size fits all” constitutionally-required compulsion defense. The case interpreted *Robinson* as barring punishment for status and not as imposing a constitutional involuntariness defense. Finally, note that if the Court had accepted Powell’s argument, it would not have created a specific “addiction” defense. Rather, it would have adopted a general compulsion defense in any case in which criminal behavior was a symptom allegedly compelled by a defendant’s disease, whether the disease was addiction or any other.

Now let us turn to Moore. Raymond Moore was almost certainly a trafficking heroin addict in Washington D.C. who was charged with possession of heroin. Moore’s expert witness, Dr. Kaufman, testified out of the hearing of the jury that Moore was a long-term addict, that Moore’s addiction was a disease, and that as a result, Moore was “helpless to control his compulsion to obtain and use heroin” (p. 1143). Moore requested the judge to charge the jury that this condition could be a basis for a defense to the possession charges. Like Leroy Powell, Raymond Moore presents an apparently sympathetic case. Mere possession of heroin is more serious than public intoxication, but it is not a very serious crime—at least not in my opinion. Possession is necessary part of the diagnostic criteria of the disorder because one cannot use a substance unless one possesses it and there was uncontested evidence that Moore could not control his compulsion to obtain (possess) and use the substance. Nevertheless, despite this

testimony and in the absence of countervailing evidence, the trial judge refused to instruct that jury that addiction might be the basis for a compulsion defense, even for a non-trafficking addict.

Moore was convicted and appealed to the influential United States Court of Appeals for the District of Columbia Circuit, claiming that his conviction was improper because he was a heroin addict with an overpowering need to use heroin and should not, therefore, have been held criminally responsible for being in possession of the drug. According to Moore, the case had one central issue:

“Is the proffered evidence of...long and intensive dependence on (addiction to) injected heroin, resulting in substantial impairment of his behavior controls and a loss of self-control over the use of heroin, relevant to his criminal responsibility for unlawful possession” (p. 1144).

Many judges wrote separately, but a majority did vote to affirm the conviction, thus rejecting Moore’s proposed defense. The judges who voted to confirm Moore’s conviction noted variously that: 1) there was controversy over whether addiction is a disease and whether we are able to know an addict’s genuine capacity to refrain from using; 2) the defense would apply to any defendant with impaired behavioral controls, even in the absence of an allegedly objective cause such as a disease; 3) it would apply not only to possession, but also to any other crimes committed to support the addiction; and, 4) adopting such a defense would undermine the strong public policy supporting the prohibition of sale and possession of controlled substances. For these reasons, they rejected adopting Moore’s proposed defense.

There were two very strong dissents. In one, the judge wrote that the common law should embrace a new principle according to which a drug addict who lacks substantial capacity to conform his conduct to the requirements of the law as a result of drug use should not be held criminally responsible for mere possession for his own use. The opinion rejected as speculative the claim that deterrence would be undermined. The judge recognized that the compulsion claim might be difficult to limit to mere possession, but evaded the problem by arguing that Congress intended that the defense should not go this far. In a second, partial dissent, the chief judge of the circuit, David Bazelon, argued that the principle behind adopting the defense applied to crimes other than mere possession and that juries should also hear evidence about compulsion arising from addiction when other crimes were charged, including armed robbery or trafficking.

Taken together, these cases appear to adopt the choice perspective for two reasons: addicts have sufficient choice, and the public policy supporting criminalization would be undermined by providing a defense, even if it could be shown that addicts have little choice about mere possession and perhaps other crimes related to their addiction. With these background cases in mind, let us now turn more generally to current doctrine to explore the criminal law's choice model.

#### Current Doctrine and the Choice Model

Recall that crimes are defined by their elements and that affirmative defenses are available even if the prosecution is able to prove all the elements of the crime. This section will first discuss the affirmative defenses, then it will address the use of intoxication to defend against the elements of the crime charged, which is termed

“negating” an element, and will finally discuss the role of addiction in sentencing and diversion.

Given that there is still controversy about how much choice addicts have, it is perhaps unsurprising that the conclusions in *Powell* and *Moore* are still regnant. The criminal law has avoided expanding a defense based on addiction raised by the *Moore* dissenters. Addiction is not an affirmative defense *per se* to any crime in the United States, England or Canada. With one limited and somewhat unsettled exception in English homicide law (Ashworth and Horder 2013, pp. 271-72; *R. v Bunch*, 2013), it is also not the basis for any other affirmative defense, such as legal insanity. Indeed, some United States jurisdictions explicitly exclude addiction (or related terms) as the basis for an insanity defense despite the inclusion of this class of disorder in the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition [DSM-5] (2013). The claim that an intoxicated addict might not have committed the crime if he had not been intoxicated has no legal purchase, although some, such as the great English criminal law scholar, Glanville Williams (1961, p. 564), disagree. Indeed, addiction does not even merit an index entry in most Anglo-American criminal law texts, except in the context of the use of alcohol intoxication as a defense in some instances that will be explored below.

