


2013

A Good Enough Reason: Addiction, Agency and Criminal Responsibility

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Recommended Citation

Morse, Stephen J., "A Good Enough Reason: Addiction, Agency and Criminal Responsibility" (2013). *Faculty Scholarship*. Paper 1605. http://scholarship.law.upenn.edu/faculty_scholarship/1605

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A Good Enough Reason:

Addiction, Agency and Criminal Responsibility

The intent of this FOA [Funding Opportunity Announcement] is to advance research on basic processes and mechanisms of self-regulation, capitalizing on recent advances in methods and theory from the psychological (social, personality, developmental), economic, neuroscience, sociocultural, and other behavioral and social science literatures. The current lack of consistency and conceptual integration in how self-regulation is studied across a range of disciplines hinders our understanding of the basic mechanisms underlying many important health and developmental outcomes. National Institutes of Health (N.I.H.), 2010

Introduction: A Moral Fable from Real Life

Let us begin with the case of a real addict, Mr. Leroy Powell, whose criminal responsibility was addressed by the Supreme Court in, *Powell v. Texas* (1968; all citations are from the case). Although it uses outdated language, the description of Powell's condition is consistent with how his clinical problem would be described today. In December of 1966, Powell was arrested, charged and convicted of public intoxication. His defense counsel had 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. The Supreme Court held that Powell's conviction and punishment were not constitutionally improper and that there was no constitutional requirement of a compulsion defense to crime. For our purposes, however, the evidence in the case will set the stage for the argument of this chapter.

Mr. Powell's 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 any more 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.

Addicts are not automatons. Even if they suffer from a chronic and relapsing brain disease, as one dominant model of addiction claims, if addicts have good enough reason not to seek and use, they don't. The questions are whether those reasons are available to them when they seek and use drugs or whether they are compelled to seek and use, even if they recognize and endorse the reasons not to.

Powell's case illustrates the issues this article will consider. What is addiction? What are the criteria for criminal responsibility, including the criteria for compulsion? Must the law adopt a medicalized view of addiction? Only after

answering those questions can we finally turn to the ultimate question of how and in what cases addiction affects criminal responsibility.

The analysis begins by contrasting medical and moral views of addiction and how such views influence responsibility and policy analysis. It suggests that since addiction always involves action and action can always be morally evaluated, we must independently decide whether addicts do not meet responsibility criteria rather than begging the question and deciding by the alternative labels of “disease” or “moral weakness.” The article then turns to the criteria for legal responsibility in general and for criminal responsibility in particular. This section shows that the criteria for criminal responsibility, like the criteria for addiction, are all folk psychological, involving acts and mental states, and therefore any scientific information about addiction must be “translated” into the law’s folk psychological criteria. Distractions about responsibility are then quickly canvassed.

With the criteria for responsibility in place, the article then turns to the direct relation between addiction and criminal responsibility. It argues that most addicts retain sufficient rational and control capacities at the relevant times to be held responsible, especially for crimes that are not part of the definition of addiction itself. The article next addresses whether there is good reason to excuse or mitigate addicts for the crimes of purchase and possession for personal use. It concludes by briefly considering what contemporary science can contribute to our understanding of addiction and agency.

What Is Addiction?

There is no consensual definition of “addiction” within any of the specialty disciplines that study the condition and there is no definitive biological marker for it. There is broad agreement, however, that persistent and apparently compulsive seeking and using drugs are the core phenomena to be explained. Some would include the presence of extremely deleterious consequences, but that appears to be a criterion for the requirement that the seeking and using is compulsive. Many experts would also add the subjective experience of “craving,” but this is more controversial. Thus, the definition most people use is behavioral, including actions and mental states (Nestler, 2000).

In short, here is what we know about addictions. Some people who ingest drugs begin persistently to seek and use drugs in a manner that they describe and observers infer is compelled and that the seeking and using then almost always creates further, often horrendous consequences for the user. Seeking and using often follow substantial planning and are clearly actions. Some addicts act intentionally to stop being addicted. There is an enormous amount of other research about the biological, psychological and environmental variables that influence the development, persistence and termination of addiction. There is also a large body of often-conflicting research on how addiction affects behavioral patterns, executive function and other cognitive capacities. In some cases addiction seems to dissociate liking from wanting and it is usually marked by ambivalence. Such evidence might prove important in deciding an individual

case. There is great behavioral heterogeneity among addicts, however, and our question is broader: Should addiction per se excuse an addict from immoral and illegal behavior? For these purposes, the statements at the beginning of the paragraph are the bedrock, uncontroversial observations.

Two ways of thinking about this condition dominate legal policy thinking. The medical model treats addiction as a chronic and relapsing brain disease (Leshner, 1997). The definitional criteria are just signs and symptoms, akin to the signs and symptoms of other medical or psychiatric disorders. The legal model does not deny that addiction may be a disorder, but it nonetheless notes that the behavioral criteria indisputably include human action.

Why does it matter if we conceptualize drug-related problems medically as a brain disease, as the usurped or “hijacked” neural mechanisms of reward, or, as a result of chosen action that is within the addicts rational control? Why should disputes among philosophers of biology and medicine about the boundaries of the disease concept, or the law’s model of the person, or the pure moralizing of many prevent useful research and policy? Otherwise useful images or models can have negative consequences, however, if they exceed their rightful boundaries or if they depend on incorrect factual premises.

Wrong or misleading images in an inapt domain and inattention to facts can produce misguided policies. Understanding the moral and legal responsibility of people for becoming addicted and for criminal conduct associated with their addictions has unfortunately been hindered by inadequate or superficial

understanding of how explanatory models of addiction relate to responsibility. Even sophisticated people tend to think that addicts are automatons, puppets pulled by the narcotic strings of a biological disease, and that therefore the addict is not responsible for actions associated with his addiction. Evidence linking addiction to a genetic predisposition or neurological abnormality contributes to this type of thinking (Keller, 2005). Conversely, many people think that addiction is purely a result of moral weakness and do not understand the psychological dilemmas addicts face. For the law's purposes, however, the metaphors and models of addiction often obscure rather than clarify issues of criminal responsibility and of social policy. Therefore, let us first delve a bit more deeply into the medical and legal views. (I have explored this issue in Morse, 2009, and will be relatively brief in what follows.)

The Medical Model

The concepts of illness and disease have powerful associations in our culture, most of which are inconsistent with the sufferer's responsibility for the features of the illness. People can be responsible for initially contracting or risking contracting diseases. And a person who suffers from many diseases can ameliorate the consequences by intentionally adhering to a prescribed medical regimen. But most diseases are pure mechanisms and the sufferer cannot terminate all the signs and symptoms simply by intentional choice.

The dominant image of people with diseases is that they are the victims of pathological mechanisms who deserve sympathy and help and do not deserve condemnation.

The brain disease model of addiction borrows heavily from the powerful moral and social associations of the concepts of illness and disease. Supported by highly technical anatomical, physiological, and genetic research demonstrating that addictions appear to have a biological basis, the brain disease model inevitably suggests that the addict is sick. The signs and symptoms of the disease—primarily compulsive drug seeking and use—are seemingly the mechanistic consequence of genetically-driven pathological brain anatomy and physiology over which the addict has no control once prolonged use has caused the pathology.

