COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

CONTAINS IMPOUNDED MATERIAL

MIDDLESEX, SS. No. SJC-12279

COMMONWEALTH OF MASSACHUSETTS,
Appellee,

v.

[redacted],
Defendant-Appellant.

ON A REPORTED QUESTION AND ON APPEAL FROM A FINDING OF PROBATION VIOLATION BY THE CONCORD DIVISION OF THE DISTRICT COURT DEPARTMENT

BRIEF OF THE COMMONWEALTH OF MASSACHUSETTS

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QUESTION PRESENTED

May the probationer permissibly be required to "remain drug free" as a condition of her probation, and may she permissibly be punished for violating that condition, where the probationer suffers from substance use disorder ("SUD"), and where her continued use of substances despite negative consequences is a symptom of that disorder?

INTRODUCTION

In the last year, the prescription opioid, heroin, and fentanyl epidemic has continued to worsen, resulting in almost six deaths per day in Massachusetts.[1] This is a nationwide crisis. According to the Centers for Disease Control, more than 50,000 Americans died from drug overdoses in both 2015 and 2016, the highest figures ever reported.[2] The criminal justice system is on the front lines of addressing this crisis - both by prosecuting dealers and traffickers and by "working to reduce the demand for drugs through innovative prevention, diversion and

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[1] Office of the Attorney General, Massachusetts Opioid Epidemic Overview (July 28, 2017), included in the Addendum on pages 1-3. The documents provided in the addendum to this brief will be cited as Add. __.

[2] Susan Broderick, *Addiction and the Criminal Justice System*, Recovery Research Institute Blog (June 26, 2017), https://www.recoveryanswers.org/blog/recovery-answers-from-an-criminal-justice-public-policy-expert/.

recovery support initiatives."[3] The therapeutic approach to addiction has led to the creation of successful diversion and treatment-oriented programs in the criminal justice system. All such programs are based on the use of drug testing to ensure compliance and increase effectiveness. The drug free and testing conditions of probation are constitutional because they are based on the proven assumption that most people with drug addiction retain the ability to exercise choice. These conditions are indispensable for promoting public safety and helping defendants with SUD to achieve recovery.

STATEMENT OF THE CASE

This case is before the Court on a question reported by Justice Singh of the Concord Division of the District Court Department. The case is consolidated with the defendant's appeal from the finding of a probation violation. Doc. No. 7.[4]

Prior Proceedings

The defendant was charged with larceny of property valued over $250, pursuant to G.L. c. 266, § 30, for stealing jewelry [redacted]. RA. 9.[5] She was arraigned in Concord District Court on July 18, 2016.

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[3] *Id.*

[4] References to the docket for this case are made as "Doc. No. __."

[5] The defendant's Record Appendix is cited as "RA. __."

RA. 1, 5. On August 22, 2016, the defendant admitted to sufficient facts to warrant a finding of guilt. RA. 2-3. The court (Brendemuehl, J.) continued the case without a finding ("CWOF"). *Id.* At the sentencing hearing, the court imposed several conditions of probation. Add. 9.[6] The defendant was required to have no contact with the victim, to pay restitution, to "continue with treatment," and to remain drug free, submitting to random drug screens. Add. 9; RA. 2, 10. The "Order of Probation Conditions", issued on August 22, 2016, specified that the probation period was to last for one year (until August 21, 2017). RA. 10. More specifically, the order stated that [redacted] was to "remain drug free" and "to submit to random testing as required." *Id.* She was also to attend "AA/NA 3 [times a] week." *Id.* The defendant did not object to these conditions and did not argue that her substance use disorder rendered her incapable of exercising any control over her drug use. Add. 5-9.

On Friday, September 2, 2016, less than two weeks after the sentencing, [redacted] met with her supervising probation officer, Wanda Rosario. RA. 11, Tr. 2.[7] Rosario administered a drug test, as required by the conditions of probation, and [redacted] tested positive

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[6] A transcript of the sentencing hearing is attached to this brief on pages 5-9 of the Addendum.

[7] The transcript of the probation violation hearing is referred to as Tr. __.

for Fentanyl and Suboxone. RA. 11, 80. Accordingly, Rosario filed a "Notice of Probation Detention Hearing," stating that the defendant had "failed to comply with a testing requirement, specifically tested positive for fentanyl 9/2/2016." RA. 13. At the detention hearing[8] held on the same day, the court (Brendemuehl, J.) found probable cause that [redacted] had violated at least one of her probation conditions and ordered her detained until she could be placed in an inpatient treatment program. RA. 3, 16, 76. She was released ten days later to the Sheehan House residential program in Tewksbury, Massachusetts. RA. 3, 17, 76.

On November 22, 2016, the court (Singh, J.) held a probation violation hearing. RA 3. The defendant argued, as she does here on appeal, that the condition requiring her to remain drug free was unconstitutional and that the court should not find that she violated probation because drug use was an uncontrollable "symptom" of her substance use disorder. Tr. 7 and 9-10. The defendant filed an "Opposition to Probation Violation and Motion to Change Condition of Probation"

[8] "A probation detention hearing may be conducted to determine whether a probationer shall be held in custody pending the conduct of a probation violation hearing." District/Municipal Courts Rules for Probation Violation Proceedings, Rule 5: Probation Detention Hearings, http://www.mass.gov/courts/case-legal-res/rules-of-court/district-muni/probation/rule5.html.

on the same day. RA 14; Tr. 3-15. In arguing that she should not be found in violation of the drug free condition because the condition is unconstitutional, the defendant relied on an affidavit by Dr. Sarah Wakeman, discussing substance use disorder and treatment approaches generally (RA. 21-28), and an affidavit by Dr. Martha Kane, providing an evaluation of [redacted] psychiatric history and recommending treatment options (RA. 50-60).[9] On December 7, 2016 (docketed on December 8, 2016), the court found the defendant in violation of probation for failing to comply with the drug free requirement by testing positive for Fentanyl. RA. 4; 80. The court did not revoke probation. RA. 80. Instead, Justice Singh ordered a modification of previously ordered probation conditions, adding that [redacted] is to "continue in-patient treatment at Sheehan House." *Id.* The court also allowed the defendant's motion to report the question of law at issue in this appeal. RA. 72.

Statement of Facts

The defendant's brief relies, in large part, on contested scientific theories of addiction and the supposed legal implications of these theories. No factual record with respect to these scientific

[9] She also submitted the following article: Nora D. Volkow, George F. Koob, A. Thomas McLellan, *Neurobiologic Advances from the Brain Disease Model of Addiction*, 374 New Eng. J. Med. 363 (2016).

conceptions of addiction exists in this case (see, *infra*, Argument Section I.A). However, a response to the defendant's presentation of the science of addiction is needed to ensure that the Court receives accurate information on these topics. Thus, an overview of the scientific issues relevant to this case is presented in the section below, although it does not constitute factual background of the case.

A. The science of addiction, choice, and criminal responsibility.

The defendant's view of the "science of addiction" assumes what it needs to prove, namely, that the physiological changes in the brain of a person with a substance use disorder[10] mean that drug use is involuntary. This inference - from the "brain disease" model of addiction to the assumption that drug use is nothing more than its involuntary symptom - is unfounded. In fact, even the scientific literature cited by the defendant reveals that any such simplistic involuntariness assumption is not justified. For example, the contingency management

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[10] As the defendant notes on page 4, n. 5, the terms "substance use disorder" and "addiction" are often used interchangeably and are so used in this brief as well. The Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013) published by the American Psychiatric Association ("DSM V") reserves the term "addiction" for severe substance use disorder in its classification of SUDs into mild, moderate, and severe. DSM V, at 483-84.

approach to treatment, which the defendant cites approvingly (DB. 15),[11] seeks to influence the behavior of people with SUD through rewards and sanctions.[12] This approach cannot work unless people with SUD retain at least some capacity to exercise control over their drug use. To be sure, addiction is accurately described as "compulsive drug seeking and using in the face of negative consequences."[13] But this characterization is behavioral and need not be rooted in neurobiology. Instead, "compulsion" should be understood in broader terms: the biological changes in the brain are important, but so are social, environmental, and relational factors. Some contextual questions about the behavior of a person with SUD may include: "How available is the drug, for example? How hopeless or isolated is she? Are there opportunities

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[11] DB.__ refers to page numbers in the defendant's brief to this Court.

[12] "Contingency management (CM), the systematic reinforcement of desired behaviors and the withholding of reinforcement or punishment of undesired behaviors, is an effective strategy in the treatment of alcohol and other drug (AOD) use disorders." Stephen T. Higgins and Nancy M. Petry, *Contingency Management: Incentives for Sobriety*, 23 Alcohol Res. and Health 122 (1999). *See also* Danielle R. Davis, et al., *A Review of the Literature on Contingency Management in the Treatment of Substance Use Disorders, 2009-2014*, 92 Preventive Med. 36 (2016).

[13] Stephen J. Morse, *Voluntary Control of Behavior and Responsibility*, 7 Am. J. of Bioethics 12(2007) ("Morse 1"); Add. 12. A copy of this article is included on pages 11-13 of the Addendum.

for help? Can she envision a more meaningful life and see a way to attain it? What are her reasons for using, and what will happen if she continues?"[14]

The "brain disease model" of addiction is itself controversial.[15] Nora Volkow, director of the National Institute on Drug Abuse (NIDA), and George Koob, director of the National Institute on Alcohol Abuse and Alcoholism (NIAAA), recently offered a defense of the theory in an article titled *Brain Disease Model of Addiction: Why Is It So Controversial?*, 2 *Lancet Psychiatry* 677 (2015).[16] Indeed, Volkow and Koob, the leading proponents of the brain disease model, recognize that their view and its significance for understanding and treating addiction is contested by many experts. Those who question the "brain disease model" do not deny that drug use, particularly persistent drug use, has a profound effect on the brain: "there are effects on the brain's reward

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[14] Sally Satel and Scott O. Lilienfeld, *Calling it "Brain Disease" Makes Addiction Harder to Treat*, Boston Globe, June 22, 2017, at K1 ("Satel & Lilienfeld"). This article is included on pages 15-19 of the Addendum.

[15] *See, e.g.*, Wayne Hall et al., *The Brain Disease Model of Addiction: Is It Supported by the Evidence and Has It Delivered on Its Promises?*, 2 Lancet Psychiatry 105 (2015).

[16] This article is a response to the above cited article by Hall et al. This exchange illustrates that the brain disease model continues to be the subject of vigorous debate in the scientific literature.

circuits, memory, perception and motivation, all of which contribute to the maintenance of addictive behavior."[17] Even accepting the neurobiological account offered in Chapter 2 of the 2016 report on addiction by the United States Surgeon General,[18] the conclusion that drug use is involuntary or that people with SUD do not exercise any control over their drug use need not follow. In fact, "[b]rain causation and brain differences [i.e. the fact that brains of people with addiction differ from those of people without addiction] 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." Morse 2, at 428; Add.23.[19] Thus, contrary to the defendant's assumption, the neurobiological account of addiction

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[17] Stephen J. Morse, *Addiction, Choice, and Criminal Law*, in Addiction & Choice: Rethinking the Relationship 426, 427 (N. Heather & G. Segal, eds., 2016) ("Morse 2"). This article is included on pages 21-40 of the Addendum.

[18] United States Office of the Surgeon General, *Facing Addiction in America: The Surgeon General's Report on Alcohol, Drugs, and Health* (2016). Chapter 2 of the report is included as an appendix to the defendant's brief, at DB. 39-69.

[19] Multiple researchers adhere to this view. *See, e.g.*, Satel & Lilienfeld, *Addiction and the Brain Disease Fallacy*, 4 Frontiers in Psychiatry 1 (2014); Gene M. Heyman, *Addiction: A Disorder of Choice* (2010); Carl Hart, High Price: A Neuroscientist's Journey of Self-Discovery That Challenges Everything You Know About Drugs and Society (2013).

is compatible with the presence of free will in persons with SUD. Similarly, the fact that genetics influence a person's susceptibility to addiction does not mean that addictive behaviors are not controllable.[20]

At the same time, skepticism about the purely neurobiological "brain disease model" is fully compatible with the recognition that many people with SUD cannot recover without treatment. Proponents of the brain disease model often point to its value in combating the stigma associated with addiction.[21] The comparison between addiction and diseases such as diabetes, hypertension, or asthma may in fact help to promote parity in insurance coverage and to improve access to treatment, thus serving an important and laudable purpose. Satel & Lilienfeld, Add. 15. However, if taken too far, the parallel between addiction and these other diseases breaks down. Addiction may be similar to diseases such as diabetes, hypertension, asthma, or cancer in that all of them

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[20] Gene M. Heyman, *Addiction and Choice: Theory and New Data*, 4 Frontiers in Psychiatry 1, 4 (2013) (arguing that "there is no necessary connection between heritability and compulsion" and citing a study showing that "learned, voluntary religious and political beliefs have substantial heritabilities").