The only exception to the bar to using addiction as an affirmative defense or the basis of one is what is known in the United States as “settled insanity.” If a defendant has become permanently mentally disordered beyond addiction, say, suffers from delirium tremens, as a result of the prolonged use of intoxicants, the defense of legal insanity may be raised.

An enormous number of crimes are committed by people who are under the influence of intoxicating substances. In what follows I shall discuss the use of intoxication to negate the elements of the crime charged, but readers should know that these doctrines apply generally to addicts and non-addicts alike. Of course, addicts are more likely to be high than non-addicts and thus these rules will disproportionately affect them, but the application to addicts will be the same as to non-addicts. Whether the criminal law should distinguish addicts from non-addicts for these purposes will be discussed in the next section of the chapter.

Recall that most crimes require a mens rea, a culpable mental state that accompanies the prohibited conduct. How evidence of intoxication might be used to negate the elements of the crime charged is the question of logical relevance: Does the evidence of intoxication in fact tend to show that an element was not present? First, the defendant might be so drunk that his consciousness is sufficiently dissociated to negate the act requirement. Second, the defendant's intoxication may be relevant to whether he formed the mental state, the mens rea, required by the definition of the crime. For example, imagine a very drunk defendant in the woods with a gun. In the drunken belief that he is shooting at a tree because his perceptions are so altered, he ends up killing a human being wearing camouflage gear. If he really believed that he was shooting at a tree, he simply did not form the intent to kill required for intentional homicide. To take another example, imagine that a very drunk patron at a bar walks out without paying the bill. Suppose the bar owner claims that he has been defrauded by the drunk patron, a form of theft. The patron claims that he was so drunk that he forgot to pay the bill but

formed no intent to steal. If this form of criminal behavior requires the intent to steal and we believe the patron, he simply did not form that intent.

The logical relevance point is straightforward. If the defendant did not act or lacked the mens rea for the crime charged, how can he be guilty of that crime (although he may be guilty of some other offense for which he does have the mens rea)? Despite this logic, a substantial minority of United States jurisdictions refuse to admit into evidence undeniably factually relevant and probative voluntary intoxication evidence proffered to negate mens rea. The remaining United States jurisdictions and English law admit it only with substantial restrictions.

The reasons for complete exclusion and for restriction of the admissibility of relevant evidence of voluntary intoxication result, I believe, primarily from the choice model and from fears for public safety. In the case of restricted testimony, the rules are highly technical, but typically evidence of intoxication is admitted to negate the mens reas for some crimes but not for others, even if mens rea in the latter case might actually be negated. The defendant will therefore be convicted of those crimes for which intoxication evidence is not admissible even if the defendant lacked mens rea. The rules are a compromise between culpability and public safety and the apparent unfairness of convicting a defendant of a crime for which he lacked mens rea is in part justified by his own fault in becoming intoxicated, a classic choice model rationale.

Leading precedents in the United States and England adopt choice reasoning explicitly. In *Montana v. Egelhoff* (1996) the United States Supreme Court held that complete exclusion of voluntary intoxication evidence proffered to negate mens rea was not unconstitutional. Justice Scalia's plurality opinion provided a number of reasons why

a jurisdiction might wish on policy grounds to exclude otherwise relevant, probative evidence. Among these were public safety and juror confusion. But one is a perfect example of the choice model.

And finally, the rule comports with and implements society's moral perception that one who has voluntarily impaired his own faculties should be responsible for the consequences (p. 50).

This view is standard in both common law and continental criminal law (in which it is called *actio libera in causa*): a defendant should not benefit from a defense that he has culpably created. The choice model is strongly at work.