There are many problems with the “chronic and relapsing brain disease” view. These include ignoring or insufficiently appreciating the role of set and setting in drug use and addiction (Zinberg, 1984), the underappreciated spontaneous remission rates for the addictions, and the sample problems for those who relapse because this group tends to be co-morbid and thus it is not clear the role addiction plays independently in the relapsing (Heyman, 2009). Perhaps most importantly, the vast number of people who cease seeking and using do so not as the result of treatment, but as the result of the exercise of agency. They have a good enough reason (Heyman, 2009). The brain disease model has much

scientific support, but it is hardly the ultimate and complete explanation of addiction.

The concept of compulsion or something like it is crucial to the medical model because without it addiction is just a habit like any other. Despite the current biologizing 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. An adequate definition of compulsion that applies to action rather than to mechanism is needed to explore compelled action's biological basis, but such a definition does not exist.

The conclusion that the addict's behavior is compulsive is usually based on two types of evidence. The first is the person's subjective self-report that he could not control himself. The second is an inference from the negative consequences that flow from persistent seeking and using, especially if the person claims that he wishes to stop. The inference is that the person would not continue to set back his own interests so disastrously unless seeking and using were compulsive. The current favored biological theory for addiction is certainly consistent with the view that some persistent drug users find it very rewarding to continue use, but it does not prove that the behavior is compulsive. An adequate independent definition of compelled action is crucial. We will return to the meaning of compelled action in the section below that relates addiction to criminal responsibility.

The Legal Model

Criminal law presupposes the “folk psychological” view of the person and behavior. This psychological theory causally explains behavior in part by mental states such as desires, beliefs, intentions, willings and plans. Biological, other psychological and sociological variables also play a role, but folk psychology considers mental states fundamental to a full explanation of human action. Human behavior cannot be adequately understood if mental state causation is completely excluded or eliminated. Folk psychology presupposes that human action will at least be rationalizable by mental state explanations or that it will be responsive to reasons, including incentives, under the right conditions.

Brief reflection should indicate that the law’s psychology must be a folk psychological theory, a view of the person as a conscious (and potentially self-conscious) creature who forms and acts on intentions that are the product of the person’s other mental states. We are the sort of creatures that can act for and respond to reasons. The law treats persons generally as intentional creatures and not as mechanical forces of nature. Law is primarily action-guiding (Sher, 2006) and could not guide people unless people could use rules as premises in their reasoning about how they should act behave. Otherwise, law would be useless, and perhaps incoherent(Shapiro 2000).

Criminal law’s concept of the person, including the addict, is the antithesis of the medical model’s mechanistic concept. Although all honest people will admit that biological and environmental variables beyond the person’s rational

control can cause an agent to be the type of person who is vulnerable to addiction and predisposed to commit crimes or can put the agent in the kind of environment that predisposes people to addiction and criminal activity, the law ultimately views the criminal wrongdoer as an agent and not simply as a passive victim. In *Powell*, for example, the Supreme Court held that a defense of “compulsion symptomatic of a disease” was not constitutionally required. The Court wrote that public drunkenness was behavior, and thus unlike the simple status of being addicted, and it refused to hold that criminal blame and punishment were constitutionally impermissible under the circumstances.

Action can always be evaluated morally, even if it is symptomatic of a disease state (Morse, 2007a). Most mental and physical diseases—even severe disorders—suffered by people who violate the criminal law do not have these exculpate because they do not sufficiently affect rational agency (Morse, 1999). Even if addiction is properly characterized as an illness, addicts may nonetheless be capable of being guided by good reasons, including the incentives law can provide (Satel & Goodwin, 1998). Whether they do have this capacity is a question that must be answered rather than begged by use of the disease model without further explanation.

.The Legal Criteria for Criminal Responsibility

The criteria for criminal responsibility, like the criteria for addiction, are entirely behavioral, including actions and mental states. If an agent acts intentionally with a culpable mental state, such as intent to cause a prohibited

harm, and the agent has no legally-recognized excuse, such as gross loss of rational capacity or control capacity, the agent will be criminally responsible. Of course the person's mental state is influenced by biological, psychological and sociological variables and knowledge of these variables may help determine what the person's mental state was, but the law is ultimately concerned with the person as an acting agent who has acted for reasons. The final explanatory pathway for law is always folk psychological.

Some may think 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, some would say "will power," is conceived of as a trait possessed by the individual that can be influenced by external events, but is nonetheless an aspect of the person (Holton, 2009). 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. In contrast, coercion exists if the defendant was metaphorically compelled to act by being placed in a "do-it-or-else," hard-choice situation. Note that in cases of metaphorical compulsion, unlike cases of no action, the agent does act intentionally.

This account of criminal responsibility is most tightly linked to retributive justifications of punishment, which hold that punishment is not justified unless the offender morally deserves punishment because the offender was at fault and

responsible, and that the offender never should be punished more than he deserves. It is generally conceded that, with exceptions that need not detain us and prove the point, desert is at least a necessary precondition for punishment in Anglo-American law. The account is also consistent with consequential justifications for punishment, such as general deterrence.

Dangerous Distractions

Before we move directly to the relation between addiction and criminal responsibility, it is important to identify some false starts and distractions that bedevil analysis of criminal responsibility of addicts or any other offenders. These are familiar to philosophers and philosophically-sophisticated lawyers, but they bear repeating at least cursorily. The four false and distracting claims that are sometimes made about the responsibility of addicts (and others) are: 1) the truth of determinism undermines genuine responsibility; 2) causation, and especially abnormal causation, of behavior entails that the behavior must be excused; and, 3) causation is the equivalent of compulsion.

The alleged incompatibility of determinism and responsibility has been argued for millennia. There is a genuine metaphysical debate with no resolution in sight, but our moral and legal practices do not treat everyone or no one as responsible. Determinism does not guide 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 any responsibility.

Our criminal responsibility criteria and practices have nothing to do with determinism or with the necessity of having so-called “free will” (Morse, 2007b). The capacity for libertarian freedom 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 almost no one in the debate about determinism and free will or responsibility argues that we are not conscious, intentional, potentially rational creatures when we act. Some scientists claim that “conscious will” is an illusion, but these arguments are at present conceptually and empirically unpersuasive and they certainly have gained no acceptance in the law (Morse, 2007c). Our current responsibility concepts and practices use criteria consistent with and independent 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 and responsibility are inconsistent and that causation per se is an excusing condition. This is sometimes called the “causal theory of excuse.” In a thoroughly physical world, however, this claim is either identical to the determinist critique of responsibility and furnishes a foundational critique of 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. 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.

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 acted under compulsion. Moreover, causation is not the equivalent of compulsion because lack of self-control and compulsion are normative standards. They apply only to some defendants. If causation were the equivalent of compulsion, all defendants would be compelled and no one would be responsible for any criminal behavior. This is clearly not the criminal law's view.

Addiction and Responsibility

The ultimate conclusion of this section is that most addicts should be held responsible for most crimes other than simple purchase, possession and use for purely personal use. In general, addiction does not sufficiently undermine either cognitive or control capacities to excuse the addict for other crimes and virtually all addicts can be held responsible for not taking the steps to prevent them from engaging in addiction-related crime.

Introductory Distinctions

Roughly speaking, addiction has four associated aspects or phenomena that might be objects of responsibility ascription: anatomical states, physiological states,

psychological states, and actions (Fingarette & Hasse, 1979). Among these, only action is a potentially appropriate object of moral and legal responsibility ascription and a justification for criminal punishment; status is neither an object of ascription nor a justification for blame and punishment (Robinson v. California, 1962). For the most part, people are held morally and legally responsible only for actions. Anatomical and physiological states may be evaluated as desirable or undesirable, but they are entirely or largely the product of mechanistic processes. Anatomical, physiological, and psychological states are not intentional human actions (albeit some mental states or processes can be produced intentionally). People may be responsible for the anatomical, physiological, and psychological states associated with addiction if they are responsible for becoming addicted, but the criminal law still would not punish those states because they are solely statuses.