[21] The extent to which calling addiction a brain disease helps reduce stigma has also been called into question. Satel & Lilienfeld, Add. 15.

can be chronic illnesses requiring ongoing self-management and access to long term resources. But, unlike drug use, symptoms of these other diseases are not human actions that can be, in the right circumstances, controlled by an act of the will. Moreover, while many people with SUD quit using drugs without treatment,[22] diabetes or cancer will rarely, if ever, improve when left untreated. When treatment is required for people with SUD, it cannot be purely passive (such as receiving medication, for example). Rather, "treatment can become the necessary catalyst to help [the person with SUD] deploy her intrinsic capacity for choice and control." Satel & Lilienfeld, Add. 16. When treatment is necessary, medication can be helpful, but a more holistic approach, geared towards changing the circumstances underlying the addiction, is almost always also required. *Id.*

One of NIDA's principles of effective treatment illustrates the importance of choice for recovery: "Sanctions or enticements from family, employment settings, and/or the criminal justice system can significantly increase treatment entry, retention

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[22] *See, e.g.*, Heyman, *Addiction and Choice: Theory and New Data, supra note 20,* at 2 ("[T]he correlates of quitting are the practical and moral concerns that affect all major decisions. They are not the correlates of recovery from the diseases addiction is said to be like, such as Alzheimer's, schizophrenia, diabetes, heart disease, cancer, and so on.")

rates, and the ultimate success of drug treatment interventions."[23] Sanctions and enticements could not have an effect on involuntary behavior, or the symptoms of diseases like diabetes or asthma. Further, "the exercise of agency" can lead to recovery from addiction or at least can cause a person with SUD to seek treatment.[24]

B. The defendant's history of addiction.[25]

[redacted] has been diagnosed with substance use disorder. RA. 50, 73. On August 24, 2016, two days after the court sentenced her for larceny, [redacted] completed an intake appointment at the Addiction Recovery Program, an intensive outpatient program at Emerson Hospital in Concord. RA. 54. On the same day, she met with Dr. Brian O'Connor, an addiction specialist, who prescribed Suboxone. RA.75. On August 29, 2016, she began the intensive outpatient program

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[23] NIDA, *Principles of Drug Addiction Treatment: A Research-Based Guide (Third Edition)*, https://www.drugabuse.gov/publications/principles-drug-addiction-treatment-research-based-guide-third-edition/principles-effective-treatment (last visited on August 9, 2017).

[24] Stephen J. Morse, *A Good Enough Reason: Addiction, Agency and Criminal Responsibility*, 56 Inquiry 490, 495 (2013).

[25] This summary relies primarily on Dr. Martha Kane's evaluation on the defendant, dated November 21, 2016. RA. 50-60. It also references the transcript of the probation violation hearing held on November 22, 2016 (Tr. 1-26), the defendant's Motion to Report Question of Law and Proposed Findings of Fact (RA. 72-77), and related documents.

at Emerson Hospital and participated in individual and group counseling. RA. 79. Four days later, [redacted] tested positive for Suboxone and Fentanyl. RA. 11, 80. Probation Officer Rosario testified that she talked to [redacted] about the test results and encouraged her to go into inpatient treatment, which [redacted] did not want to do. Tr. 20. [redacted] told Rosario that her parents were out of town. *Id.* Rosario also stated that she knew the process of detoxing from fentanyl was "very dangerous" (Tr. 21) and that she decided to bring [redacted] before the court on a probable cause hearing on the same day because "it was the Friday before Labor Day and [she] felt that [she] couldn't have [redacted] leave [her] office testing positive for Fentanyl." Tr. 21. [redacted] was detained until September 12, 2016, when she was released to inpatient treatment at Sheehan House. RA. 3.

Dr. Kane interviewed [redacted] at Sheehan House on October 17, 2016. RA. 50. Based on this interview, [redacted] records, and other collateral contacts (RA. 51), Dr. Kane reported that [redacted] was adopted when she was 10 days old and was raised in Acton, Massachusetts. *Id.* [redacted] parents indicated that her birth mother suffered from substance use disorder. RA. 52. [redacted] had been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) at age 7. *Id.* She began using drugs intermittently around age 14. *Id.*

Substance use started with alcohol, nicotine, and marijuana, followed by a "cascade of illicit use." RA. 53. During high school, [redacted] exhibited symptoms of anxiety and depression and was treated with medication. RA. 53. She also exhibited "significant trauma symptoms" after "observ[ing] her father fall and sustain serious injuries." *Id.* She used "drugs and drug use rituals to help her manage her emotional states." *Id.* By her early twenties she was diagnosed with "severe Substance Use Disorder," with numerous symptoms, including craving, continued use despite recurrent negative outcomes, and withdrawal. *Id.* Symptoms of depression and anxiety also persisted. *Id.* Dr. Kane recited [redacted] report that in August of 2016, she was using cannabis daily, and fentanyl multiple times every day. *Id.* According to [redacted], drug court "initiated her into treatment for SUD." RA. 54. Further, [redacted] attributed a relapse with fentanyl in November 2015 "in part to gradually withdrawing from her treatment supports." *Id.* Finally, [redacted] reported benefitting from the structure and skills training in the residential program, as well as the mutual aid groups that provide positive social connections. *Id.*

Some of Dr. Kane's treatment recommendations included continued access to therapeutic services, with reductions in service intensity over at least two

years. RA. 59. Dr. Kane noted that "[c]ritically, Ms. [redacted] should feel that she is a collaborator with her providers on treatment decisions." *Id.*

SUMMARY OF ARGUMENT

The defendant's argument rests on a false dichotomy between addiction as purely a brain disease to be understood in neurobiological terms and addiction as a moral failing to be punished rather than treated. The purely neurobiological view is reductive and inaccurate. The old-fashioned moralistic approach has been rightly discredited and is no longer prevalent. Neither of these extreme positions offers an adequate explanation of addictive behavior: a better view of addiction is more nuanced, encompassing biological, social, and behavioral components. Indeed, there is wide consensus that exclusively punitive responses to addiction in the criminal justice system are not effective. They do not lead to rehabilitation and do not make us safer. Instead, drug courts and treatment-based probation have become increasingly important.[26] Drug free and testing conditions are essential for drug courts[27]: they help to make sure

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[26] Massachusetts Court System, Specialty Court Locations, http://www.mass.gov/courts/programs/specialty-courts/specialty-courts-locations.html (last visited on August 9, 2017).

[27] *See, e.g.*, Massachusetts Adult Drug Court Manual, at 46-47, http://www.mass.gov/courts/docs/specialty-

that defendants remain engaged in treatment and avoid long-term incarceration. These conditions allow probation officers to evaluate the individual probationer's progress and to determine when a higher level of intervention, such as inpatient treatment, may be needed. Sanctions for violations of these conditions are not only permissible, they are indispensable tools in achieving recovery and rehabilitation, as well as in protecting the public.

ARGUMENT

I. THE DEFENDANT'S SENTENCE FOR LARCENY DID NOT VIOLATE THE EIGHTH AMENDMENT OR ARTICLE 26 OF THE MASSACHUSETTS DECLARATION OF RIGHTS.

The drug free requirement for probationers with SUD is consistent with the holdings of the two key Supreme Court decisions on point: *Robinson v. California*, 370 U.S. 660 (1962); and *Powell v. Texas*, 392 U.S. 514 (1968). First, the defendant's argument that the drug free condition is unconstitutional rests on factual assumptions about the science of addiction that have not been developed in the trial court and thus cannot be decided on appeal. Second, probation is a sentence imposed for a crime - in this case, larceny. [redacted] was not "punished" for drug use; instead, she was sentenced to probation after admitting to sufficient facts for a larceny conviction, and the conditions of her probation were

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courts/adult-drug-court-manual.pdf.

reasonably related to the circumstances of her crime. Third, drug free and testing conditions are not in themselves punitive, but are tools to ensure that probationers with SUD can remain in the community while staying safe and engaged in treatment.

A. The record is inadequate to decide the defendant's fact-dependent constitutional claims.

The defendant's brief contains a lengthy discussion of the science of addiction. It presents the controversial view that addiction is a brain disease, which eliminates the addicted person's free will to decide whether or not to use drugs. Both of [redacted] major arguments in this case - that the drug free requirement constitutes cruel and unusual punishment and that her probation violation was not willful - rely on the assumption that the scientific conception of addiction as a "brain disease" that eliminates free will is well established. However, as discussed in the Statement of Facts, Section A above, the "brain disease" model is not uniformly accepted in the scientific community. Perhaps more importantly, even those who accept the brain disease model in general terms often reject the "lack of free will" hypothesis because it is inconsistent with the research on the role of motivation in treatment.[28] The

[28] *See, e.g.*, John F. Kelly and M. Claire Greene, *Beyond Motivation: Initial Validation of the*

trial court did not engage in any fact-finding with regard to the science of addiction. Thus, the record is not sufficiently developed to decide the constitutional questions before this Court. *See Doe v. Doe*, 378 Mass. 202, 203 (1979) ("Where constitutional questions and matters of asserted public policy are raised, it is preferable to pass on the issues in light of a fully developed trial record rather than, as here, in the abstract.").

The defendant presented Dr. Wakeman's affidavit discussing the science of addiction (RA. 21-28), as well as one scientific article on the subject (*supra* note 9), to the trial court. However, the merits, validity, and methodology of this scientific analysis were never subjected to adversarial argument or testing. *Cf. Commonwealth v. Lanigan*, 419 Mass. 15, 25-26 (1994) (discussing judge's "gatekeeper" role in "challenge to the validity of any process or theory underlying a proffered opinion"). Further, the defendant's brief to this Court relies on extensive additional literature, which is subject to vigorous debate in the scientific community but has never been presented to or tested by the trial court. *Stratos v. Dep't of Pub. Welfare*, 387 Mass. 312, 324 n.12 (1982)

Commitment to Sobriety Scale, 46 J. Subst. Abuse Treat. 1, 9 (2014) (noting that "[m]otivation for sobriety is a construct central to the SUD treatment and recovery field").

(citation in brief to a survey that was not in the appellate record was "not properly before" this Court); *see generally* Mass. R. App. P. 8(a) (describing the record on appeal). What is more, the lower court proceedings did not include findings that [redacted] SUD rendered her incapable of exercising any control over her decision to use drugs. These untested scientific assumptions should not form the basis of a change in the law with respect to drug free and testing conditions of probation.

The defendant's brief is replete with scientific assumptions of questionable credibility. For example, she opens by stating that "Drug addiction, we now know, is a *chronic* brain disease whose hallmark feature is an *inability* to exert control over the impulse to use drugs - despite negative consequences." DB. 1 (emphasis added) (internal quotations omitted). Some researchers have questioned the characterization of addiction as chronic.[29] Others believe that the ability to exert control over the impulse to use drugs is severely impaired in addiction, not eliminated.[30] Similarly, the defendant states that she "did not 'choose' to relapse any more than a person who has

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[29] *See, e.g.*, Gene M. Heyman, *Quitting Drugs: Quantitative and Qualitative Features*, 9 Ann. Rev. Clinical Psychol. 29, 53 (2013).

[30] *See supra* note 19.

hypertension chooses to have high blood pressure." DB. 5.[31] Again, many have argued that people with SUD retain the ability to make choices regarding drug use and that this capacity for choice can be a powerful tool for recovery.[32] These disagreements - among others - are crucial for evaluating the validity of the defendant's legal arguments, but they have never been tested in the adversarial process. The science of addiction presented by the defendant is not "fact" and cannot properly form the basis of the answer to the question presented.

B. The defendant was permissibly punished for larceny.

1. [redacted]sentence reflected her needs as a person diagnosed with SUD.

Defendants who are convicted of a crime can, unless otherwise specifically prohibited by law, be sentenced to a term of probation. M.G.L. c. 276, § 87; *see, e.g., Commonwealth v. Sheridan*, 51 Mass. App. Ct. 74, 76 (2001) ("Probation, whether 'straight' or

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[31] Multiple other statements in the defendant's brief rely on the unproven assumption that the brain changes associated with addiction mean that a person with SUD does not have free will with respect to drug use. *See, e.g.*, DB. 32 ("the disorder, by definition, has eliminated the capacity to exert free will over the compulsion to use") and DB. 33 (drug use is a "symptom of substance use disorder that is [inseparable] from the brain disease itself").

[32] Satel & Lilienfeld, Add. 17. Davis, et al., *A Review of the Literature on Contingency Management*, *supra* note 12.

coupled with a suspended sentence, is a legal disposition which allows a criminal offender to remain in the community subject to certain conditions and under the supervision of the court.") (quoting *Commonwealth v. Durling*, 407 Mass. 108, 111 (1990)). The primary goals of probation are rehabilitation of the probationer and protection of the public, while other goals may include punishment, deterrence, and retribution. *Commonwealth v. Obi*, 475 Mass. 541, 547 (2016). "These goals are best served if the conditions of probation are tailored to address the particular characteristics of the defendant and the crime." *Commonwealth v. Pike*, 428 Mass. 393, 403 (1998). Judges must have "the flexibility at sentencing" to tailor conditions appropriately. *Commonwealth v. Goodwin*, 458 Mass. 11, 16 (2010) (citing *Commonwealth v. Lapointe*, 435 Mass. 455, 459-460 (2001)). The defendant contests none of these well-established propositions. Instead, she asserts that "[j]ailing her because she tested positive for fentanyl simply punishes her for [the SUD] diagnosis." DB. 28. This statement is misleading at best: sanctions for probation violations are not a punishment for the offending conduct. Instead, they constitute punishment for the underlying crime that led to a sentence of probation in the first place. *See, e.g., Goodwin*, 458 Mass. at 15; *Commonwealth v. Ward*, 33 Mass. L. Rptr.