In *D.P.P. v. Majewski* (1977), a unanimous House of Lords upheld one of the technical distinctions alluded to above that permit defendants to introduce intoxication evidence to negate the mens reas of only some crimes. Most of the Lords recognized that there was some illogic in the rule, but all upheld it as either a justifiable compromise or as sound in itself and it had long provenance. Most striking for our purpose, however, is one passage from Lord Elwyn-Jones' opinion for the Court. He wrote,

If a man of his own volition takes a substance which causes him to cast off the restraints of reason and conscience, no wrong is done to him by holding him answerable criminally for any injury he may do while in that condition. His course of conduct in reducing himself by drugs and drink to that condition in my view supplies the evidence of mens rea, of guilty mind certainly sufficient for crimes of basic intent. It is a reckless course of conduct and recklessness is enough to constitute the necessary mens rea in assault cases... The drunkenness is itself an intrinsic, an integral part of the crime, the other part being the evidence

of the unlawful use of force against the victim. Together they add up to criminal recklessness (pp. 474-5).

In other words, the culpability in getting drunk—itself not a crime—is the equivalent of actually foreseeing the consequences of one’s actions even if the intoxicated defendant did not foresee them. Such reasoning—Majewski chose to get drunk, after all—presaged Justice Scalia’s argument in *Egelhoff* and is clearly based on the choice model.

Despite massive academic criticism of the *Majewski* rule and numerous Law Commission reform proposals, it remains the rule and many think it works reasonably well. Some Commonwealth countries, such as Australia, New Zealand and Canada, have the more expansive logical relevance rule and it seems not to have opened the floodgates of alcohol-awash crime (Ashworth and Horder 2013). Apparently, however, juries in those jurisdictions seldom fully acquit, suggesting that the culpability based on choice model is implicitly guiding decision making even if the law is more lenient.

Finally, even the Model Penal Code in the United States, which has had major influence on law reform and which strongly emphasizes subjective culpability and rejects strict liability of the sort *Majewski* potentially imposes, adopted a similar rule in Section 2.08(2) of the Code (American Law Institute 1962). If an intoxicated defendant was not aware of a risk he would have been aware of if was sober, then he will be held to have been aware of the risk. When substances are involved, the choice model seems recalcitrant to change.

In short, Anglo-American rules concerning the effects of voluntary intoxication on prima facie culpability strongly reflect the choice model with no or some qualifications.

The need for completeness compels me at this point to mention involuntary intoxication, that is, intoxication occasioned through no fault of the agent. Examples would be mistakenly consuming an intoxicant, or being duped into or forced to consume one. The law treats such cases more permissively than cases of voluntary intoxication by providing a limited complete defense and the ability to negate all mens rea. But it does not apply to intoxication associated with addiction because the law currently treats such states of intoxication as the agent's fault even though many addiction specialists would vehemently disagree. The law's view of involuntariness in this context could apply to addicts and non-addicts alike. Even addicts could be duped or coerced into becoming intoxicated on a given occasion.

#### Addiction-Related Legal Practices

There are two United States contexts in which addiction has potential mitigating force: sentencing, particularly capital sentencing, and diversion to specialized drug courts. There are no studies that empirically examine the degree to which evidence of addiction is sought to be used as a mitigating factor during non-capital sentencing and it is never listed as a statutorily specified mitigating factor. It is probably the case that the same considerations about its impact would apply in both non-capital and capital sentencing, so I shall discuss only the latter.

Beginning in 1978, the United States Supreme Court has repeatedly held that capital defendants can produce virtually any mitigating evidence (*Lockett v. Ohio* 1978) and the bar for the admissibility for such evidence is low. Thus, even if addiction is not a statutory mitigating factor, an addicted defendant convicted of capital murder may

certainly introduce evidence of his condition for the purpose of showing that addiction diminished his capacity for rationality or self-control or to support any other relevant mitigating theory. Doing so also raises the danger that addiction will be thought to aggravate culpability based on the choice perspective—especially the moralistic strain—and it is possible that it will make the defendant seem more dangerous, which is a statutory aggravating factor in some jurisdictions. Addiction is a knife that could cut both ways in capital and non-capital sentencing.

Drug courts are an increasingly common phenomenon in the United States. The substantive and procedural details vary across jurisdictions, but these courts aim to divert from criminal prosecution to the drug courts addicted criminal defendants charged with non-violent crimes whose addiction played a role in their criminal conduct. If diverted defendants successfully complete the drug court imposed regimen of staying clean and in treatment, they are discharged and the criminal charges are dropped. This approach seems eminently sensible and these courts have fervent supporters, but they also have critics on the grounds that they do not afford proper due process and genuinely solid evidence for their cost-benefit justified efficacy is lacking. Whatever the merits of the debate may be, drug courts are now an entrenched feature of criminal justice in a majority of United States jurisdictions and they do permit some number of addicts to avoid criminal conviction and punishment.