The primary behavioral signs of addiction—seeking and using substances (Cami & Farre, 2003)—and other criminal behaviors related to the addiction are intentional human actions whether or not those actions are signs of a disease. The addict has a desire to consume the addictive substance, often described as craving or excessive appetite, believes that consuming it will satisfy that craving, and therefore forms and acts on the intention to seek and to use. Such explanatory practical syllogisms are the mark of all intentional actions. To assume that the addict is not responsible for addiction-related behavior just because it has biological causes or because the action is the sign of a disease generally commits

the fundamental psycholegal error and therefore begs the question of responsibility. The addict must be evaluated as an acting agent, a person who acts for reasons, and not simply as a biophysical mechanism.

Crimes addicts commit may be divided into three classes and the law might well treat the responsibility of the addict differently depending on the type of crime committed. The first is behaviors that are criterial for addiction itself, such as buying, possessing and using substances. The relation between addiction and criminal conduct is analytic. The second is crimes committed in support of the addiction or as a non-criterial consequence of addiction, such as theft to obtain the money to buy drugs or Powell's disorderly conduct. Crimes committed for dealers who will provide drugs as payment fall into this category. Crimes in the second category may of course be over-determined, driven not only by the desire for drugs but also for the pleasures that criminal behavior provides. The third class is crimes committed by addicts that do not seem driven by addiction, but that may or may not be related to an addiction-related milieu or life-style. The relation in such cases is indirect. For example, addicts who are part of a gang may commit crimes to protect turf rather than directly to support their habits.

Responsibility for Becoming Addicted

Whether or not an addict is responsible when his actions are motivated in part or wholly by his addiction, if the addict is responsible for being in that state, it is possible that analysis of responsibility need go no further.

Before they reach the age of reason, some children and many early and middle adolescents have substantial experience with alcohol, nicotine, and other drugs, and a small number of them become problem users. Still, the simplifying assumption will be made that virtually all people do not have their first substantial experience with potentially addicting substances until they are mid- to late adolescents, an age at which there is reasonable evidence that adolescents are in general formally cognitively indistinguishable from adults, but are nonetheless on average psychosocially less mature and less risk-averse (Morse, 1997; Steinberg et al, 2009a;). There has been criticism of the findings and ecological validity of the studies purporting to demonstrate such differences (Fischer, Stein & Heikkinen. 2009), but let us assume that they are reasonably valid (Steinberg et al, 2009b). Nonetheless, the differences are not so large as to preclude responsibility. For example, mid to late adolescents can be held criminally responsible. In recent years, the Supreme Court of the United States has held that because adolescents are less responsible than adults, the harshest adult penalties cannot be applied to them mandatorily or applied to them at all (*Roper v. Simmons*, 2005; *Graham v. Florida*, 2010; *Miller v. Alabama*, 2012). Nonetheless, it is widely accepted that adolescents are sufficiently responsible to deserve criminal convictions.

By the age of reason, any competent person knows generally about the dangers of addicting substances. Most people who use potentially addicting substances do not become addicts, but between 15 and 17 percent do (Deroche-

Gamonet et al, 2004). Whether one considers this a high or low risk is a normative question. On the other hand, they may overestimate the benefits of drug use and underestimate the risks of becoming addicted (Elster, 1999). Experience with and empathy for those already addicted is simply no substitute for genuine knowledge. Consequently, perhaps addicts are not fully responsible for their addictions because they operate with insufficient information.

This claim appears plausible, but too strong. There is sufficiently good information about the perils of addiction as a result of both observation and indirect sources to warrant the conclusion that those who take drugs understand the risks sufficiently to be held responsible if addiction ensues. After all, as long as people have general normative competence, perfect information is not required for responsibility.

One can deny that any drug use is rational because drug use is immoral and choosing immorality is irrational. Claiming that immorality is irrational is philosophically controversial, of course, and in this context it suggests a moralistic, virtue ethics. Why, precisely, is limited experimentation or more general recreational use immoral? (Husak, 1992; Hough, 1994). Because it feels good? Does all such use degrade the moral personality? Perhaps, but, limited initial experience rarely hooks anyone—even if the experimental or recreational user is a member of an at-risk population and if becoming addicted almost always requires prolonged use (Kalivas & Volkow, 2005).

The usual response is that the process of addiction is insidious. No single instance of use seems to cross a threshold; the process is instead stealthily additive, a slippery slope. At some point, however, the addict is hooked without realizing it. Because no initial user can predict whether and when he specifically will become addicted, it is always irrational to start or to continue.

There is truth to this response, but the insidiousness of the addiction process is well-known generally and proto-addicts are usually aware that they are developing a problem before the problem becomes a diagnosable addiction. They may, of course, be “in denial” or using other defense mechanisms, but the use of defense mechanisms is an imperfect shield at best and is not an excusing condition that morality and law will recognize when serious harms occur. Excellent insight is not necessary for responsibility. It is difficult to resist the conclusions that most and perhaps all users prior to addiction have some awareness of the risk of potential addiction and that pre-addictive use is conduct for which the user is responsible. Consequently, most addicts are responsible for becoming addicted.

Even if consciously risking or intentionally choosing to become an addict is not rational behavior, responsibility for conduct does not require acting for good, rational reasons. It is sufficient that the agent retain the general capacity for rationality, the capacity to know the facts and to grasp and be guided by the relevant reasons that pertain in the situation. Some addicts may lose this capacity after becoming addicted, but that is a different issue addressed below. Until

addiction occurs and perhaps thereafter there is little reason to believe that otherwise responsible agents do not retain this general capacity. Of course, how much rational capacity is necessary for responsibility is a normative matter, but in liberal societies the bar is usually set reasonably low to maximize personal liberty.

Finally, few people are compelled to become addicted. Peer pressure to experiment may be common in adolescence and early adulthood, but it seldom takes a form that would justify a compulsion excuse. Initial use is almost always intentional and in most cases rational. The user tries the substance to please friends, for the thrill of experimenting or being on the edge, and for many other reasons that do not suggest excusing irrationality. Moreover, almost no one is literally forced to become an addict by the involuntary administration of substances. In conclusion, most people who become addicts may fairly be held responsible to a substantial degree for becoming addicted.

To the extent that addicts seek to use their addiction as a mitigating or excusing circumstance when they are charged with crimes related to the addiction, they become vulnerable to the claim that they have caused the condition of their own excuse and, therefore, should not be excused. This is a form of strict liability, however, and becoming an addict is distinguishable from committing crimes once one is addicted. Very few would in fact foresee committing specific crimes, although they may be aware that the addicted life poses risks of illness, poverty, and criminality. The only crimes one may specifically foresee would be crimes of buying, possession, and use in the case of people addicted to illicit substances. For

those addicted to arguably the most dangerous drug, ethanol, there may be no specific awareness of the risk of future criminality, except, perhaps, driving under the influence. In short, even if addicts are mostly responsible for becoming addicted and may be aware of the general risks addiction poses, this responsibility is different from the responsibility necessary to be culpable for specific crimes.