123, 2015 WL 7740510, at *3 ("A sanction following the finding of a violation of probation is not a punishment for the offending conduct, but the imposition of a punishment for the underlying offense for which the defendant is on probation.")

In sentencing [redacted] for larceny, the judge correctly took into account her SUD diagnosis.[33] The CWOF disposition with one year of probation, conditioned on [redacted] remaining drug free and submitting to random drug testing, was proper.[34] After finding that there was probable cause that [redacted] had violated probation, the judge detained her until she could enter inpatient treatment.[35] By conflating this sanction for the probation violation with the punishment for the underlying crime, [redacted] tries to advance her argument that punishing a person for substance use is neither constitutional nor

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[33] *See* Order of Probation Conditions, requiring treatment and drug testing. RA. 10.

[34] M.G.L. c. 266, §30(1) provides for sentences of up to five years in state prison. By contrast, a CWOF is a more favorable disposition for the defendant than a conviction. Here, it gave [redacted] the opportunity to "'earn' a dismissal" by complying with probation conditions. *Commonwealth v. Pyles*, 423 Mass. 717, 722 n. 7 (1996). *See also Souza v. Registrar of Motor Vehicles*, 462 Mass. 227, 233 (2012); *Commonwealth v. Powell*, 453 Mass. 320, 327 n.9 (2009).

[35] No additional sanctions were imposed after the finding of violation on December 8, 2016. R. 4, 80. [redacted] was ordered to continue inpatient treatment. *Id.*

effective.[36] However, unlike the defendants in *Robinson* and *Powell*, [redacted] was not punished for her substance use. *See Bearden v. Georgia*, 461 U.S. 660, 669, n. 9 (1983); *Commonwealth v. Odoardi*, 397 Mass. 28, 30 (1986).

[redacted]sentence was consistent with the idea that punishment alone is not effective for criminal defendants with SUD. The drug free and testing requirement helped make [redacted] accountable to the court and to her probation officer and allowed for an accurate evaluation of her treatment needs. Addiction recovery experts have recognized that "that treatment does not need to be voluntary to be effective."[37] In fact, "[t]he willingness to make a change in behavior may be spurred by the negative consequences of an arrest." *Id.* [redacted] herself has credited drug court with initiating her into treatment. RA. 54. Sanctions can in fact be effective if they are targeted, as they were here, towards a renewed commitment to treatment.

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[36] For example, the defendant cites a study by Otiashvilli et al. (DB. 17), which showed that a "massive street drug testing" program in the Republic of Georgia "leading to heavy fines or imprisonment" for testing positive did not improve treatment outcomes. This process is not at all comparable to treatment-focused probation, which, coupled with drug-testing, has been demonstrated to help many people with SUD to achieve sobriety.

[37] Broderick, *supra* note 2 (citing principle #11 of the 13 NIDA Principles of Effective Addiction Treatment).

2. [redacted] waived her defense of not being able to comply with a drug free condition by failing to raise it at sentencing.

[redacted] did not raise the argument that she could not comply with the drug free condition at her sentencing hearing. Add. 5-9. In fact, there was no discussion of inability to comply during the August 22, 2016 sentencing. According to [redacted] her SUD was active at the time (DB. 20); yet, she did not argue that it meant she lacked free will to abstain from drug use. By failing to raise her inability to comply with probation conditions, [redacted] waived this argument. *Commonwealth v. Vargas*, 475 Mass. 86, 93 (2016) ("In agreeing to abide by the condition of no marijuana use, the defendant explicitly waived his right not to be prosecuted for the use or possession of marijuana, and he agreed to be subject to punishment for noncompliance.").

[redacted] claims that she "had every sincere intention of being drug-free" but "could not control the compulsion to use". BR. 20. If she believed that she "could not control the compulsion to use"[38] at the time of sentencing, [redacted] should not have agreed to the drug free condition of probation. Another way to

[38] Notably, this would not have to mean that [redacted] lacked free will, but rather that her ability to control her actions was so impaired that she could not exercise it without the intensive support of inpatient treatment.

"receive a CWOF and protect [her] record from a felony conviction" (DB. 21) would have been to alert the judge that she was in need of more intensive, inpatient treatment. However, it was reasonable for her and for the sentencing judge to expect that she would be capable of abstaining from drug use, particularly because the drug free condition was not imposed in isolation but in conjunction with treatment. RA. 10. At this time, no medical diagnosis can accurately assess whether or not the volitional powers of a particular person with SUD have been so impaired as to make the exercise of control over drug use impossible.[39] The judge reasonably determined that the goals of probation would be best served by allowing [redacted] to remain in the community while engaging in treatment and submitting to random drug tests to ensure that she remained drug free. Although it turned out that [redacted] needed the additional resources of impatient treatment, this could not have been known in advance - especially when [redacted] herself did not identify this need to the sentencing judge.

[39] Douglas Husak and Emily Murphy, *The Relevance of the Neuroscience of Addiction to Criminal Law, in* A Primer on Criminal Law and Neuroscience 217, 223 (Stephen J. Morse and Adina L. Roskies, eds., 2013).

C. Probation programs based on drug free conditions are constitutional and successful.

1. <u>The drug free requirement is not "cruel and unusual."</u>

Relying on *Robinson* and *Powell*, two landmark Supreme Court Eighth Amendment decisions, the defendant argues that her incarceration for the probation violation constituted cruel and unusual punishment. However, neither *Robinson* nor *Powell*, nor any other case cited by the defendant, compels the position she puts forth - namely, that drug free and testing conditions violate the Eighth Amendment.

In *Robinson*, the Supreme Court struck down as unconstitutional a statute criminalizing the status of being an addict. Punishing the very status of being an addict was cruel and unusual under the Eighth Amendment because it was analogous to "mak[ing] it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease." *Robinson*, 370 U.S. at 666. The *Robinson* majority did not "deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, 'involuntary' or 'occasioned by a compulsion.'" *Powell*, 392 U.S. at 533; *see also United States ex rel. Swanson v. Reincke*, 344 F.2d 260, 263 (2nd Cir. 1965) (concluding that the punishment in *Robinson* was cruel and unusual not because "the punishment was severe" but because "no crime had been

committed"). In this case, as argued in Argument Section I.B.1, the defendant was not punished for her status of being an addict. Instead, her punishment - the sentence of one year of probation with conditions - was imposed for the crime of larceny. The defendant does not contend that it would have been unconstitutional to punish her for larceny by incarceration, only that under *Robinson* it is unconstitutional to criminalize addiction as such. This well-established principle is not controlling here: [redacted] was first appropriately punished for larceny and then permissibly sanctioned for violating a condition of her probation.

In *Powell*, a divided Supreme Court upheld a statute prohibiting public drunkenness. *Powell*, 392 U.S. at 537. According to the plurality, the statute did not violate the Eighth Amendment because it punished the *act* of being drunk in public rather than the mere *status* of being a chronic alcoholic. *Id.* at 532. Refusing to extend *Robinson* to involuntary conduct, Justice Marshall - writing for the plurality - stated that "[n]othing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms." *Id.* at 536.

The dissent by contrast favored a broader reading of *Robinson,* claiming it stood for the principle that "[c]riminal penalties may not be inflicted upon a

person for being in a condition he is powerless to change." *Id.* at 567. Persuaded that Powell was "powerless to avoid drinking" (*id.* at 568), the dissent believed he could not be punished for public drunkenness. The dissent's reading of *Robinson* did not prevail and has not been adopted by any court since.[40]

The cases which the defendant summarily dismisses as "rely[ing] at least partially on a flawed view of substance addiction as a character defect that can be ordered into submission" (DB. 30)[41] actually rest on

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[40] *See, e.g., Smith v. Follette*, 445 F.2d 955, 961 (2d Cir. 1971); *Bruno v. Louisiana*, 316 F. Supp. 1120, 1122, n. 2 (E.D.La. 1970); *Wheeler v. United States*, 276 A.2d 722, 726 (D.C. 1970) (all adopting the narrow "status offense" reading of *Robinson*). Further, the two cases favoring the defendant's view were decided before *Powell* and are otherwise not persuasive for several reasons: first, they are exceptions to the otherwise widely accepted idea that substance free conditions are permissible; second, they contemplate incarceration or involuntary commitment as the alternative. *See State v. Oyler*, 92 Idaho 43 (1968) ("After sound determination that a probationer could not possibly perform a fundamental condition of his probation, the judge has discretion to remove probation and pronounce sentence."); *Sweeney v. United States*, 353 F.2d 10 (7th Cir. 1965) (finding that the alcohol abstention condition "would be unreasonable as impossible if psychiatric or other expert testimony was to establish that petitioner's alcoholism has destroyed his power of volition and prevented his compliance with the condition" and noting that under *Robinson*, "quarantine, confinement, or sequestration" would be permissible).

[41] Neither *Spry v. State*, 750 So.2d 123 (Fla. Dist. Ct. App. 2000), nor *Sobota v. Williard*, 247 Or. 151 (1967), endorse the position that addiction is a character defect. They merely acknowledge that there

the defendants' failure to show that they lacked the capacity to abstain from using alcohol.[42] Finally, the unspecified cases which the defendant claims, without argument, to have been "wrongly decided"[43] show that most courts have adopted the *Powell* plurality's position as controlling. *See also, United States v. Moore*, 486 F.2d 1139 (D.C. Cir. 1973) (noting that "the majority in *Powell* 'unmistakably recoiled from opening up new avenues of escape from criminal accountability by reason of the compulsion of such things as alcoholism and, presumably, drug addiction - *conditions from which it is still widely assumed,*

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are a number of explanations for engaging in the "forbidden conduct" of drinking intoxicants, *Sobota*, 247 Or. at 152-153, and that probation can be a tool for ensuring rehabilitation and compliance with treatment. *Martin v. State*, 517 P.2d 1399 (Alaska 1974), similarly makes no mention of a character disorder. It simply held that a probationary condition to abstain from drinking was not contrary to Alaska Const. Art. I, § 12's mandate that criminal administration "be based on the principle of reformation . . . ." *Id.* at 1402, n. 12.

[42] Despite finding that the defendants in *Mulligan v. Department of Health and Social Services*, 86 Wis. 2d 517, 521 (1979), and *United States v. Miller*, 549 F.2d 105, 107 (9th Cir. 1976), had not shown that they had no control over their drinking, those courts noted that a probation condition mandating that a defendant abstain from drinking was reasonable if it served a rehabilitative purpose and if alcohol substantially contributed to the defendant's illegal behavior.

[43] See the defendant's citation to the dissent in *People v. Kellogg*, 119 Cal. App. 4th 593, 611-627 (2004), presumably to indicate her agreement with the dissent's reasoning in that case. DB. 30.

rightly or wrongly, that the victim retains some capacity to liberate himself.'") (emphasis in the original).[44]

The defendant's state law claim that her detention for violating a probation condition was "cruel or unusual" fares no better. Under Massachusetts law, to prove that punishment is cruel or unusual, "a sentenced defendant must meet the 'heavy burden' of showing that the sentence 'shocks the conscience and offends fundamental notions of human dignity.'" *Obi*, 475 Mass. at 546 (citing *Commonwealth v. Jackson*, 369 Mass. 904, 910 (1976)). As noted above (Statement of Facts, Section A), the state of the science of addiction does not support the defendant's lack-of-free-will argument.[45] Consequently, she cannot prove that the drug free and testing

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[44] "Thus it would appear that according to the Supreme Court, 'rightly or wrongly,' an addict is not under an 'irresistible compulsion' to possess narcotics, but retains some ability to extricate himself from his addiction by ceasing to take the drugs." *Moore*, 486 F. 2d. at 1153. Because the debate over whether the involuntariness hypothesis is right or wrong continues, no change in the law is warranted.

[45] This is in contradistinction to *Diatchenko v. District Attorney for the Suffolk Dist.*, 466 Mass. 655, 660 (2013) where the Court found that a strong body of science called for a change in the law. The *Diatchenko* court also relied on a long line of Supreme Court decisions that gradually expanded Eighth Amendment protections for juveniles as society's standards of decency evolved. No such line of cases exists here.

conditions of her probations violated Article 26 of the Massachusetts Declaration of Rights.

Finally, cases applying *Robinson* and *Powell* to homeless defendants are inapposite (*see infra* Section II.A). The holding in *Jones v. City of Los Angeles* relied on the proposition that "the conduct at issue here [sleeping on the streets] is involuntary and inseparable from status [homelessness] – they are one and the same, given that human beings are biologically compelled to rest, whether by sitting, lying, or sleeping." 444 F.3d 1118, 1136 (9th Cir. 2006), *vacated on other grounds*, 505 F.3d 1006 (9th Cir. 2007).[46] Drug use, by contrast, is not "involuntary and inseparable" from the status of being addicted. In sum, the drug free condition is not cruel or unusual but rather eminently reasonable. It supports the public policy of preventing behavior that "create[s] substantial health and safety hazards, both for [the defendant] and for members of the general public." *Powell*, 392 U.S. at 532.