#### A Defense of Current Criminal Law

Criminal law is generally unforgiving towards addicts specifically and those doctrines that might sometimes favor addicts, such as the rules about negating mens rea, are not specific to addicts but apply more generally. Given the profound effects of

addiction, can such unyielding rules be fair? Although many addicts are responsible for becoming addicted, the following discussion will assume that an addict is not responsible for becoming an addict, say, because he became addicted as a youth or because he was in pathological denial about what was happening. I shall also assume that the rules apply to adults and that juveniles require special treatment.

Let us begin with affirmative defense. Consider an addict who is broadly mentally debilitated by chronic intoxication. Recall that the law is already forgiving in such cases, permitting the addict suffering from “settled insanity” to raise the full excusing condition of legal insanity. Most addicts are not so severely debilitated, however, so let us turn to the more “typical” addict.

I believe that there are roughly two accounts for why addicts might not be responsible for addiction-related crimes, including possession and other crimes committed to obtain drugs (Morse 2011).. The first is irrationality. As a result of various psychological factors, including cue salience, craving, memory, and other variables, at times of peak desire the addict simply cannot “think straight,” cannot bring to bear the good reasons to refrain. This assumes that addicts do have good reasons to refrain, but this may not always be true (Burroughs 2013, esp. pp. 144-47). The irrationality theory is consistent with the view that regards self-control difficulties as resulting from an agent’s inability to consider distant rather than immediate consequences. The other account uses a different form of self-control that analogizes the addict’s subjective state at times of peak craving as akin to the legal excuse of duress. The addict is threatened by such dysphoria if he doesn’t use substances that he experiences the situation like a “do it or else” threat of a gun to one’s head. Whether one finds these accounts or another

convincing, there is surely some plausible theory of excuse or mitigation that would apply to many addicts at the time of criminal behavior. A very attractive case for a more forgiving legal response arises if one believes that once an agent is addicted, he will inevitably be in an excusing state at the time of his crimes on some and perhaps most occasions,

There are at least three difficulties with this position, one of which seems relatively decisive. First, much is still not understood about the actual choice possibilities of “typical” addicts. Maybe most can in fact think straight at the times of their crimes but choose not to or they are not substantially threatened by dysphoria or, even if they are threatened with severe dysphoria, they retain the capacity not to give in. The criminal law is justified in adopting the more “conservative” approach under such conditions of uncertainty. Second and relatedly, unforgiving criminal law doctrines enhance deterrence. The demand for and use of drugs is price elastic for addicts. Addicts retain capacity for choice. The threat of criminal sanctions might well deter addiction-related criminal behavior on the margin.

The third and seemingly most decisive reason is the potential for diachronous responsibility (Kennett 2001) for addicts who do not suffer from settled insanity.. Even if they are not responsible at the times of peak craving as previously discussed, at earlier quiescent times they are lucid. They know then from experience that they will again be in a psychological state in which they will find it subjectively very difficult not to use drugs or to engage in other criminal conduct to obtain drugs. In those moments, they are responsible and know it is their other- and self-regarding duty not to permit themselves to be in a situation in which they will find it supremely difficult to refrain from criminal

behavior. They then must take whatever steps are necessary to prevent themselves from allowing that state to occur, especially if there is a serious risk of violent addiction-related crimes such as armed robbery or burglary. If they do not, they will be responsible for any crimes they commit, although they might otherwise qualify for mitigation or an excuse.

An analogy from criminal law may be instructive. In a famous case, a person suffering from epilepsy and subject to seizures had a seizure and blacked out while driving on the public highway (*People v. Decina*, 1956). His automobile ran up on the curb and killed four pedestrians. Because he was blacked out, the killing conduct was not his act and he had no mens rea at the time of the killing. Nevertheless, he was held liable for negligent homicide as a result of his careless previous act of driving while knowing he was subject to seizures. Unless addicts are always non-responsible, an assertion contradicted by the clinical facts, diachronous responsibility is a sufficient ground to deny an excuse to addicts.

For similar reasons, the criminal law is justified in not providing addicts with enhanced ability to negate mens rea. Recall that the law limits the use of intoxication evidence to negate mens rea in part because it views most cases of intoxication as the user's fault. Many would claim, however, that the intoxication of addicts is a sign of their disorder and not their fault. Thus, a crucial part of the rationale for limitations on mens rea negation should not apply to addicts. Nevertheless, for the reasons addressed just above, when addicts are not intoxicated and not in peak craving states, they know they will become intoxicated again unless they take steps to avoid future intoxication,

which they are capable of doing when lucid. Consequently, the law need not be more relaxed about mens rea negation for addicts than non-addicts.