Act and Mental State (“Mens Rea”) Requirements for Responsibility

Once addicted, should addicts be responsible for use and further drug-related activity? By definition, addicts—or many of them—experience subjective craving and compulsion to seek and use drugs. In some cases, withdrawal also might be feared, but most addicts know that the physical symptoms are manageable, and for some of the “hardest” drugs, addicts experience no physical withdrawal or any withdrawal syndrome (Haney, 2004; Greenfield & Hennessey, 2004). Does addiction negate action or mental state?

Addiction and Action

Biological models and the discovery of biological causes imply that the addict’s symptomatic behaviors are solely mechanisms, but this is not true. Compulsive states are marked by allegedly overwhelming desires or cravings, but whether the cravings are produced by faulty biology, faulty psychology, faulty environment, or some combination of the three, a desire is just a desire and its satisfaction by seeking and using is human action, even if addicts have special difficulty using good judgment to avoid acting on their undesirable desires (Holton, 2009). The addict desires, broadly, either the pleasure of intoxication, the

avoidance of the pain of withdrawal or inner tension, or both. The addict believes that using the substance will satisfy the desire and consequently forms the intention to seek and to use the substance.

To attempt to demonstrate that people suffering from compulsive states are similar to mechanisms, the following type of analogy is often used. Imagine that a person is hanging by the fingernails from a cliff over a very deep chasm. The hapless cliffhanger is strong enough to hold on for a while, but not strong enough to save his life by pulling himself up. As time passes and gravity and muscle physiology do their work, he inevitably weakens and it becomes harder and harder to hang on. Finally it becomes impossible and the cliffhanger falls to his death. We are asked to believe that the operation of compulsive desires or cravings is like the combined effect of gravity and muscle physiology. At first the hapless addict can perhaps resist, but inevitably he weakens and satisfies the desire for drugs.

Brief reflection demonstrates that the analogy is flawed. Unlike action to satisfy a desire, the fall is a genuine mechanism. Holding on indefinitely is physically impossible and the ultimate failure of strength is not intentional. Imagine the following counterexample: A vicious gunslinger trails the addict closely and threatens to kill him instantly if he seeks or uses drugs. Assuming that the addict wants to live as much as the cliffhanger does, no addict would yield to the desire. Conversely, even if the same gunslinger threatened to shoot the cliffhanger immediately if he started to fall, he will fall every time. Of course,

liberal societies do not force or even permit addicts to employ such a self-management technique. Moreover, ascriptions of responsibility would appear unfair if such draconian self-management techniques were necessary.

Nonetheless, the counterexample, like Powell, indicates that the addict's behavior is not a mechanism and is potentially responsive to a sufficiently good reason not to yield.

An addict is not a cliffhanger, so consider some closer analogies, such as a powerful, persistent itch or the motor and verbal tics of those suffering from Tourette's Disorder. It can be damnably hard not to scratch an itch, even if it is contraindicated. The premonitory buildup of tension that precedes and is relieved by tic behavior among those suffering from Tourette's is usually intense and more bothersome than the tics themselves. In these cases, the "pressure" to satisfy the desire, to end the discomfort, can be immense. Even so, the agent will be reward sensitive or reason responsive to some degree. The gun at the head will wusucceed. If people with itches or pre-tic tension satisfy the desire to rid themselves of the itch, discomfort, or tension, surely their behavior will be action and not mechanism. In some extreme Tourette's cases tic-ing may be more like a reflex than action and responsibility would be blocked because the agent did not act. All other cases involve action.

Although the addict's behavior is not mechanism, perhaps not seeking and using is as hard as not scratching an itch or preventing ticing. Is it fair to expect the addict to self-regulate successfully in ordinary circumstances that do not

permit brute techniques, such as threatening oneself with instant death? Is yielding to the desire an appropriate basis for blame and punishment, especially in extreme cases? Perhaps, drug-related activity is sufficiently analogous to mechanistic movement to qualify for an excuse, but this requires an argument rather than an analogy. If one concludes, as I think one should, that the addict's behavior is clearly action and not mechanism, then one must turn to an excusing condition to respond to the addict's difficulty refraining from criminal conduct.

Addiction and Mental State

The law is generally unforgiving if a defendant lacked a required mental state as a result of voluntarily getting drunk. For example, the Supreme Court upheld the exclusion of all evidence of intoxication in a case in which the defendant was plausibly in a state of alcoholic blackout at the time of killing two companions (Montana v. Egelhoff, 1996). For another example, the influential Model Penal Code (American Law Institute, 1962, §2.08(2)) equates voluntarily getting drunk with a defendant's subjective awareness that his conduct was creating a substantial and unjustifiable risk of a prohibited harm, such as the risk of death. These rules are harsh—getting drunk is not itself a crime—and many people think that they are unfair, but the usual justification for them is that the defendant was responsible for creating his own potential defense of lacking a required mental state.

In most cases, however an intoxicated person, whether or not he is an addict, will form the mental state required by the definition of the crime. There

are exceptions, however, especially in some cases in which the defendant claims he was not aware of a prohibited risk he was creating. For example, extremely drunk drivers may not be aware of the magnitude of the danger he creates or a drunk undergraduate may not be consciously aware of the risk that the person he is with is not consenting to his sexual advances. Still, this is a minority of cases.

Whether or not addicts were responsible for becoming addicted, they will not lack mens rea for their substance-related criminal activity. Virtually all potential addicts are consciously aware of the risk that if addicted they will persistently and intentionally seek and use substances. Nevertheless, the previous conscious awareness of this risk is distinguishable from forming the intention pre-addiction to seek and use after becoming addicted. For most addicts, however, there will be no mens rea problem when they seek and use. They are not automatons and they do form the intent to buy, possess, and use. In most cases of serious criminal wrongdoing, the potential addict may be unaware of the risk of committing such offenses unless the addict has a history of such wrongdoing. Even if this is true, however, there still will be no mens rea problem. An addict who burgles, robs, or kills surely forms the intent to do so.

In the narrow legal sense, most addicts have the true purpose to engage in their drug-related conduct. If they deserve mitigation and excuse, it is because they are internally coerced or not fully rational, not because they lack the mental

state required by the definition of the offense. Let us therefore turn to the excusing theories.

Excusing Theories

If compulsion and lack of the capacity for rationality are the law's primary excusing conditions, as is standardly claimed (Morse, 2007b), do craving and compulsion to use addictive substances or to engage in other addiction-related crimes provide a compulsion or rationality excuse? This section considers the two prime candidates for excusing addiction-related actions: the internal coercion theory and the lack of rational capacity theory. It concludes that the latter is preferable on conceptual and empirical grounds. It then suggests that the possibility of so-called diachronous responsibility may decisively bar most addicts from claiming an excuse to crime on either theory.

The Internal Coercion/Lack of Control Theory

Too often we are seduced by medical metaphors that strongly suggest mechanism (Morse, 2002). Nevertheless, the disease model and ordinary language—the addict allegedly “can't help using,” or, more bluntly, is “compelled to use” suggest that addiction primarily produces a control or “volitional” problem.

Volition is a vexing foundational problem for philosophy, psychology, and law (Behr, 1993). Even if “black box” models of control problems seem to explain the phenomena deemed addiction, the law's concept of the person as a conscious, intentional agent implies that such models cannot provide the law with

adequate guidance to decide if an excuse is warranted either in general or in individual cases. Any model must translate into terms of human agency.