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[46] *See also Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992) (noting that Eighth Amendment prohibits punishment for sleeping, eating and other innocent conduct); *State v. Adams*, 91 So. 3d 724 (Ala. App. 2010) (sex offender who could not obtain housing could not be punished for violating a statute that required him to provide an address).

2. Drug testing on probation can increase public safety and contribute to successful treatment.

A substantial body of research supports the idea that sanctions for failure to comply with drug free and testing conditions, along with rewards for compliance, can help probationers reach recovery goals. Contrary to the defendant's claim, reliance on such conditions is not a vestige of "the obsolete notion that ascribes addiction to some inchoate moral failure" (DB. 31), but a policy based on the best science available to us. The recognition that addiction can respond to incentives and sanctions need not (and did not in this case) go hand in hand with a moralizing attitude. Treatment-oriented probation programs are built on the recognition that recovery requires active engagement and commitment on the part of the person with SUD. For example, one such program is called Hawaii's Opportunity Probation with Enforcement (HOPE). In 2013, HOPE made the list of top 25 innovations in government selected by the Harvard Kennedy School of Government. Sam Kornell, *Probation that Works*, Slate (June 5, 2013). The program is based on the idea that "judicial punishment should be 'swift, certain, and proportionate.'" *Id.* A year after it was implemented, HOPE's outcomes were quite promising: "Participants in HOPE were 55 percent less likely than members of a control group to be arrested

for a new crime, 72 percent less likely to use drugs, and 53 percent less likely to have their probation revoked. As a result, they served 48 percent fewer days of incarceration." *Id.* A ten-year follow up study of the expanded HOPE program also found that "HOPE probationers performed better than those under routine supervision" and "were less likely to be revoked and returned to prison."[47]

HOPE has since been implemented in many states, including Massachusetts. *See* HOPE/MORR (Massachusetts Offender Recidivism Reduction) Project, http://www.mass.gov/courts/programs/probation-programs/. In a performance report analyzing the HOPE/MORR project, dated October 2015, the BOTEC Analysis Corporation found that the Worcester District Court was performing successfully and compared well with other HOPE implementations.[48] Significantly, the report points out that "HOPE can be considered a 'triage' to distinguish between probationers who are able to desist from drug use on their own and those who need treatment." BOTEC Report, at 5. The fact that the HOPE model can be successful demonstrates that

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[47] Angela Hawken et al., *HOPE II: A Follow Up to Hawaii's HOPE Evaluation* (May 17, 2016), https://www.ncjrs.gov/pdffiles1/nij/grants/249912.pdf.

[48] BOTEC Analysis Corporation, *HOPE Fidelity Review: Worcester District Court* (October 2015) ("BOTEC Report").

people with SUD have the ability to change their behavior in response to well-structured sanctions, combined with appropriate treatment. This capacity for choice shows that requiring people with SUD to remain drug free is constitutional.[49]

II. [redacted] VIOLATION OF THE DRUG FREE CONDITION WAS WILLFUL, AND THE COURT'S FINDING OF VIOLATION WAS CORRECT.

SUD is not similar to homelessness or poverty in its effect on a person's ability to comply with conditions of probation. The district court properly found that [redacted] violated probation because her drug use was voluntary - despite any strong compulsion to use resulting from her SUD - making her accountable for the violation. The ten-day detention until [redacted] enrolled in inpatient treatment not only was permissible, but may have helped to save her life, given the dangerous nature of fentanyl in particular.[50]

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[49] Even cases where SUD is so severe as to require inpatient treatment do not prove the absence of choice. Rather, they demonstrate that some people cannot make the right choice without the intensive support offered by the restricted setting of inpatient treatment facilities. *See, e.g.*, Satel and Lilienfeld, *Addiction and the Brain Disease Fallacy*, *supra* note 19, at 6.

[50] *See, e.g.*, Sarah Zhang, *Fentanyl Is So Deadly That It's Changing How First Responders Do Their Jobs*, The Atlantic (May 15, 2017), https://www.theatlantic.com/health/archive/2017/05/fentanyl-first-responders/526389/.

A. Substance use disorder is not a legal excuse or defense to a probation violation.

Despite the inclusion of substance use disorder in the Diagnostic and Statistical Manual of Mental Disorders, it is not the basis for any affirmative defense to criminal responsibility, such as insanity. Some jurisdictions exclude addiction from the insanity defense by statute. *See, e.g.* Cal. Penal Code § 29.8 (stating that the insanity defense "shall not be found by the trier of fact solely on the basis of a personality or adjustment disorder, a seizure disorder, or an addiction to, or abuse of, intoxicating substances."); *see also* Morse 2, at 437; Add. 32. This Court recently reaffirmed that the insanity defense is not available when "the loss of substantial capacity to appreciate the wrongfulness of [the defendant's] conduct or conform his behavior to the requirement of the law is caused by the voluntary consumption of drugs or alcohol." *Commonwealth v. Muller*, 477 Mass. 415, 78 N.E.3d 51, 60 (2017). In fact, the section of the jury instruction in *Muller* that stated, "[t]he normal consequences of drug and alcohol addiction are not a basis for relieving a defendant of criminal responsibility" was not disputed. *Id.* at 61.[51] *See also Commonwealth v.*

[51] The *Muller* court found that the judge's instructions were erroneous in failing to clarify, as required in *Commonwealth v. Berry*, 457 Mass. 602 (2010), that the

DiPadova, 460 Mass. 424, 431 (2011) ("alcoholism or drug addiction do not qualify as mental disease[s] or defect[s]. . .; as a result, a defendant whose lack of substantial capacity is due solely to one of these conditions, and not to any mental disease or defect, is criminally responsible") (internal quotations omitted). The defendant asserts that her consumption of drugs was involuntary. However, no court has recognized that drug use by a person with SUD is involuntary. *See* Section I.C.1. Neither is there a scientific consensus on this issue, as discussed in the Statement of Facts, Section A.

Because it has not been established (either generally or in [redacted]s case at the time of sentencing or at the time of the violation), that SUD leaves people "powerless to exert control over the compulsion to use opioids" (*see, e.g.*, DB. 34), the defendant's reliance on *Commonwealth v. Henry*, 475 Mass. 117 (2016), *Commonwealth v. Poirier*, 458 Mass. 1014 (2010), and *Commonwealth v. Canadyan*, 458 Mass. 574 (2010) is misplaced. As explained in detail below,

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voluntary consumption of drugs or alcohol does not preclude the defense of lack of criminal responsibility where the mental disease or defect, standing alone, causes the defendant to lose the substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements for the law. *Muller*, 78 N.E.3d at 60.

[redacted] analogy between drug use by a person with SUD and homelessness or poverty is deeply flawed. She states: "[redacted] did not 'choose' to relapse any more than a person who has hypertension chooses to have high blood pressure, a person who is homeless chooses to sleep in an alley, or a person who is destitute chooses not to pay court-ordered fees or restitution." DB. 5-6. These faulty analogies form the basis of [redacted] argument that *Henry*, *Poirier*, and *Canadyan* are applicable to her case (*see* DB. 33-36). Accordingly, the argument cannot succeed.

The holding of *Henry*, in relevant part, is that, "in determining whether to impose restitution and the amount of any such restitution, a judge must consider a defendant's ability to pay, and may not impose a longer period of probation or extend the length of probation because of a defendant's limited ability to pay restitution." 475 Mass. at 118. This holding rests on "the fundamental principle that a criminal defendant should not face additional punishment solely because of his or her poverty." *Id.* at 122. In *Henry*, this Court recognized that "impos[ing] a restitution amount that the defendant cannot afford to pay simply dooms the defendant to noncompliance." *Id.* In *Canadyan*, the defendant's probation was conditioned on him wearing a global positioning system (GPS) monitoring device. The technical requirements of the

GPS included "access to either a dedicated telephone line, an electrical outlet, or both." *Canadyan*, 458 Mass. at 576. Neither of these was available at the homeless shelter where the defendant lived. *Id.* The Court found that the defendant's failure to wear the GPS device did not violate his probation conditions based on evidence that homeless shelters could not accommodate the technical requirements of the GPS and that the defendant had not "wilfully remained homeless for the purpose of evading the GPS monitoring condition of his probation." *Id.* at 576. *Poirier* was another case in which the defendant's failure to comply with a GPS requirement was excused. In *Poirier*, the probation department did not provide the defendant with a GPS device to wear. 458 Mass. 1014. The Court found that "[w]here, as here, a defendant is not responsible for his inability to comply with a probation condition because the probation department failed to provide the equipment needed to comply, a defendant is not in violation of that probation condition." *Id.* at 106.

In all of these three cases - *Henry*, *Canadyan*, and *Poirier* - the violation of probation conditions could not be deemed wilful because of evidence that the defendants' failure to comply with a probation condition could not be "properly attributed" to them. *Poirier*, 458 Mass. 1015. *Henry* and *Canadyan* cite

Bearden v. Georgia, 461 U.S. 660, 669 n. 10 (1983), for the proposition that "basic fairness forbids the revocation of probation when the probationer is without fault in his failure to [comply]." In *Bearden*, the United States Supreme Court held that, "in revocation proceedings for failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay." *Bearden*, 461 U.S. at 672. Depriving "the probationer of his conditional freedom simply because, through no fault of his own, he cannot pay the fine" would violate due process. *Id.* at 673.[52]

The *Henry*, *Canadyan*, and *Poirier* line of cases is not controlling here because the inability to pay restitution or to find a home cannot be reasonably analogized to the inability "to control the compulsion to use opioids" (DB. 34-5). One cannot gain access to financial resources by an act of willpower. There are numerous factors outside a person's control that influence her ability to find a job, secure an income,

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[52] The court recognized that "lack of fault in violating a term of probation" would not necessarily "prevent a court from revoking probation." *Bearden*, 461 U.S. 660, 669, n. 9 (noting that "it may indeed be reckless for a court to permit a person convicted of driving while intoxicated to remain on probation once it becomes evident that efforts at controlling his chronic drunken driving have failed") (comparing to *Powell* and *Robinson*).

and find a place to live.[53] By contrast, control over drug use is ultimately an internal process (even if some require access to external support structures to exercise it). While impaired decision-making can be a defining feature of addiction, the ability to make choices is not completely eliminated. *See* Statement of Facts, Section A; Morse 1, Add. 12("Even if addicts have difficulty controlling their behavior, they are not zombies or automatons, but instead act intentionally to satisfy their desire to find and use drugs."). Nor is there currently a way to ascertain, by means of a brain scan or other medical diagnostic tool, whether or not a particular person's neurobiology has been so affected by drugs that they have no choice but to use. Morse, *Good Enough Reason*, at 508, *supra* note 24 ("Even if 'willpower' is an independent human ability and there apparently are individual differences in self-control, no sufficiently valid metric and instrumentation can accurately resolve questions about the strength of craving and the ability to resist."); *see also* Husak & Murphy, at 223, *supra* note 39 ("A dearth of evidence addresses the pragmatic issue of how bad an addiction really is, either in groups or in individuals.")

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[53] In *Canadyan*, for example, "there was specific evidence with respect to the defendant's efforts to secure alternate housing," which were all impeded by circumstances beyond his control. 458 Mass. at 576.

In this case, [redacted], her sentencing attorney, and the judge believed that she would be able to comply with a drug free condition of probation. Had there been evidence to the contrary, [redacted] probation could have been conditioned on inpatient treatment. Unfortunately, as the defendant makes clear, the recovery process can be uneven. Random drug testing is designed to ensure that the level of treatment can be appropriately adjusted to the needs of the probationer. When [redacted] tested positive for Fentanyl, while already receiving medical treatment in the form of Suboxone, where it was a Friday before a long weekend and [redacted]s parents were out of town (Tr. 20), the probation officer properly decided to request detention, and the judge properly detained [redacted] until an inpatient placement could be found. The finding of a violation was not contrary to the holdings of *Henry*, *Canadyan*, or *Poirier*. Furthermore, the brief ten-day detention contributed to the goals of rehabilitation and public safety.

B. [redacted] violated probation conditions when she tested positive for fentanyl.

The defendant claims that her probation violation did not constitute a "wilful failure to comply" but "was literally the opposite." DB. 35. It is difficult to ascertain what that means. [redacted] asserts that she had "every sincere intention" of complying with the

drug free condition when she agreed to it. *Id.* Although the record suggests that [redacted] did engage in treatment after sentencing, as was required by her probation condition, that treatment clearly proved to have been insufficient. She could have requested inpatient treatment, but she did not do so. In fact, even after testing positive for Fentanyl, [redacted] did not want to go to inpatient treatment. Tr. 20. [redacted] admits that she had previously underestimated her need for treatment and relapsed in November 2015 as a result. DB. 19 (stating that [redacted] attributed her previous relapse "to having withdrawn from parts of her [treatment] plan because she thought she could 'sustain her recovery without as much support'"). The claim that "the precise neural circuitry necessary for [redacted] behavior to follow her intention was not functioning" is misleading. As argued above, no direct link between the brain changes involved in addiction and a particular decision to use drugs has been established. People with SUD are often able to resist the "compulsion" to use drugs. [redacted] has not presented any evidence - nor could she do so, given the state of the science as described in the Statement of Facts, Section A above - that her drug use was involuntary. The difficulty in exercising control over drug use, however severe, is not comparable to the lack of control over one's financial situation or

living conditions that the defendants in *Henry*, *Canadyan*, and *Poirier* experienced. Therefore, the trial judge properly found that [redacted] violated the terms of her probation.