Two counter-arguments to the above reasons to retain current law are denial and lack of opportunity. As people slide into addiction—and almost no one becomes an addict after first use—they may well deny to themselves and others that they are on such a perilous path. This suggests that they may not be fully responsible or responsible at all for becoming addicts. Genuine addicts, or at least most of them, know they are addicted or at least understand that there is a “problem.” Assertions to the contrary are again inconsistent with the clinical facts. Even if denial, anyway a vexed concept in psychiatry, prevents addicts from understanding that they are addicted, if they get into trouble with the law as a result of drug use, they know that they at least have a “problem” resulting from use. At that point, they also know in their lucid moments that they have the duty to take the steps necessary to avoid criminal behavior. Diachronous responsibility still obtains.

By lack of opportunity, I mean the limited treatment resources available in many places to addicts who wish to exercise their diachronous responsibility and to refrain from further criminal behavior. We know from spontaneous remission rates that most addicts can apparently quit using permanently without treatment, but typically they do so after numerous failed attempts and only after they have recognized the good reasons to do so, usually involving family obligations, self-esteem or the like (Heyman 2009, 2013). Fear of criminal sanctions appears to be an insufficient reason for many. Thus, especially when the typical addict is young, having trouble quitting and at higher risk for crimes other than possession, it may be too much to ask of such addicts to refrain without

outside help. If outside help is unavailable, diachronous responsibility would be unfair. I think that there is much to this counter-argument, although it certainly weakens as the addiction-related crimes become more serious, such as armed robbery or even homicide.

### Criticism of Current Legal Regulation of Addiction

Having offered a principled defense of current legal doctrines concerning addiction, I should now like to suggest that on both rights and consequential grounds, the criminal law concerning controlled substances and addictions is misguided. Space limitations prevent me from offering anything but the most superficial, sketchy gesture towards my preferred regime, but here it is. There is a powerful case based on a liberal conception of negative liberty that would grant citizens the right to consume whatever substances they wish as long as they internalize foreseeable externalities through insurance or other means. I fully recognize that decriminalization would be fraught and unpredictable and that the dangers may be great (MacCoun and Reuter 2011), but the risks are worth taking in the name of liberty. Even if the law did not decriminalize drugs, no one should be prosecuted for possession of small amounts of any drug for personal use. The moral and political arguments for the right to consume what a competent adult chooses are too powerful (e.g., Husak 1992, 2002).

The second ground is consequential. The “war on drugs” in the United States is such an abject failure that I am willing to take the risk to reduce the overall harms to individuals and to society at large. I do not base this position on the success of other places, such as British Columbia or Portugal, in moving towards decriminalization without catastrophe striking. The United States is simply too different. Rather, my view is based on the observation that the strongly moralistic view towards drug consumption

prevents our society from recognizing that the regime of criminalization produces vast costs. Harm would be substantially reduced in a decriminalized system. Possession would not be a crime and the cost of drugs would be sufficiently low so that addicts would not have to commit crimes other than possession to support their habit. If they committed crimes while intoxicated, the usual rules would apply with no unfairness. The vast sums now spent on law enforcement could be used to support research and treatment. The money would be far better spent in this way.

Finally, I believe that the substantive law of criminal responsibility is too harsh. In particular, there is no generic mitigating doctrine that would apply to all defendants who might have substantial rationality or self-control problems that do not warrant a complete excuse. Taking such problems into account is largely limited to sentencing and is thus discretionary. Assuming that the problem of diachronous responsibility could be finessed generally or did not obtain in particular cases, many addicts might qualify for such mitigation. I have proposed such a doctrine (Morse 2003) and believe that the problem of diachronous responsibility might not loom so large if defendants were simply seeking mitigation and not a full excuse.

In short, the current criminal law response to drugs and addiction is defensible, but it is far from optimum.

### Conclusion

Current Anglo-American law concerning addiction is most consistent with the choice model of addictive behavior and the no-choice model has made few inroads despite the enormous advances in the psychological, genetic and neuroscientific understanding of addiction. The law's conservatism is defensible, even in the face of the

chronic and relapsing brain disease model of addiction, which often unjustifiably assumes that addicts have essentially no choice about use and other crimes committed to support use. Nevertheless, sound legal policy should move away from a primarily criminal law response and should move towards a more liberal regime based on rights and good overall consequences.

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