Consider some alternatives. If one adopts Professor Michael Moore's influential, widely noticed contention that volition is a functional mental state of executory intention (Moore, 1993), the problem of volition disappears because virtually no addict has a volitional problem. Their wills translate their desires for the drug into the necessary action quite effectively. On this account, almost no intentional conduct will raise a volitional problem. Moore's view, like all theories of the philosophical foundations of action, is controversial. Some competitors that consider volition a species of desire, a view that Moore and others reject (Strawson, 1986), may raise volitional problems in the case of addicts (Wallace, 1999). Unless these alternatives can be reduced to ordinary language concepts that apply to agency, however, it will be impossible for legislatures and courts to rationally use them to develop legal rules.

An "internal coercion" model is one possible explanation of a control or volitional excuse based on "disorders of desire." The model employs a moralized, commonsense approach that is analogous to the criminal law excuse of duress (Wertheimer, 1987), and that requires no implausible, unverifiable empirical assumptions about how the mind works. Consequently, the criteria for duress will be considered before turning to whether the model can be applied to addictions.

Duress obtains if the defendant is threatened with the use of deadly force or grievous bodily harm against himself or another unless the defendant commits

an equally or more serious crime, and a person of reasonable firmness would have been “unable to resist” the threat (American Law Institute, 1962, §2.09). In other words, an agent faced with a particularly “hard choice”—commit a crime or be killed or grievously injured—is legally excused if the choice is too hard to expect the agent to obey the law. The defense is not based on empirical assumptions about the subjective capacity of an individual agent to resist threats; it is moralized and objective. Using the term “objective” is not meant to suggest that the “person of reasonable firmness” criterion has a reality independent of our practices. It is meant to be a normative standard that expresses what we all expect of each other in our legal and moral culture. For example, the defense is not available to a defendant allegedly subjectively “unable” to resist if the threats were less than death or grievous bodily harm or if a person of reasonable firmness would have been able to resist.

The moralized criterion of the person of reasonable firmness appears to risk unfairness. Suppose a person would find it extraordinarily difficult to resist threats that a person of reasonable firmness could resist. Criminal penalties would be retributively unjust because a person does not deserve punishment for conduct that is so difficult for that agent to avoid. Moreover, specific deterrence is bootless in such cases. A purely consequential view might justify punishment to deter the marginal people, but at the cost of injustice to those who find it supremely difficult to resist. Because fault is a necessary condition for blame and punishment, denying the defense would be unjust. Those who take this position

should argue for a purely subjective view of the duress excuse, which would require difficult empirical assessment of each defendant's capacity to resist. This standard would be a nightmare to adjudicate, but worth the effort if it were necessary to avoid injustice.

There is a good argument, however, that the moralized, objective standard is not unfair. If a person is threatened with death, for example, the defense of duress should be potentially available unless the balance of evils is so negative that every person would be expected to resist. In all other cases, the question would at least "go to the jury." Thus, there will be few cases involving sufficiently serious threats in which the person incapable of resisting would lose the potential defense. The person who genuinely finds resisting extremely difficult even when the threats are relatively mild— say, kill or be touched—will almost certainly be a person with irrational fears that will qualify for some type of irrationality defense. Duress might not obtain, but exculpation will be available on other grounds.

The formulation, "unable to resist," has the unmistakable implication of mechanism. Unless *force majeure* or genuine mechanism is at work, we virtually never know whether the agent is genuinely unable or is simply unwilling to resist, and if the latter, how hard it is for the agent to resist. In the present state of knowledge, research evidence concerning the characteristics that help people maintain control when faced with temptation or experiencing impulses is no more than a general guide (Baumeister et al., 1994). Even if "willpower" is an

independent human ability and there apparently are individual differences in self-control (Tangney, Baumeister & Boone, 2004), no sufficiently valid metric and instrumentation can accurately resolve questions about the strength of craving and the ability to resist. This was in large part the reason that both the American Psychiatric Association and the American Bar Association recommended the abolition of the control or volitional test for legal insanity in the wake of the ferment concerning the defense of legal insanity following the *Hinckley* verdict (American Bar Association, 1989; American Psychiatric Association, 1982). If strength of craving or of resistance are to be the touchstones, legal decision makers will have to act with little scientific guidance and lots of common sense (Donovan, 1988; Cooney et al, 2005; Blume et al, 2005). Moreover, the psychological processes that explain lack of control are better understood as processes that undermine rationality.

The analogy often used to demonstrate that craving is like duress is that the intense cravings or desires of “compulsive” states are like an “internal” gun to the head. The sufferer’s fear of withdrawal and of other dysphoric states is allegedly so great that it is analogous to the “do-it-or-else” fear of death or grievous bodily injury that is necessary for a duress defense. Yielding to a compulsive desire, a craving, is therefore like yielding to a threat of death or grievous bodily harm. The argument is that we cannot expect a person of reasonable firmness not to yield in the face of such an internally generated hard choice.

The analogy is attractive, but theoretically and practically problematic. First, the analogy suggests no problem with the defender's will, which operates effectively to execute the intention to block or to remove the dysphoria (Fingarette & Hasse, 1979). Further, it is entirely rational, at least in the short term, to wish to terminate ghastly dysphoria, even if there are competing reasons not to, such as criminal sanctions or moral degradation. And it is simply not the case that addicts always act to satisfy their cravings because they fear dysphoria. Many just yield because it is unpleasant to abstain, not because they substantially fear dysphoria. In addition, the phenomenology of the sufferer's response to craving, unlike the phenomenology of the victim threatened by death, is not clearly the product of unitary, simple causes. Suppose, for example, that the primary motive is the pleasure or that such pleasure is an important, additional motive. The possibility of pleasure seems more like an offer than a threat, and offers expand rather than contract freedom. The strong desire for pleasure is not a hard-choice excusing condition in law or morals.

Assuming that fear of dysphoria is a sufficient motive and that the analogy to the fear of death or grievous bodily harm is initially plausible, two problems remain: assessing the strength of the fear and deciding what degree of fear of dysphoria is sufficient to excuse what types of conduct. Based on ordinary experience and common sense, the criminal law uses threats of death or grievous bodily harms as objective indicators of the type of stimulus that would in ordinary people create sufficient hard choice to justify an excuse. People subjected to such

threats will differ markedly in their subjective fear responses and in their desires to live or to remain uninjured, but ordinary, average people will have very substantial fear and find the choice to resist very difficult, even if they do not have great subjective fear.

We have all experienced dysphoric states, and many have experienced intense dysphoria, but dysphoria as a source of present and potential pain is more subjective than death or grievous bodily injury. Consequently, assessing the average or ordinary intensity of craving or inner tension, including seemingly strong states, is simply more difficult than assessing the fear of death or grievous bodily injury. Focusing on more objective markers of compulsive states, such as physical withdrawal symptoms, will surely help, but fear of such symptoms is unlikely to support an excuse.

Fear of the physical symptoms of withdrawal from most drugs is not likely to be as intense as the fear of death or grievous bodily harm because in most cases withdrawal is not terribly painful and can be medically managed to reduce the discomfort (Kaplan, 1983). Withdrawal from alcohol dependence can be extremely severe, but it, too, can be medically managed, and because alcohol is freely and inexpensively available for adults, those who fear withdrawal and do not want treatment seldom need to commit crimes to obtain alcohol.

Dysphoric states are undesirable, but does their threat, especially if medical management is available, produce a sufficiently hard choice to warrant an excuse? The answer to this question is not obvious, but perhaps at the extreme

they do. People suffering from severe depressive disorders, for example, report psychological pain that is apparently as great as the reported pain from many forms of grievous bodily harm, and some depressed people kill themselves to avoid the pain. For another example, some people addicted to alcohol who are being treated with a drug that makes them dreadfully sick if they ingest any alcohol, including trace amounts, will “drink through” the sickness (Ludwig, 1988).