III. DRUG TESTING IS THE PRECONDITION FOR THERAPEUTIC APPROACHES TO PROBATION.

As argued in Sections I and II, the drug free and testing conditions are constitutional. What is more, they are indispensable for promoting recovery and reducing incarceration. Further, the Massachusetts legislature has recognized that drug free and testing conditions are indispensable in helping criminal defendants with SUD to achieve a productive recovery.

A. Discretion at sentencing and during probation promotes the goals of probation and reduces incarceration rates.

"A judge has considerable latitude within the framework of the applicable statute to determine the appropriate individualized sentence." *Commonwealth v. Goodwin*, 414 Mass. 88, 91 (1993). In determining what is appropriate, the judge may consider multiple factors that are relevant to the defendant's character, behavior, and background. *Id.* at 92. Similarly, when a judge determines that incarceration is not necessary and sentences the defendant to probation, she "has broad discretion to impose conditions of probation which are reasonably calculated to control the conduct of the defendant."

Commonwealth v. Williams, 60 Mass. App. Ct. 331, 332 (2004) (citing *Pike*, 428 Mass. at 402) (finding that the alcohol abstention condition was reasonable where the defendant was also required to engage in anger management counseling).

As the defendant points out, merely punitive approaches to addiction do not work well. Thus, sentencing [redacted] to probation conditioned on treatment was the best way to ensure that the goals of rehabilitation and public safety would be achieved. The requirement of treatment alone would have been insufficient, however. As the record makes clear, [redacted] had difficulty identifying what the appropriate level of treatment for her would be at the time. Tr. 20. By requiring her to remain drug free and to submit to drug testing, the judge gave [redacted]s probation officer the tools to assess how she was doing and the ability to bring her before the judge when a modification was needed. Without the drug free condition, the judge's sentencing options would be severely limited: the only way of making sure that [redacted] did not use drugs would be either incarceration or involuntary commitment. Overall, eliminating the drug free requirement would likely force judges to choose incarceration over probation more often. *See, e.g.*, *Sobota*, 247 Or. at 153 ("If an offender cannot be placed on probation on the condition that he

refrain from doing the acts dictated by his particular character disorder, the use of probation will be sharply curtailed."). However, as the defendant correctly observes "[f]orced abstinence [while incarcerated] is not treatment" (DB. 16), and it may not cure addiction. By contrast, programs like HOPE demonstrate that the use of "swift, certain, and proportionate" probation sanctions can be very successful in promoting recovery. Thus, the drug free condition in [redacted] case was first and foremost related to the goal of rehabilitation. *See e.g.*, *Spry*, 750 So. 2d 123 (abstention from alcohol requirement permissible as long as related to rehabilitation); *Martin*, 517 P. 2d 1399 (reasonable to conclude that rehabilitation was dependent upon his abstention from alcohol).

Further, probation officers have discretion when deciding whether or not to file a notice of violation with the court.[54] In this case, the probation officer took a very thoughtful approach in responding to [redacted] positive drug screen. She considered the risk associated with allowing [redacted] to leave and concluded

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[54] *See* District/Municipal Courts Rules for Probation Violation Proceedings Rule 4, http://www.mass.gov/courts/case-legal-res/rules-of-court/district-muni/probation/rule4.html; Guidelines for Probation Violation Proceedings in the Superior Court, http://www.mass.gov/courts/court-info/trial-court/sc/guidelines-for-probation-violation-proceedings.html.

that the safest course of action (safest for [redacted] herself as well as, potentially, for the public) was to ask the judge to detain [redacted] until an inpatient treatment placement could be found. Again, this discretion is important because the probation officer has an ongoing relationship with the defendant and is in the best position to assess what course of action will promote the goals of probation.

B. Massachusetts statutes authorizing drug testing and drug free housing for drug dependent probationers are not unconstitutional.

Chapter 111E, § 12 of Massachusetts General Laws provides that courts may employ "[a] periodic program of urinalysis . . . as a condition of probation to determine the drug free status of the probationer."[55] The defendant in effect asks the Court to find this statutory provision unconstitutional. However, as argued in detail above, she has not presented an adequate scientific foundation for her claim. First, there is wide consensus that, even if the brain disease model is helpful, it is not exhaustive in explaining the causes of addiction. Furthermore, most (including the experts cited by the defendant) agree that behavioral treatment by evidence-based psychotherapies is often indispensable for treating

[55] It is noteworthy that drug free conditions are used as conditions of probation in all states.

addiction. RA. 26 (Wakeman Aff., § 55).[56] Such treatment is predicated on active committed participation by the patient and therefore presuppose the exercise of agency and free will. To put it differently, the patients who have the best rate of success are those who actively participate in their own recovery.[57] Second, there is no scientific evidence that the brain disease model, even if accurate, leads to the conclusion that people with addiction cannot choose whether or not to use drugs. To the contrary, evidence suggests that choice does exist and that people with addiction can be guided to make good choices with the proper incentives. Heyman, *Addiction and Choice: Theory and New Data, supra* note 20.

A 2015 decision of this Court that concerned the science of juvenile brain development is instructive here. In *Commonwealth v. Okoro*, 471 Mass. 51 (2015), the Court held that mandatory life imprisonment with eligibility for parole after fifteen years was

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[56] The three such methods listed by Wakeman here are "motivational interviewing, cognitive-behavioral therapy (CBT), and contingency management." Interestingly, at least the first and the last of these rely on the ability of a person with addiction to make choices.

[57] Satel & Lilienfeld, Add. 17; Note that Dr. Kane suggests that it is critical that [redacted] is a "collaborator with her providers on treatment decisions." RA. 59.

constitutional punishment for juveniles who are convicted of second-degree murder. The Court wrote:

> Scientific and social science research on adolescent brain development and related issues continues. At this point, we cannot predict what the ultimate results of this research will be, or more importantly, how it will inform our understanding of constitutional sentencing as applied to youth. In short, we appear to deal here with a rapidly changing field of study and knowledge, and there is value in awaiting further developments.

Okoro, 471 Mass. at 59-60. In this case, the research results are much more uncertain and controversial. Consequently, there is even less reason to overturn the legislative determination that drug free and testing conditions of probation are permissible. *See Id.* at 58 (deference to the legislature is warranted where the science is still developing).

IV. LACK OF CULPABILITY FOR PROBATION VIOLATIONS BY PEOPLE WITH SUD WOULD SUGGEST THAT THEY LACK CRIMINAL RESPONSIBILITY FOR DRUG RELATED CRIMES GENERALLY.

The defendant offers no limiting principle for her proposition that probationers with SUD cannot be held accountable for their drug use. Yet, if the Court were to find that she did not have free will with regard to her drug use, this "compulsion" may serve as an excuse to the drug-related larceny itself (and may naturally be extended to other drug-related crimes). *See, e.g., Moore*, 486 F. 2d at 1147 (rejecting

defendant's argument that his heroin addiction was a defense to drug possession and noting that "[t]he obvious danger is that this defense will be extended to all other crimes-bank robberies, street muggings, burglaries-which can be shown to be the product of the same drug-craving compulsion"). Currently, "[a]ddiction is not an affirmative defense per se to any crime in the United States, England or Canada." Morse 2, at 436; Add. 31. As noted above, the insanity defense does not extend to addiction, unless the defendant "has become permanently mentally disordered beyond addiction . . . as a result of the prolonged use of intoxicants." *Id.* at 437; Add. 32.

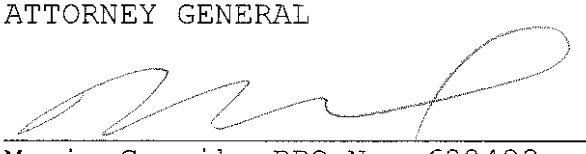
People diagnosed with SUD can be held accountable for their actions, including for the choice to use drugs while on probation conditioned on abstinence. In sanctioning [redacted] for violating probation, the court did not "punish her for a state she is powerless to change." DB. 26. Instead, the court recognized that [redacted] needs additional therapeutic support in order to make better choices in the future and ordered that she be incarcerated only for as long as was needed to find appropriate treatment. The drug free condition was reasonable in light of [redacted] drug-related crime. The change in criminal law that the defendant advocates would be detrimental both to people with SUD and to the community at large.

CONCLUSION

For the foregoing reasons, the Court should find that probationers who suffer from substance use disorder may be required to remain drug free as a condition of their probation. Accordingly, the Court should affirm the district court's finding that [redacted] violated her probation conditions when she tested positive for Fentanyl.

Respectfully submitted,

MAURA HEALEY
ATTORNEY GENERAL



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Date: August 15, 2017

CERTIFICATION PURSUANT TO MASS. R. APP. P. 16(k)

I certify that the foregoing brief complies with all rules of court pertaining to the filing of briefs, including, but not limited to, Mass. R. App. P. 16 and 20.

Maria Granik
Assistant Attorney General

August 15, 2017

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2017, I caused two (2) true and accurate copies of the foregoing brief to be served via first class mail, postage prepaid, upon:

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STATUTORY ADDENDUM

UNITED STATES CONSTITUTION

Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

MASSACHUSETTS DECLARATION OF RIGHTS

Article 26

No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.

MASSACHUSETTS GENERAL LAWS

CHAPTER 111E DRUG REHABILITATION

SECTION 12 Probation of drug dependent persons; treatment; urinalysis program; reports

Any court may, in placing on probation a defendant who is a drug dependent person who would benefit by treatment, impose as a condition of probation that the defendant receive treatment in a facility as an inpatient or outpatient; provided, however, that the court shall not impose such a condition of probation unless, after consulting with the facility, it determines that adequate and appropriate treatment is available. The defendant shall receive treatment at the facility for so long as the administrator of the facility deems that the defendant will benefit by treatment, but in no event shall he receive treatment at the facility for a period longer than the period of probation ordered by the court. A periodic program of urinalysis may be employed as a condition of probation to determine the drug free status of the probationer. The cost of the administration of such program shall be borne by the commonwealth. If the court requires as

a condition of probation that the defendant shall reside in alcohol and drug free housing, the judge issuing the order shall require the probation officer to refer the defendant only to alcohol and drug free housing certified pursuant to section 18A of chapter 17 and the probation officer shall require the defendant to reside in housing so certified in order to satisfy such condition if such certified housing is available. If at any time during the period of treatment the defendant does not cooperate with the administrator or the probation officer, or does not conduct himself in accordance with the order or conditions of his probation, the administrator or the probation officer may make a report thereon to the court which placed him on probation, which may consider such conduct as a breach of probation. Throughout the period of probation at a facility pursuant to this section, the administrator of said facility shall provide quarterly written reports on the progress being made in treatment by the defendant to the defendant's probation officer.

CHAPTER 266 CRIMES AGAINST PROPERTY

SECTION 30 Larceny; general provisions and penalties

(1) Whoever steals, or with intent to defraud obtains by a false pretence, or whoever unlawfully, and with intent to steal or embezzle, converts, or secretes with intent to convert, the property of another as defined in this section, whether such property is or is not in his possession at the time of such conversion or secreting, shall be guilty of larceny, and shall, if the property stolen is a firearm, as defined in section one hundred and twenty-one of chapter one hundred and forty, or, if the value of the

property stolen exceeds two hundred and fifty dollars, be punished by imprisonment in the state prison for not more than five years, or by a fine of not more than twenty-five thousand dollars and imprisonment in jail for not more than two years; or, if the value of the property stolen, other than a firearm as so defined, does not exceed two hundred and fifty dollars, shall be punished by imprisonment in jail for not more than one year or by a fine of not more than three hundred dollars; or, if the property was stolen from the conveyance of a common carrier or of a person carrying on an express business, shall be punished for the first offence by imprisonment for not less than six months nor more than two and one half years, or by a fine of not less than fifty nor more than six hundred dollars, or both, and for a subsequent offence, by imprisonment for not less than eighteen months nor more than two and one half years, or by a fine of not less than one hundred and fifty nor more than six hundred dollars, or both.

(2) The term "property", as used in the section, shall include money, personal chattels, a bank note, bond, promissory note, bill of exchange or other bill, order or certificate, a book of accounts for or concerning money or goods due or to become due or to be delivered, a deed or writing containing a conveyance of land, any valuable contract in force, a receipt, release or defeasance, a writ, process, certificate of title or duplicate certificate issued under chapter one hundred and eighty-five, a public record, anything which is of the realty or is annexed thereto, a security deposit received pursuant to section fifteen B of chapter one hundred and eighty-six, electronically processed or stored data, either tangible or intangible, data while in transit, telecommunications services, and any domesticated

animal, including dogs, or a beast or bird which is ordinarily kept in confinement.