These examples and common sense suggest that fear of or aversion to dysphoric states may be very strong. But is it as strong as the fear of death? Assuming that the feared dysphoria of unconsummated cravings can be substantial, it will likely seldom be as severe as the fear of death or grievous bodily harm. If this is right, and assuming, too, that we could reliably assess the fear of dysphoria, few addicts would succeed with a hard-choice excuse. On the other hand, if the drug-related activities were solely possession for personal use and use itself, then perhaps the justification of necessity should obtain (American Law Institute, 1962, §3.02). Even if the harm of such activity is less than the harm of dysphoria, however, the law would hold most addicts responsible for becoming addicted and thus for placing themselves in the situation that created the need for the defense. The law disallows the justification in such cases. Finally, even if addicts were not responsible for becoming addicted, all legislatures would today resist permitting a justification for possession and use on policy grounds and would surely reject an excuse for other, possibly related crimes, such as robbery,

to pay for drugs. The disease model is powerful, but the moral failure model is resilient.

In sum, the internal coercion or duress approach uses understandable terms and has a moral basis derived from a defense that the criminal law and ordinary morality already accept. Nevertheless, currently insurmountable practical problems beset attempting to assess the appropriateness of an excuse in individual cases. What is more, thinking about excuse in terms of control difficulties will invite misleading metaphorical thinking about mechanism and expert testimony that is little more than moral judgment wrapped in the white coat of allegedly scientific or clinical understanding. The law should not adopt an internal coercion excuse.

The Irrationality Theory

Irrationality is the most straightforward explanation of why some addicts should perhaps be excused, and will excuse any addict who may apparently qualify under the internal coercion theory. If the craving sufficiently interferes with the addict's ability to grasp and be guided by reason, then a classic irrationality problem arises. Finally, it is simply more practicable to assess rationality than to assess the strength of compulsive desires.

The subjective experience of addicts is diverse, but a modal tale about severe addiction may be useful. Despite different historical pathways to addiction, descriptions of the subjective experience are broadly of a piece (Donovan, 1988), although different descriptors and metaphors are used. The following story is not

meant to include all the features of the addictive process; rather, it is an approximation of the subjective experience preceding use that may bear on responsibility.

Between episodes of use of the substance, the addict commonly experiences a buildup of tension, irritation, anxiety, boredom, depression, or other dysphoric states. As time passes since the last use, these dysphoric states typically become stronger, more persistent, more intense, and more demanding. In some cases, the buildup is described as sheer desire, sheer wanting. As the wanting remains unsatisfied, increased dysphoric states or, in some cases, excitement, accompany the wanting. For illicit drug addicts, anxiety or fear about obtaining the substance often adds to the dysphoria.

At some point, the addict metaphorically, and in some cases literally, can think of nothing but the desire to use the substance. One informant described the desire like “a buzzing in my ears that prevents me from focusing.” It is like an extreme version of being dehydrated or starved: the addict can ordinarily think of nothing except getting and using. It is like the moment just before orgasm during an episode of exceptional excitement, but usually without the pleasurable feeling of sexual excitement. There is only one tune or story in the addict’s head and nothing else drives it out.

When the addict cannot get the tune out of his head, it is very difficult to concentrate the mind on the good reasons not to use, especially because, there is seldom a police officer at the elbow or other available “self-management

technique” sufficiently powerful to motivate the addict to think clearly about drug-related activity. Fundamental components of rationality—the capacities to think clearly and self-consciously to evaluate one’s conduct—are compromised. The agent may not recognize the various options at all or may not be able coherently to weigh and assess those that are recognized. Attention is captured and narrowly focused; judgment and motivation may be disconnected (Holton, 2009). For moral and legal purposes, however, the precise mechanisms by which addiction can compromise rationality are less important than the clear evidence that it can do so (Elster, 1999; Kalivas, 2004; Vanderschuren & Everitt, 2004; Redish et al, 2008). On the other hand, the addict’s characteristic ambivalence about addiction suggests that addicts recognize that they have good reason to stop, at least during lucid or inter-use intervals.

The degree to which the general capacity for rationality is compromised can vary widely among addicts. The modal tale is told as an extreme case and is anyway only an approximation. Still, addiction can compromise rationality and therefore can potentially excuse drug-related activity, especially for those most severely affected. Thus, the question remains whether the law should consider addiction as the basis for a potential irrationality excuse. This is an important question for social and legal policy because drugs are a factor in much criminal conduct. Possession and use offenses are rampant, and in big cities, over half of all people arrested for felonies test positive for addictive substances (Harrison &

Beck, 2003). Many of these are surely addicts. Should they be held responsible, and for what crimes?

Responsibility Despite the Presence of an Excusing Condition at the Time of the Crime?

Assume that as a result of addiction, some addicts are sufficiently irrational or are so “internally coerced” to warrant mitigation or excuse at the time they commit their substance-related crimes. Should they be held responsible nonetheless? Two theories suggest in general that virtually all should be. The first is that by experimenting with drugs, the addict knowingly took the risk that he would become irrational or internally coerced, including the possibility that the excuse would operate specifically in contexts involving substance-related behavior. This theory comes dangerously close to strict liability in many instances, however, because most people who experiment with drugs probably are not consciously aware that they might become involved in criminal behavior beyond buying and possessing and using drugs. And even the latter is not a feature for licit addictive drugs such as ethanol.

The second and more convincing theory is that almost all addicts have lucid, rational intervals between episodes of use during which they could act on the good reasons to seek help quitting or otherwise to take steps to avoid engaging in harmful drug-related behavior. This has been termed a case of potential diachronic self-control because the person knows that at a later time he will be in a state of non-responsibility (Kennett, 2001). Again, the ambivalence about

addiction that characterizes addicts implies that they are capable of and do recognize these good reasons during their lucid intervals. Even if some addicts are unable to think rationally when they are in a state of intense craving, they are capable of rationality in refractory periods and have a duty to take steps to avoid future offending. Consider the following analogy. If a person knows that he is subject to psychomotor epileptic seizures that cause blackout, then he will be held responsible if he blacks out while driving and kills someone. Although when he killed he was in a blacked out state that would otherwise defeat liability, he will be guilty of creating a unreasonable risk of death simply by driving with knowledge that he might black out. The question for addicts would be with what mental state they commit their crimes while they are not fully rational. In virtually all cases, they would commit their crimes intentionally and the law would not provide an excuse for their “culpable” lack of rationality or internal coercion. A sentencing judge might consider this a mitigating factor as a matter of discretion.

Both theories for holding addicts responsible are potentially subject to the same objection, however. Addiction can become an entire lifestyle and the consequences of prolonged use of substances can so debilitate some addicts physically and psychosocially that this group has exceptional difficulty at all times exercising rationality concerning their status and behavior. Although potential addicts may be aware of the risk of irrationality, they may not be fully aware of the risk of extreme irrationality that can arise. In such instances, perhaps,

one cannot find responsibility for extreme irrationality by referring back to pre-addiction, knowing conduct, or by considering quiescent intervals. In cases of extreme debilitation, the intervals between episodes of use may not be fully rational.