(3) The stealing of real property may be a larceny from one or more tenants, sole, joint or in common, in fee, for life or years, at will or sufferance, mortgagors or mortgagees, in possession of the same, or who may have an action of tort against the offender for trespass upon the property, but not from one having only the use or custody thereof. The larceny may be from a wife in possession, if she is authorized by law to hold such property as if sole, otherwise her occupation may be the possession of the husband. If such property which was of a person deceased is stolen, it may be a larceny from any one or more heirs, devisees, reversioners, remaindermen or others, who have a right upon such deceased to take possession, but not having entered, as it would be after entry. The larceny may be from a person whose name is unknown, if it would be such if the property stolen were personal, and may be committed by those who have only the use or custody of the property, but not by a person against whom no action of tort could be maintained for acts like those constituting the larceny.

(4) Whoever steals, or with intent to defraud obtains by a false pretense, or whoever unlawfully, and with intent to steal or embezzle, converts, secretes, unlawfully takes, carries away, conceals or copies with intent to convert any trade secret of another, regardless of value, whether such trade secret is or is not in his possession at the time of such conversion or secreting, shall be guilty of larceny, and shall be punished by imprisonment in the state prison for not more than five years, or by a fine of not more than twenty-five thousand dollars and imprisonment in jail for not more than two years. The

term "trade secret" as used in this paragraph means and includes anything tangible or intangible or electronically kept or stored, which constitutes, represents, evidences or records a secret scientific, technical, merchandising, production or management information, design, process, procedure, formula, invention or improvement.

(5) Whoever steals or with intent to defraud obtains by a false pretense, or whoever unlawfully, and with intent to steal or embezzle, converts, or secretes with intent to convert, the property of another, sixty years of age or older, or of a person with a disability as defined in section thirteen K of chapter two hundred and sixty-five, whether such property is or is not in his possession at the time of such conversion or secreting, shall be guilty of larceny, and shall, if the value of the property exceeds two hundred and fifty dollars, be punished by imprisonment in the state prison for not more than ten years or in the house of correction for not more than two and one-half years, or by a fine of not more than fifty thousand dollars or by both such fine and imprisonment; or if the value of the property does not exceed two hundred and fifty dollars, shall be punished by imprisonment in the house of correction for not more than two and one-half years or by a fine of not more than one thousand dollars or by both such fine and imprisonment. The court may order, regardless of the value of the property, restitution to be paid to the victim commensurate with the value of the property.

CHAPTER 276 **SEARCH WARRANTS, REWARDS, FUGITIVES FROM JUSTICE, ARREST, EXAMINATION, COMMITMENT AND BAIL. PROBATION OFFICERS AND BOARD OF PROBATION**

SECTION 87 **Placing certain persons in care of probation officer**

The superior court, any district court and any juvenile court may place on probation in the care of its probation officer any person before it charged with an offense or a crime for such time and upon such conditions as it deems proper, with the defendant's consent, before trial and before a plea of guilty, or in any case after a finding or verdict of guilty; provided, that, in the case of any child under the age of 18 placed upon probation by the superior court, he may be placed in the care of a probation officer of any district court or of any juvenile court, within the judicial district of which such child resides; and provided further, that no person convicted under section twenty-two A, 22B, 22C, 24B or subsection (b) of section 50 of chapter two hundred and sixty-five or section thirty-five A of chapter two hundred and seventy-two shall, if it appears that he has previously been convicted under said sections and was eighteen years of age or older at the time of committing the offense for which he was so convicted, be released on parole or probation prior to the completion of five years of his sentence.

MASSACHUSETTS RULES OF APPELLATE PROCEDURE

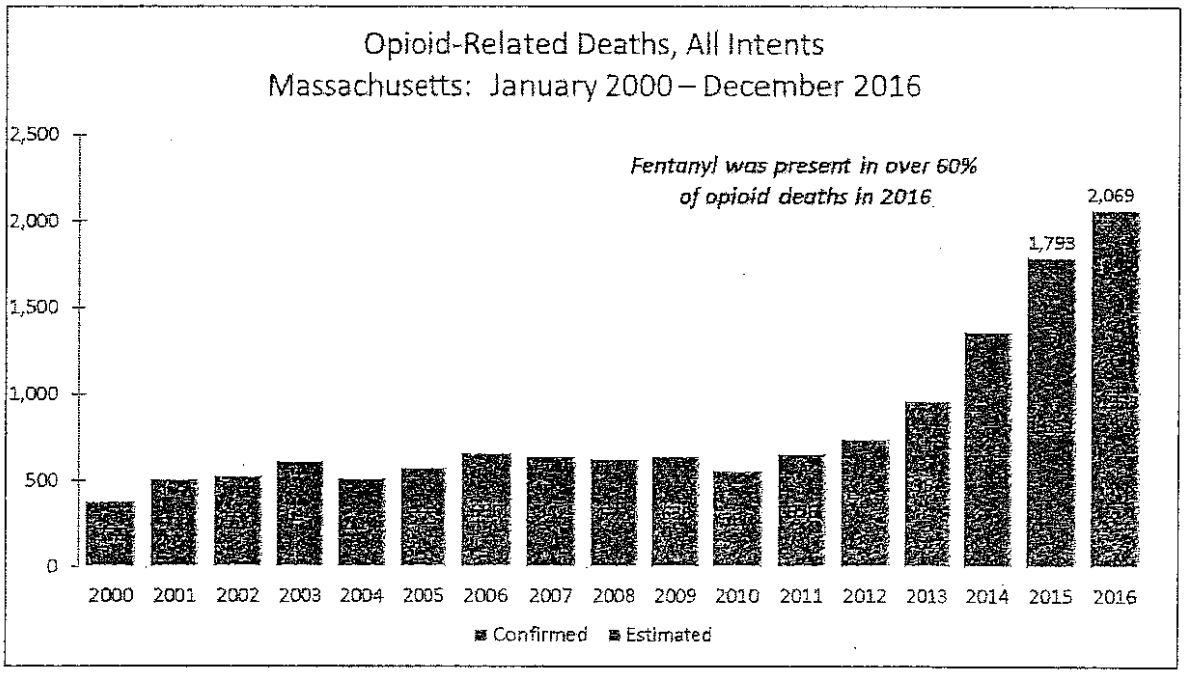
Rule 8 **The Record on Appeal**

(a) Composition of the Record on Appeal. The original papers and exhibits on file, the transcript of

proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the lower court shall constitute the record on appeal in all cases. In a civil case, in an appeal from an appellate division, the original papers and exhibits shall include the report of the trial judge to the appellate division with any exhibits made a part of such report.

ADDENDUM

In the last year, the prescription opioid, heroin, and fentanyl epidemic has continued to worsen, resulting in almost six deaths a day in Massachusetts. From 2000 to 2016, the number of fatal opiate-related overdoses in Massachusetts increased by over 445%. The latest numbers from the Massachusetts Department of Public Health (DPH) reveal that 2016 appears to have been the deadliest year in Massachusetts history in terms of opiate-related fatalities, with a total of 2,069 residents having unintentionally overdosed – more than 2015 and a 175% increase over 2012.[1]



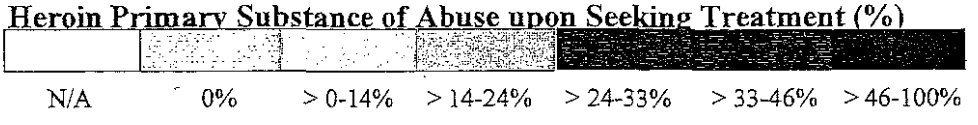
While the opioid addiction epidemic is nationwide, in 2014, annual opioid-related deaths in our state ranked the tenth highest in the nation, and the highest in New England. The progression from prescription opioids to heroin has now made a devastating escalation to

[1] See http://www.mass.gov/eohhs/docs/dph/stop-addiction/current-statistics/data-brief-overdose-deaths-may-2017.pdf.

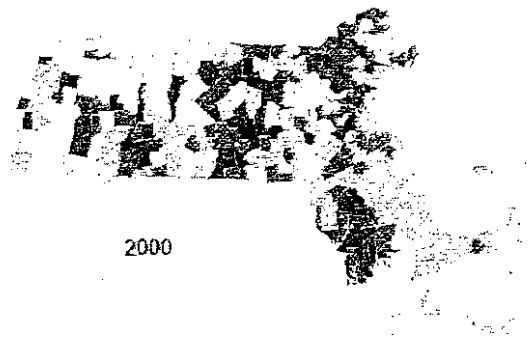
fentanyl. More than ever, this powerful synthetic opioid, fentanyl, is claiming lives in Massachusetts, fueling an overdose death toll that continues to rise.

Data from the Massachusetts Department of Public Health Bureau of Substance Abuse Services (BSAS) shows an increasing need for opioid-related treatment in Massachusetts. In 2000, about one third of admissions to substance abuse treatment centers and programs were opioid-related. By 2015, that figure had increased to more than half, overtaking alcohol as the most prevalent substance recorded by BSAS at treatment intake. The Massachusetts Health Policy Commission (HPC) recorded similar numbers for emergency room visits and hospitalizations during that time. At admission, clients identify a primary substance of use for which they are seeking treatment. Below, view maps at five-year intervals which show the increase in the percentage of admissions identifying heroin as their primary substance of use.

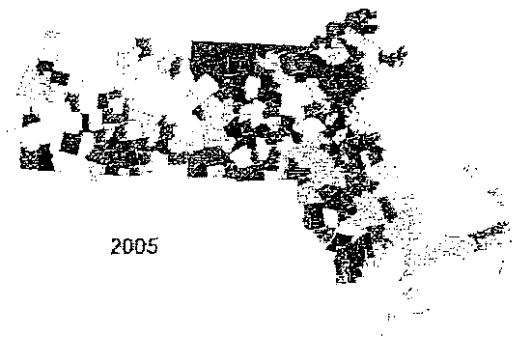
Percentage of Patients in Treatment Listing Heroin as their Primary Substance of Use[2]



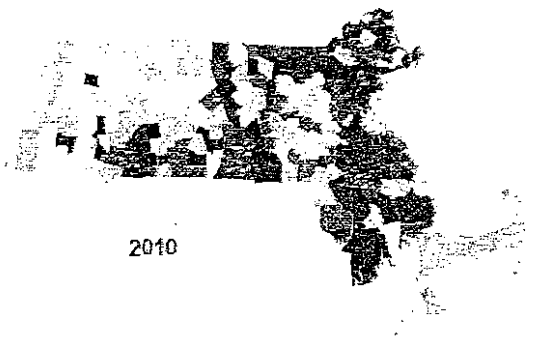
[2] Sources: Massachusetts Bureau of Substance Abuse Services, Massachusetts Department of Public Health http://www.mass.gov/chapter55/



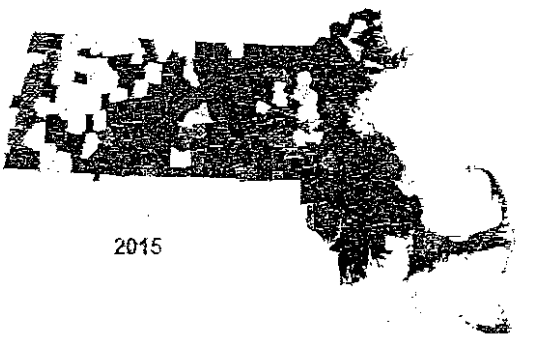
2000



2005



2010



2015

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.

CONCORD DISTRICT COURT
NO. 1647CR000901

COMMONWEALTH OF MASSACHUSETTS

V.

[redacted]

[redacted] OF THE SENTENCING HEARING BEFORE
BRENDEMUEHL, J., AUGUST 22, 2016

TRANSCRIBED BY ATTORNEY GENERAL'S OFFICE, CRIMINAL APPEALS DIVISION

COURT OFFICER: Ms. [redacted] sworn in.

MS. [redacted]: Yes, thank you.

JUDGE BRENDEMUEHL: Ms. [redacted] I have a green sheet which has your signature on it. Did you have enough time to review it with your attorney?

MS. [redacted]: Yes, I did.

JUDGE BRENDEMUEHL: Before you signed it?

MS. [redacted] Yes.

JUDGE BRENDEMUEHL: You now may state the facts.

ATTORNEY FOR THE COMMONWEALTH: Thank you, your Honor.

Had this case received a trial the Commonwealth would have proven beyond a reasonable doubt that on March 28, 2016 officers were dispatched to speak with the reporting party regarding missing jewelry. Upon arrival they were met by that party. They spoke with her and she explained she had noticed three items of jewelry missing a few days prior. [redacted]

[redacted]

She further went on to describe the missing blue ring valued at over $1,000. She stated it was kept in the guest room in a box. She stated that it is openly visible and that there appeared to be nothing else missing at the time.

[redacted] They then spoke with her after Miranda to which she did sign a written confession admitting to those charges, your Honor, those were essentially the facts.

JUDGE BRENDEMUEHL: Ma'am, are those facts essentially true; is that what happened? I just want to -- what we agreed upon is to attend, complete and continue with outpatient treatment, what type of treatment is that?

DEFENSE ATTORNEY: Yes she -- yes when she relapsed she was in our drug court. She had completed the drug court here. But when she relapsed she had went into this program which was an alternative kind of thing, it's a private treatment program where she worked on a farm and they dealt with information.

Subsequent to that, your Honor, she ended up going and she realized having been treated there before that she wasn't receiving the kind of support system, so what she did is she went to Emerson. She did an intake and she will be getting the, I think it's called the Lighthouse Program, where she will be going -- in the interim though she did go to the NA and NIAA, I do have that since the last few years so she has actively trying to work on her rehab.

It's just that the program she was in which her father had paid for wasn't giving her what she needed, so she then went ahead and took it on herself to get into the Emerson program. So when I say it's to be complete that's probably going to be the Lighthouse Program where it's my understanding that she's not going to start until a couple of weeks from now and that's what she would have to attend and complete.

I understand that there is an issue of restitution, however, I don't know if we know the amount at this point in time. So what I would be asking the court to do is to set it for an out of court compliance on the out of court restitution date; to have my client necessarily appear unless we disagree on the amount.

If the District Attorney might be able to give me the restitution amount say by September 22nd and maybe we can set a restitution date for November 28th and that should give everyone plenty of time. And if there is a dispute, then if I get the information by September 22nd, I could talk with my client and if there's some issue then she could come in on the 28th . If there is no dispute then I would let the court know that she just agrees to the restitution and I will tell probation so we don't have any issues. She recognizes there is restitution, we just don't know what it is because the items were melted down.

JUDGE BRENDEMUEHL: So you are seeking an out of court restitution that the two of you could discuss --

DEFENSE ATTORNEY: That's what I'd be asking, yes.

JUDGE BRENDEMUEHL: -- then you would put it on for hea[redacted] 28th if we have to come into court, but if the DA can just get me something prior to that, more or less, I think we would agree on it.

JUDGE BRENDEMUEHL: So the agreement would be the CWOF for a year, random screens, AA/NA three times a week, attend and complete and continue with the outpatient substance abuse treatment with releases to probation and stay away from the named victim with the restitution hearing being held November 28th.

ATTORNEY FOR THE COMMONWEALTH: Yes, Your Honor.

DEFENSE ATTORNEY: Could I maybe indulge the court for one further minute. Would the court consider if she is actually actively in a program and I know part of the program history is going at least three or four days every day from 8 or 9 to 5, would the court consider waiving the probation fee while she is in the program and/or paying restitution?

JUDGE BRENDEMUEHL: Definitely while she is paying restitution that yes that's a given -- that it will be waived while she is paying that.

DEFENSE ATTORNEY: Okay.

JUDGE BRENDEMUEHL Are we -- do we have a ballpark of the restitution?

ATTORNEY FOR THE COMMONWEALTH: I would estimate it around $1,800 which were the three items stolen.

JUDGE BRENDEMUEHL Okay. So it is something that can be taken care of within the period of probation. So she can start paying that. She can also have the community service option if that's something and then it will be suspended when she's paid the restitution.

So, ma'am, I'm just going to ask you a series of questions.

QUESTIONS BY JUDGE BRENDELMUCHL OF THE WITNESS:

Q Could you please give me your full name?

A [redacted].

Q How old are you?

A Twenty eight.

Q How far did you go in school?

A I have my associates degree in liberal arts and science.

Q Are you suffering from any sort of mental health issue which would interfere with your ability to understand the nature of this admission today?

A No.

Q Have you consumed any drugs, alcohol, or medication which would interfere with your ability to understand the nature of this admission?

A No.

Q I am going to go over some rights that you are giving up by this admission today. The first right you are giving up is your right to a jury trial. At a jury trial you and your attorney would choose six people from the community that would listen to the facts of the case and determine whether the commonwealth had met its burden of proof in its case against you beyond a reasonable doubt. All six people would have to agree. You also instead of a jury trial could have waived your right to a jury trial and elected to proceed before a judge where a judge rather than a jury would make those determinations.

Do you understand that by this admission today you are giving up your right to a jury trial or a trial before a judge?

A Yes, Your Honor.

Q Do you also understand that you are also giving up your right to cross examine any witness called by the Commonwealth, to offer evidence on your own behalf, or testify on your own behalf?

A Yes.

Q Do you understand that you are not obligated to testify because you are presumed innocent and the Commonwealth has the entire burden of proof on the case?

A Yes.

Q Has anyone forced you, threatened you, or promised you anything in return for this admission today?

A No.

JUDGE BRENDEMUEHL: Counsel, have you reviewed the elements of the maximum penalties and possible defenses or other choices as well as the potential consequences of a probation violation?

DEFENSE ATTORNEY: Yes I have, Your Honor.

Q I am required to advise you that if you are not a United States citizen this admission may cause you to be deported, be denied admission to the United States if you leave the

country and try to reenter or be denied naturalization as a citizen. In addition, if the offense you are admitting to is one that requires removal from the United States under federal immigration law and the federal government seeks to have you removed it is almost certain this admission would cause you to be deported, be denied admission or be denied naturalization as a citizen. Do you have any questions for the Court or do you need any more time to speak with your attorney?

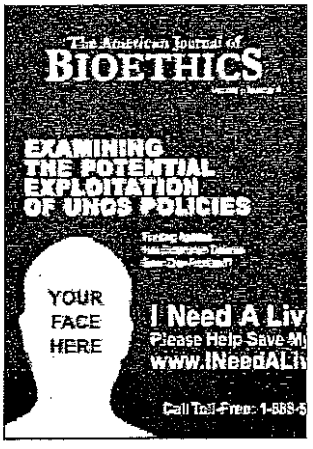
A No.

Q Understanding everything I have explained to you and all the rights you are giving up, do you still wish to admit to these facts?

A Yes.

JUDGE BRENDEMUEHL: I find there is a factual basis for the plea. It is made merely voluntarily on full knowledge of the consequences, I will accept the tender, and impose as such.

COURT CLERK: All right. Ma'am, your sufficient facts having been accepted by the court you are placed in a continuance without a finding for one year to August 21, 2017 during that period of probation to undergo random screens, attending AA or NA two times a week – I'm sorry – attending and continuing with outpatient substance abuse treatment with release to probation, stay away from the named victim in this matter, restitution to be determined on November 28, 2016. There is a one-time $90.00 victim witness fee and a $65.00 monthly probation supervision fee. That fee also has a community service option and also will be waived while you are paying restitution. Ma'am, you will be given some paperwork by the probation department, please take that paperwork with you sign and date it. Please just take a seat and someone will be with you.



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Voluntary Control of Behavior and Responsibility

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Open Peer Commentaries

Voluntary Control of Behavior and Responsibility

Stephen J. Morse, University of Pennsylvania

Hyman's (2007) sensible, sophisticated, and balanced article makes the following important points about addictions. Whether addiction should be considered a disease, a moral failure, or sometimes both, is an open question. The primary criterion of addiction is behavioral, namely, compulsive drug seeking and using in the face of negative consequences. Even if addicts have difficulty controlling their behavior, they are not zombies or automatons, but instead act intentionally to satisfy their desire to find and use drugs. The neural mechanisms of addiction are still controversial but will surely be found. Environmental variables play an important role in explaining addictive behavior.

Hyman (2007) offers his view of the most plausible candidate for an explanatory mechanism, which involves abnormal usurpation by drugs of the potent dopamine system that regulates reward. This usurpation makes drugs highly salient to the addict at the expense of other, more adaptive goals, creates craving if use is delayed, and thus undermines the addict's ability to avoid seeking and using. Hyman concludes that recent neurobiological work suggests that "some apparently voluntary behaviors may not be as freely planned and executed as they first appeared" (2007, 8). This conclusion is the pay-off from neurobiology for understanding voluntary control of behavior. One implication, Hyman notes, is that addicts may not be as responsible for their conduct as some think (2007, 8).

One consistent conceptual difficulty in this area is to define *voluntary*, a task Hyman (2007) undertakes only by implication. It is useful to distinguish literal involuntariness and metaphorical involuntariness. In cases of literally involuntary behavior, the body moves but it is not human action because it is not a result of the agent's intentions. Reflexes and tremors are examples. Any bodily movement (or failure to move) that is a product of the agent's intentions is an action, and involuntariness is only metaphorical. We may conclude that for various reasons we wish to characterize an action as involuntary, say, to avoid ascribing responsibility for it, but then we need to have criteria for metaphorical involuntariness.

Hyman's (2007) criteria for involuntariness are that the planning and the execution of some intentional behaviors may not be "free." Others writing about addictions often use the phrase *loss of control*. These criteria are more like conclusions than premises, however. Before we can reach any conclusion about moral or legal implications, we need to know the criteria for free and unfree, or for control and loss of control. Whether addiction's causal mechanism is primarily genetic, neurobiological, psychological, sociological, or some combination of these—as is almost certainly the case—involuntariness is a conclusion we reach about behavior. Consequently, we must have behavioral criteria for the conclusion that the addict's seeking and using behavior is unfree or beyond his or her control.

Let us begin with the behavioral phenomenology of addiction. Here, in brief, is what we knew before we had a neuroscientific foundation for causal hypotheses. Some people who use drugs over time develop a powerful, insistent desire to take drugs, often termed *a craving*, a desire that is stimulated and enhanced by the environmental cues that are associated with the activity. They engage in repetitive seeking and using behavior that is termed *compulsive* because the addict reports that he or she subjectively feels compelled to use drugs and the activity continues despite markedly and often disastrously negative life effects. Even if they are able to quit, addicts are in substantial danger of re-engaging in drug use. (The ability of addicts to quit temporarily or permanently is an inconvenient fact for the most reductionist disease account. Few diseases can be in remission or cured by intentionally suppressing their definitional signs.)

What can we infer from this description? It is reasonable to conclude that drug use causes some type of change in the person that increases desire to extremely high levels. Viewed objectively, most addiction is not rational in the sense that few people would on reflection choose to be in a position that caused them so much misery. For the same reason, we can infer that addiction undermines the addict's rational capacities and that avoiding the behavior is very difficult, making use appear compulsive. Finally, the risk of relapse

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among quitters suggests that the predisposing causal mechanisms persist, even if the former addict is not using at a given time. Note, that we could draw these inferences prior to any neurobiological understanding of the addict's brain.

These inferences raise two familiar excusing conditions: lack of rational capacity and compulsion. Of the two, I believe and have argued at length elsewhere (Morse 2006), lack of rational capacity is the better explanation of why addiction might excuse or mitigate responsibility and in fact explains perceived loss of control. In brief, the argument is that the addict's strong desires—the "go" mechanism—make it very difficult for the addict to think straight about what he or she has good reason to do—the "stop" mechanism. If the go mechanism is sufficiently strong, it will make it very difficult for the stop mechanism to work properly. If the stop mechanism is independently weakened, then the go mechanism gains increased motivational advantage.

It is just this loss of capacity to bring good reason to bear that makes it so difficult to control oneself. After all, most of our self-control measures use our capacity for rationality directly or indirectly. A picture of a pig on the refrigerator door, for example, is meant to remind the overeater of the good reasons not to eat at just the moment he or she is about to indulge. When the craving is greatest, the addict can scarcely think about anything except using drugs despite the many rational incentives not to do so and constructs self-defeating rationalizations if necessary. Anyone who has ever been in a state of strong desire for something that they know is not good for them will find this account all too familiar.

Diminished capacity to bring reason to bear rationally to evaluate and to control one's conduct can be caused by a large number of variables in addition to craving. Consider rage, for example. Whatever causal mechanism is at work, there is a common final behavioral pathway. What is doing the potential work of mitigation or excuse is the final pathway, diminished rationality, rather than any particular brain mechanism. This, I suggest, is the best interpretation of the behavioral criteria for lack of cognitive control, for the inability to "freely plan and execute" behavior. Lack of voluntariness really means lack of rational capacity. The brain mechanisms do help us to understand, however, how dysfunctional behavioral regulation occurs.

Hyman is concerned that understanding of this type of dysregulation has "not yet penetrated folk psychology" (2007, 8). This observation may be largely correct, but in some circumstances the law already takes rage and other untoward feeling states into account for assessing responsibility. The so-called "provocation/passion" rule that reduces an intentional killing from murder to manslaughter is an example. Ordinary people also tend to be more forgiving if an agent acts badly but has some sympathetic reason, such as stress or grief, for acting out of character.

What is more, neurobiological findings about the brain mechanisms for addiction and other states that undermine rationality do not cast doubt on the folk psychological model of human behavior. The capacity to bring rationality to bear is a continuum concept. As the person finds it increasingly difficult to bring reason to bear, the case for mitigation or excuse likewise increases. Indeed, diminished capacity for rationality is a classic folk psychology excusing condition. Consider the legal defense of insanity, for example.

Most people who suffer from such diminution do not become automatons, as Hyman (2007) recognizes. They retain some capacity for rationality; they do act intentionally. The question for morality and law, then, is always how much loss of rational capacity justifies mitigation and excuse. This is a normative question, a matter of practical reason that science cannot resolve. Science can, however, help determine how much loss of rational capacity has occurred. But, ultimately, the question for the law and morals is behavioral, not brain states. People, not brains, are held responsible, are praised and blamed, rewarded and punished. If the brain findings and behavior are inconsistent, the behavior must be our guide.