The foregoing objection does not seem decisive, however. In those few cases in which prolonged drug use produces a permanent, major mental disorder that compromises rationality at the time of criminal conduct, the addict will have available a traditional insanity defense based on “settled insanity” resulting from the use of intoxicants (La Fave, 2010). But except in such rare cases, most addicts’ rational intervals are probably sufficiently rational to hold them largely or fully responsible for diminishing their own rationality at the time of use or of other drug-related crimes. In addition, as a result of both street wisdom and personal history, experienced addicts typically know during these intervals both what treatment alternatives are available and the type of criminal behavior beyond seeking and using in which they are likely to engage. Indeed, much of the further criminal activity probably takes place during the rational intervals and involves harm to others, which carries greater criminal penalties, giving the addict even stronger self—and other—regarding reasons not to offend than in the case of personal possession and use.

Finally, suppose one concludes that some addicts deserve mitigation or excuse for at least some criminal conduct. The subsection on the internal coercion theory suggests that irrationality would excuse any addict that the internal

coercion theory might fairly excuse. The argument, in brief, is this: A person driven crazy by fear is crazy. Or, in the alternative, people so fearful of mild dysphoric states that they appear incapable of bucking up when reasonable people would be irrationally fearful. Any plausible story about allegedly compulsive cravings motivating the criminal conduct, especially in cases of serious crime, also will be a story in which the addict is less than fully rational or not rational at all. In such cases, irrationality would be the appropriate excusing claim; there would be no need to resort to problematic internal coercion.

The conclusion is that most addicts are responsible for seeking and using and almost none should be excused for further criminal activity, and especially not for serious wrongdoing that is not a direct consequence of the addiction itself. There are simply too many periods of rationality and there is simply too much awareness of alternative possibilities to permit excuse in more than a small number of cases unless, perhaps, the law expanded doctrines of mitigation (Morse, 2003).

Can Science Solve the Moral and Legal Dilemmas Addiction Creates?

This section will assume that the radical challenges to agency, such as that we are merely “victims of neuronal circumstances” (Greene & Cohen, 2006), will not succeed for the foreseeable future. In the extremely unlikely event they do succeed, not only addicts will be recognized as lacking agency; no one will be a genuine agent. For now, however, we can put such dystopian visions aside because they are neither conceptually nor empirically justified (Morse, 2011a).

Given current legal doctrine, at present the new neuroscience is seldom relevant to legal decisions about criminal responsibility in general (Morse & Newsome, 2013) or about addiction and responsibility in particular (Husak & Murphy, 2013). In the near to intermediate future, however, neuroscience, behavioral genetics and psychology might teach us a good deal more about the human capacity for rationality and self-control or self-regulation and about how and under what conditions they are compromised. If so, we will learn much useful information that can guide normative decision-making about agency and responsibility. Once again, however, that knowledge will first have to be translated into the folk-psychological criteria of agency and responsibility. And if there is a conflict between a scientific finding and the agent's actual behavior, with the rarest of exceptions, we must believe the behavior. The criteria for agency and responsibility are once again behavior, and actions speak louder than images, SNPs, or any psychological test finding. Finally, whatever scientific information we learn will not tell us how much of what capacities is necessary for full agency and responsibility. That is a normative question to which science can contribute but cannot determine.

Conclusion

All behavior is caused by innumerable variables over which we have no control. Some causal stories surely arouse more sympathy than others, but sympathy and an unfortunate life history are not excusing conditions per se. One may wish to consider such variables for disposition on consequential grounds or

as an expression of mercy, but they do not excuse unless they produce sufficient irrationality or a sufficiently hard choice. Focusing on individual responsibility should not blind us to the remediable causes of wrongdoing and should not diminish justifiable sympathy for wrongdoers, but neither should explanations and sympathy undermine our view that most wrongdoers are responsible agents. If they have good enough reason, addicts can quit or move to controlled use.

Author's Note: This article draws on and extends previously published work on the same topic (Morse, 2011b). I thank Ed Greenlee for his invaluable help.

References

American Bar Association. (1989). *ABA criminal justice mental health standards*.

Washington, DC: American Bar Association.</bok>

American Law Institute. (1962). *Model penal code*. Philadelphia: The American

Law Institute.</bok>

American Psychiatric Association. (1982). *Insanity defense: position statement*.

Washington, DC: American Psychiatric Association.

<bok>Baumeister, R. F., Hetherington, T. F., & Tice, D. (1994). *Losing control: how*

and why people fail at self-regulation. San Diego: Academic

Press.</bok>

Behr, B. J. (1993). Why volition is a foundation problem for psychology.

Consciousness and Cognition, 2 (4), 281–309.</jrn>

- <edb>Blume, A. W., Morera, O. F., & Garcia de la Cruz, B. (2005).
 Assessment of addictive behaviors in ethnic-minority cultures. In D. M.
 Donovan & G. Alan Marlatt (Eds.), *Assessment of addictive behaviors*
 (2nd ed., pp. 49–70). New York: Guilford Press.</edb>
- Camí, J., & Farré, M. 2003. Mechanisms of disease: drug addiction. *New England
 Journal of Medicine*, 349 (10), 975–986.</jrn>
- <edb>Cooney, N. L., Kadden, R. M., & Steinberg, H. R. (2005). Assessment of
 alcohol problems. In D. M. Donovan & G. Alan Marlatt (Eds.),
Assessment of addictive behaviors (2nd ed., pp. 71–112). New York:
 Guilford Press.</edb>
- <jrn>Deroche-Gamonet, V., Belin, D., & Piazza, P. V. (2004). Evidence for
 addiction-like behavior in the rat. *Science*, 305 (5686), 1014–1017.</jrn>
- Donovan, D. M. (1988). Assessment of addictive behaviors: implications of an
 emerging biopsychosocial model. In D. M. Donovan & G. Alan Marlatt
 (Eds.), *Assessment of addictive behaviors* (pp. 3–48). New York: Guilford
 Press.
- <bok>Elster, J. (1999). *Strong feelings: emotion, addiction and human behavior*.
 Cambridge, MA: MIT Press.</bok>
- <bok>Fingarette, H., & Hasse, A. F. (1979). *Mental disabilities and criminal
 responsibility*. Berkeley, CA: University of California Press.</bok>

- <jrn>Fischer, K. W., Stein, Z., & Heikkinen, K. (2009). Narrow assessments misrepresent development and misguide policy: comment on Steinberg, Cauffman, Woolard, Graham, and Banich 2009. *American Psychologist*, 64 (7), 595–600.</jrn>
- Graham v. Florida*, 130 S. Ct. 2011 (2010).
- Greene J. & Cohen, J (2006) For the law, neuroscience changes nothing and everything. In: S. Zeki & O. Goodenough (Eds.), *Law & the Brain*, pp.207-226 (Oxford: Oxford University Press).
- Greenfield, S. F., & Hennessy, G. (2004). Assessment of the patient. In M. Galanter & H. D. Kleber (Eds.), *The American Psychiatric Publishing textbook of substance abuse treatment* (3rd ed., pp. 101–120). Washington, DC: American Psychiatric Publishing, Inc.</edb>
- <edb>Haney, M. (2004). Neurobiology of stimulants. In M. Glanter & H. D. Kleber (Eds.), *The American Psychiatric Publishing textbook of substance abuse treatment* (3rd ed., pp. 31–40). Washington, DC: American Psychiatric Publishing, Inc.</edb>
- <bok>Harrison, P. M., & Beck, A. J. (2003). *Prisoners in 2002*. Washington, DC: Bureau of Justice Statistics.</bok>
- <bok>Heyman, G. (2009). *Addiction: a disorder of choice*. Cambridge, MA: Harvard University Press.</bok>

- <bok>Holton, R. (2009). *Willing, wanting, waiting*. New York: Oxford University Press.</bok>
- <edb>Hough, S. (1994). The moral mirror of pleasure. In S. Luper-Foy & C. Brown (Eds.), *Drugs, morality, and the law* (pp. 153–182). New York: Garland Publishing, Inc.</edb>
- Husak, D. N. (1992). *Drugs and rights*. Cambridge: Cambridge University Press.</bok>
- Husak, D. & Murphy, E. (2013) The Relevance of the Neuroscience of Addiction to Criminal Law. In S.J. Morse & A.R. Roskies (Eds.) *A Primer on criminal law and neuroscience* (Oxford University Press, *in press*).
- Kalivas, P. W. (2004). Choose to study choice in addiction. *American Journal of Psychiatry*, 161 (2), 193–194.</jrn>
- <jrn>Kalivas, P. W., & Volkow, N. D. (2005). The neural basis of addiction: a pathology of motivation and choice. *American Journal of Psychiatry*, 162 (8), 1403–1413.</jrn>
- <bok>Kaplan, J. (1983). *The hardest drug: heroin and public policy*. Chicago: University of Chicago Press.</bok>
- Kasanetz, F., Deroche-Gamonet, V., Berson, N., Balado, E., Lafourcade, M., Manzoni, O., & Piazza, P.V. (2010). Transition to addiction is associated with a persistent impairment in synaptic plasticity. *Science*, 32 (5986), 1709-1712

- <jrn>Keller, J. (2005). In genes we trust: the biological component of psychological essentialism and its relationship to mechanisms of motivated social cognition. *Journal of Personality and Social Psychology*, 88 (4), 686–702.</jrn>
- <bok>Kennett, J. (2001). *Agency and responsibility: a common-sense moral psychology*. New York: Oxford University Press.</bok>
- <bok>LaFare, W. R. (2010). *Criminal law* (5th ed.). St. Paul, MN: West.</bok>
- Leshner, A. I. (1997). Addiction is a brain disease, and it matters. *Science*, 278 (5335), 45–47.</jrn>
- <bok>Ludwig, A. M. (1988). *Understanding the alcoholic's mind: the nature of craving and how to control it*. New York: Oxford University Press.</bok>
- Miller v. Alabama*, 132 S. Ct. 2455 (2012).
- <lg>Montana v. Egelhoff, 518 U.S. 37 (1996).</lg>
- <bok>Moore, M. S. (1993). *Act and crime: the philosophy of action and its implications for criminal law*. New York: Oxford University Press.</bok>
- Morse, S. J. (1994). Culpability and control. *University of Pennsylvania Law Review*, 142 (5), 1587–1660.</jrn>

- <jrn>Morse, S. J. (1997). Immaturity and irresponsibility. *Journal of Criminal Law & Criminology*, 88 (4), 15–67.</jrn>
- <jrn>Morse, S. J. (1999). Craziiness and criminal responsibility. *Behavioral Sciences & the Law*, 17 (2), 147–164.</jrn>
- <jrn>Morse, S. J. (2002). Uncontrollable urges and irrational people. *Virginia Law Review*, 88 (5), 1025–1078.</jrn>
- <jrn>Morse, S. J. (2003). Diminished rationality, diminished responsibility. *Ohio State Journal of Criminal Law*, 1 (1), 289–308.</jrn>
- <jrn>Morse, S. J. (2007a). Voluntary control of behavior and responsibility. *American Journal of Bioethics*, 7 (1), 12–13.</jrn>
- Morse, S. J. (2007b). The non-problem of free will in forensic psychiatry and psychology. *Behavioral Sciences & the Law*, 25 (2), 203–220.</jrn>
- <jrn>Morse, S. J. (2007c). Criminal responsibility and the disappearing person. *Cardozo Law Review*, 28 (6), 2545–2575.</jrn>
- <edb>Morse, S. J. (2009). Addiction, science and criminal responsibility. In N. Farahany (Ed.), *The impact of the behavioral sciences on criminal law* (pp. 241–288). New York: Oxford University Press.</edb>
- Morse, S. J. (2011a) Lost in Translation?: An Essay on Law and Neuroscience. In M. Freeman (Ed.) *Law and neuroscience: current legal issues* (pp.529-562). Oxford: Oxford University Press.

- Morse, S.J. (2011b) Addiction and Criminal Responsibility. In J. Poland & G. Graham (Eds.), *Addiction and responsibility* (pp. 159-199). Cambridge MA: MIT Press.
- Morse, S.J. & Newsome, W.T. (2013) Criminal responsibility, criminal competence, and the prediction of criminal behavior. In S.J. Morse & A.R. Roskies (Eds.) *A primer on criminal law and neuroscience* (Oxford University Press, *in press*).
- Nestler, E. J. (2000). Genes and addiction. *Nature Genetics*, 26 (3), 277–281.</jrn><bok></bok>
- Powell v. Texas*, 392 U.S. 514 (1968).</lgl>
- Redish, A. D., Jensen, S., & Johnson, A. (2008). A unified framework for addiction: vulnerabilities in the decision process. *Behavioral and Brain Sciences*, 31 (4), 415–437.</jrn>
- Robinson v. California*, 370 U.S. 660 (1962).</lgl>
- Roper v. Simmons*, 543 U.S. 551 (2005).
- <bok>Satel, S. L., & Goodwin, F. K. (1998). *Is drug addiction a brain disease?* Washington, DC: Ethics & Public Policy Center.</bok>
- Shapiro, S.J. (2000). *Law, morality and the guidance of conduct*, *Legal Theory*,(6), 127-170.
- Sher, G. (2006). *In praise of blame*. New York: Oxford University Press.

- Steinberg, L., Cauffman, E., Woolard, J., Graham, S., & Banich, M. (2009a).
Are adolescents less mature than adults? Minors' access to abortion, the
juvenile death penalty, and the alleged APA 'flip-flop'. *American
Psychologist, 64* (7), 583–594.</jrn>
- Steinberg, L., Cauffman, E., Woolard, J., Graham, S., & Banich, M. (2009b).
Reconciling the complexity of human development with the reality of
legal policy: reply to Fischer, Stein, and Heikkinen (2009). *American
Psychologist, 64* (7), 601–604.</jrn>
- Strawson, G. (1986). *Freedom and belief*. New York: Oxford University
Press.</bok>
- Tangney, J. P., Baumeister, R. F., & Boone, A. L. (2004). High self-control
predicts good adjustment, less pathology, better grades, and interpersonal
success. *Journal of Personality, 72* (2), 271–324.</jrn>
- <lg1>*United States v. Lyons*, 731 F.2d 243 (5th Cir. 1984) (en banc)</lg1>
- <jrn>Vanderschuren, L. J. M. J., & Everitt, B. J. (2004). Drug seeking becomes
compulsive after prolonged cocaine self-administration. *Science, 305*
(5686), 1017–1019.</jrn>
- Wallace, R. J. (1999). Addiction as defect of the will: some philosophical
reflections. *Law and Philosophy, 18* (5), 621–654.</jrn>
- Warner, L.A., Kessler, R.C., Hughes, M., Anthony, J.C. & Nelson, C.B. (1995).
Prevalence and correlates of drug use and dependence in the United

States: results from the national comorbidity survey. *Archives of General Psychiatry*, 52 (7), 219-229.

Wertheimer, A. (1987). *Coercion*. Princeton, NJ: Princeton University Press.

Zinberg, N.E. (1984) *Drug, set and setting: the basis for controlled intoxicant use*. New Haven: Yale University Press.