Finally, the addict's rationality is often severely compromised at the time of drug seeking and using, but it is not compromised at all times for most addicts. Instead, the addict's rationality waxes and wanes. When the addict is not in a strong drive state, he or she is capable of taking the steps to prevent maladaptive behavior that the addict knows will result when craving revives. The addict is responsible for later non-responsible behavior because the addict is responsible for failure to avoid the later behavior. Philosophers call this *diachronous responsibility*. It may be part of the reason that people are unwilling fully to excuse addicts, even if their condition can be considered a disease and even if they are non-responsible at the time of taking drugs or other illegal acts resulting from addiction.

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Calling it 'brain disease' makes addiction harder to treat

Satel, Sally; Lilienfeld, Scott O . Boston Globe ; Boston, Mass. [Boston, Mass]22 June 2017: K.1.

FULL TEXT

AT LAST official count, in 2015, over 33,000 people have died from opioid painkillers, heroin, and fentanyl —twice the number killed by guns —and the number of fatalities is rising. Health officials, police chiefs, employers, welfare workers, and politicians at all levels of government are desperately calling for more effective drug treatment, better prevention, smarter opioid prescribing, and improved pain management.

Urgent attention is being devoted to every facet of the epidemic except one: how to think about drug addiction itself. As the opioid crisis deepens, it's time to examine whether current thinking about addiction limits our understanding of the epidemic and impedes our efforts to contain it.

Within the medical and research communities, the dominant narrative holds that that addiction is a "brain disease." In a seminal article published 20 years ago in Science, "Drug Addiction is a Brain Disease and it Matters," Alan Leshner, then director of the National Institute on Drug Abuse, or NIDA, proclaimed that addiction was a brain disease on the ground that "addiction is tied to changes in brain structure and function."

Before Leshner and his NIDA colleagues designated addiction a disease of the brain —meaning that addiction is fundamentally a drug-induced disorder of disrupted brain function —doctors and much of the public regarded addiction as a vague sort of "disease" that manifested as an uncontrollable drive to use drugs or alcohol. Leshner coined a durable metaphor, writing that drugs "hijack" the brain's motivational and reward circuitry thereby making the condition involuntary. The brain disease model of addiction soon became orthodoxy in academic and research circles, which are heavily dependent on NIDA funding for training and research, and was also adopted by politicians, drug czars, public health officials, and the treatment industry. "Addiction is a chronic disease of the brain," then-Surgeon General Vivek Murthy asserted in a report last year, "and it's one that we have to treat the way we would any other chronic illness: with skill, with compassion and with urgency." This idea has by now filtered into mass culture. "Opioid Addiction Is a Brain Disease, Not a Moral Failing —and We Have to Stop Looking At It That Way," declares a headline from a popular fashion and beauty magazine.

The formulation's appeal is obvious: It is tidy. It signifies medical gravitas and neuroscientific sophistication. It also implies that suffers should not be subject to social stigma —another benevolent aim —even though most research shows that this kind of reframing is unlikely to reduce the public's aversion to addicted individuals.

For its part, NIDA had high hopes that neuroscience would led to better treatments. "Groundbreaking discoveries about the brain [are] enabling us to respond effectively to the problem," proclaimed Nora Volkow, who succeeded Leshner as head of NIDA in 2003. The truth, to date, is much less exhilarating. No new important biological treatments or medications for addiction have emerged since addiction was officially labeled a brain disease by NIDA. And the useful medications we do have —methadone (1939), buprenorphine (1966), the overdose "antidote" naloxone (1960), and the opioid blocker naltrexone (1963) —were all developed before the ascent of addiction neuroscience.

By making the brain the seat of addiction, its champions at NIDA hoped to elicit more funding from Congress for research and treatment. Laudable aims, to be sure, but they're rooted in the dubious assumption that neurobiology is destiny. The "brain [of an addicted person] is no longer able to produce something needed for our functioning

and that healthy people take for granted, free will," Volkow claimed.

To be sure, neural circuits involved in motivation, pleasure, and impulsivity are altered in the course of addiction. Genes, too, play a role in how the brain reacts to short and long-term exposure to drugs, and the strength of such innate influence differs among individuals, making some more vulnerable to developing drug problems.

Yet although biological changes constrain some of the choices that addicts make, in no way do those changes preclude the capacity to make important decisions. That is why President Obama's drug czar, Michael Botticelli, himself a former alcoholic, was able to change his behavior despite the alterations his brain had undergone. Back in 1988, he was charged with drunk driving on the Massachusetts Turnpike; a judge gave him the choice of going to jail or participating in a treatment program. Botticelli made a decision: He went to a church basement for help, joined Alcoholics Anonymous, and quit drinking. Yet on CBS's "60 Minutes," Botticelli contradicted the significance of his own story when he drew an analogy between having cancer and being addicted. "We don't expect people with cancer to stop having cancer," he said.

Botticelli's analogy doesn't work. No amount of reward or punishment can alter the course of, say, brain cancer. It is an entirely autonomous biological condition. Imagine threatening to impose a penalty on a brain cancer victim if her vision or speech continued to worsen or to offer of $1 million if she could stay well. It wouldn't matter.

Addiction, by comparison, is a complex set of activities whose course can be altered when the user confronts foreseeable consequences. A vast research literature on contingency management intervention, familiar to psychologists for decades, bears out this claim: rewards, such as gift cards or movie tickets for clean urine screens improve outcomes. (NIDA actually supports contingency management research —not nearly as much as it should, mind you —and in doing so betrays something of a split between its misbegotten messaging and its duty to fund useful clinical research.)

Clearly, people who are addicted have some capacity for control, but why do they exercise it at certain times but not at others? The answer is the context in which the addict finds herself. How available is the drug, for example? How hopeless or isolated is she? Are there opportunities for help? Can she envision a more meaningful life and see a way to attain it? What are her reasons for using, and what will happen if she continues? Even the intensity of craving and the distress of opioid withdrawal can be modulated by her expectations of these experiences.

A swirl of circumstances surrounds the addicted individual. And when even a few of them change, quitting and recovery can look more attractive and achievable to her. That may happen spontaneously in the face of new rewards, say, when a new relationship comes along or a child is born, or new threats in the form of a spouse threatening to leave, for example. These shifting dynamics can motivate the addict to quit on her own, contrary to assertions that addicts cannot just stop. Still, many cannot quit unaided; in that case, treatment can become the necessary catalyst to help her deploy her intrinsic capacity for choice and control.

This contextual alchemy gets lost when the brain looms so large in the explanation of addiction. And when the brain takes center stage, medical approaches assume greater promise than they actually have.

Consider the story of buprenorphine, or "bupe." Like methadone, bupe (trade name: Suboxone) is an opioid and so can prevent withdrawal and blunt cravings. It can also produce euphoria in high enough doses. Unlike methadone, however, bupe's chemical structure makes it less dangerous if taken in excess. Thus, bupe can be prescribed out of a doctor's office —methadone cannot —as long as the doctor has passed an eight-hour test.

NIDA promoted buprenorphine as a medication that primary care doctors could use to treat heavy opioid addiction. More precisely, it could help reverse the brain changes of addiction, and therefore resolve the addict's problem. But it turned out that many busy primary care doctors were not up to the time-consuming job of treating complicated patients. Early in their treatment, patients need close monitoring along with counseling, and observed urine collection. Bupe simply can't be administered like antibiotics or blood pressure pills. The evidence? By 2015, buprenorphine became the third most diverted prescription opioid in the country: patients abuse it and sell it. In many prisons, bupe is both abused by inmates and used for barter; all the medication originally dispensed by well-

meaning doctors to patients who divert it. Now bupe mega-clinics, resembling notorious pill mills, are cropping up in some states. These developments are giving buprenorphine a bad name, which is a shame, because it can be enormously helpful when administered properly to motivated individuals.

Another problem with a heavily biological perspective is that it undervalues the powerful social and psychological engines of addiction. The much-publicized "deaths of despair" among poorly educated, low-income white Americans attest poignantly to this reality. Volumes of social science research confirm that addiction breeds in communities where opportunities are scarce, pessimism is rife, and drug use is normalized. Still, one need not hail from a Rust Belt town that is "hemorrhaging jobs and hope," as in J.D. Vance's "Hillbilly Elegy," to seek a good numbing agent.

No matter how wealthy they might be, people discover that opioids are an excellent short-term balm for existential maladies like self-loathing, emptiness, erosion of purpose, and isolation. Years of heavy use condition people to desire drugs at the first stab of distress. After so much time spent damaging themselves, their families, and their futures, a new layer of anguish has formed over the original bedrock of misery, urging onward the cycle of misery-and-relief. Surely, people don't chose to be addicts, but that is not what they are choosing: what they want is relief. That people use drugs for reasons —a notion the brain disease model can't accommodate —helps explain why people are so ambivalent about giving up opioids, why they drop out of treatment at high rates, and why many don't even take advantage of treatment when it is offered. The link between psychic pain and addiction explains why some people are more vulnerable to abusing opioid prescriptions than others, contrary to the popular trope that we are all at risk.

Meanwhile, those who advance a brain disease model are left to explain persistent drug use in purely biological terms, pointing to dopamine surges in the reward circuitry that underlie drug cravings and to damage induced in brain regions important to self-control. To be sure, biology is involved, but it is only one part of the story, and often not the most important. Perhaps we should think about addiction as a symptom of pre-existing problems, not a distinct disease in its own right.

The unidimensional brain disease model has not delivered on its therapeutic promises because its explanatory reach is too limited. What good, then, can come of abandoning a strictly neuroscientific view of addiction? For one, we would view addiction as a set of behaviors powered by multiple intersecting causes across several dimensions —biological, psychological, social, and cultural. For any given user at any given time, one or several of these factors may be more or less influential.

A more nuanced view would also expose the false choice that experts often put to us —namely, that addiction is a disease and not a moral matter. Granted, this rhetoric is intended to shift attitudes toward compassion and treatment over blame and punishment. This is a worthy goal, to be certain. But the price of shaming us into to endorsing "disease" (or "brain disease") lest we pick the palpably offensive alterative —"moral failing" —is the loss of crucial knowledge about addiction.

What we need to know is this: Addicted individuals have the capacity to make choices. The most effective treatment programs for addiction rely not on medications alone, but on sanctions and incentives to shape more healthy behaviors. Engagement in treatment is key to recovery, because the longer a patient remains, the better he or she fares.

In light of the marked ambivalence that besets so many users, any intervention that sways their decision to remain in care is constructive. Methods include, for example, the creative use of incentives in treatment programs, and diversion programs within the criminal justice system. Anti-addiction medication may sometimes be necessary to stabilize patients while they embark on the ambitious journey of rebuilding themselves, their relationships, and their futures.

There is little that NIDA can do for those "dying of a broken heart," as President Bill Clinton described white Americans who lack diplomas and face diminished life expectancies. That kind of renewal is a daunting cultural

project. At the very least, however, NIDA should stop promoting rhetoric that needlessly narrows our thinking about addiction.

In grim tandem, the currency of the brain disease model grew alongside the opioid epidemic. Flawed thinking about addiction by no means caused the problem, but a neurocentric orientation obscures vital truths. For one, it downplays the fact that addicts retain the capacity for choice. The brain disease model also fosters an unrealistic medication campaign. Lastly, it distracts us from the crucial reality that excessive drug use serves a psychological function, no matter how self-destructive it is.

If there's a dark gift of the drug epidemic, it's that we are forced to become more thoughtful about why we have one.

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Caption:

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Chapter 23

Addiction, choice, and criminal law

Stephen J. Morse

Abstract

Some claim that addiction is a chronic and relapsing brain disease; others claim that it is a product of choice; still others think that addictions have both disease and choice aspects. Which of these views holds sway in a particular domain enormously influences how that domain treats addictions. With limited exceptions, Anglo-American criminal law has implicitly adopted the choice model and a corresponding approach to responsibility. Addiction is irrelevant to the criteria for the prima facie case of crime, it is not an excusing or mitigating condition per se, and it does not contribute relevant evidence to existing excusing conditions, such as legal insanity. This chapter evaluates the criminal law's model of responsibility using scientific and clinical evidence and dominant criminal law theories. It concludes that although the law's approach is generally justifiable, current doctrine and practice are probably too unforgiving and harsh. Recommendations for reform conclude the chapter.

1 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 part 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.

2 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; see also Chapter 21, this volume). 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 respond similarly 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.

3 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 "willpower," 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. In addition, 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.

4 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 to 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.

5 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 eighteenth-century 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, this section discusses 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. Section 6 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 90 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 8th and 14th 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 involuntariness 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 involuntariness 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.

(*Powell*, pp. 519–20)

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.

(Powell, 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, 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 a 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 voted to affirm the conviction, thus rejecting Moore's proposed defense. The judges who voted to affirm 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.

6 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. 474–75)

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 he 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.

7 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.

8 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. 144–7). 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 rational 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.

9 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 of decriminalization 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.

10 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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