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Legal Regulation of Addictive Substances and Addiction

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Legal Regulation of Addictive Substances and Addiction

Abstract
The law regulates addiction in two primary ways: by limiting access to controlled substances and by criminal and civil law doctrines pertaining to addicts. This chapter first addresses the basic definitional and conceptual issues concerning addiction. Then it turns to the justification of substance regulation in the USA and public policy issues. It suggests that the right to use substances recreationally, even at the risk of negative consequences such as addiction, is weighty and that regulation of substances and addiction-related behavior by criminal law is problematic. Next, it considers whether addiction should be a mitigating or excusing condition for crime and whether addicts can be involuntarily civilly committed. It describes the current state of the law and proposes that, in most cases, addiction should not excuse criminal offending and addicts should not be civilly committed. A final section considers social and criminal justice policies that could alleviate the costs of addiction.

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CHAPTER

14

Legal Regulation of Addictive Substances and Addiction

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INTRODUCTION

The law regulates addiction in two primary ways: by limiting access to controlled substances and by criminal and civil law doctrines that pertain to addicts. The general ability of the state to legally regulate

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potentially harmful commodities and behaviors, including by criminal law prohibitions and punishment, is an unquestionably justifiable exercise of its police power authority to act for the benefit of public health, safety and welfare. The public policy issues are whether legal regulation is wise in a specific context and whether it may conflict with individual rights.

This chapter first addresses the basic definitional and conceptual issues concerning addiction that must be clarified to make progress. Then it turns to the justification of substance regulation in the USA and to the public policy issues themselves. The author suggests that the right to use substances recreationally, even at the risk of severe negative consequences such as addiction, is weighty and that regulation of substances and addiction-related behavior by the criminal law is problematic. Next, the chapter considers whether addiction should be a mitigating or excusing condition for crime and whether addicts can be involuntarily civilly committed. The current state of the law is described and it is proposed that, in most cases, addiction should not mitigate or excuse criminal offending and that addicts should not be civilly committed. A final section briefly considers sensible social and criminal justice policies that could alleviate the costs of addiction, even if society does not decriminalize drugs or excuse addicts.

CLARIFICATIONS AND ASSUMPTIONS ABOUT DRUGS AND ADDICTION

Virtually every statement that can be made about drugs and addiction, whether it is factual or normative, is contestable. In this section, the author will try to remain as neutral as possible.

Despite common belief to the contrary, there is no consensual definition either of a drug, which is the most common cause of an addiction, or of addiction, but clarity about both is necessary to discuss legal regulation sensibly. Let us start with the definition of a drug or a substance. Virtually all definitions are vague or overinclusive, permitting categorization as a drug of almost any substance that may be consumed. Some definitions are circularly dependent on legal regulations. If a law regulating "drugs" includes a particular substance within its ambit, it is a drug or a "controlled substance", that is, a substance that cannot be consumed except under limited conditions such as a physician's prescription (Drug Abuse Prevention and Control Act, 2010, Section 802(6)). If it is not so included, it is not a drug for legal purposes. Vague, overinclusive and circular definitions cannot sensibly guide public policy, especially when the state's awesome power to blame and punish for illegitimate use is dependent on the definition.

Definitional problems concerning drugs and regulation cannot be entirely avoided by using allegedly scientific or value-neutral medical/therapeutic or nutritional concepts. Concepts such as disease and therapy are themselves value laden and inevitably problematic and controversial. Many substances that have unquestionably legitimate medical or nutritional uses can also be used for non-medical or non-nutritional purposes that may be of questionable legitimacy. Finally, definitions that define a substance as a drug in terms of its intended use rather than in terms of its inherent properties obscure important questions of legitimate use.

Despite the conceptual problems attending the definition of a drug, a loose but common-sense definition is possible for discussing addiction and regulation. This common-sense definition would be substances that can be consumed recreationally, that is, primarily to produce pleasure, whether or not those substances have other legitimate uses. For the purpose of understanding the current debate about addiction and regulation, recreational drugs can be defined as consumable substances that: (1) can affect mood, cognition and behavior in pleasurable ways; (2) can be used primarily for recreation, including relaxation, excitement and pleasurable states generally; and (3) can be used so as to endanger the user and others. Although admittedly loose, this definition covers both legal recreational substances, such as ethanol (alcohol), nicotine and caffeine, and substances that are illegal either per se or if they are not properly prescribed by physicians, such as marijuana, cocaine, opiates, e.g., heroin, barbiturates, amphetamines, phencyclidine (PCP), and the like. Let us defer the definition of an addictive drug until we have considered the nature of addiction.

The primary criteria of addiction commonly employed at present are behavioral, namely, persistent drug seeking and using, especially compulsively, in the face of negative consequences (Morse, 2009). The neural mechanisms of addiction are debatable, but are being intensively investigated and will probably be uncovered (Hyman, 2007), and environmental variables play an important role in explaining addictive behavior (Kalant, 2010).

The most important terms for legal purposes are "compulsive" and "negative consequences". There is no gold-standard definition of or psychological or biological test for compulsivity, which also must be demonstrated behaviorally. There are extremely suggestive laboratory findings, especially with non-human animals (e.g. Everitt & Robbins, 2005), but none is yet diagnostic for humans. 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 highly 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 must be, 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 today, it is not justified by the data (Heyman, 2009). 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, and 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 proven independently (Fingarette & Hasse, 1979). Whether addiction should be considered a disease, a moral failure, or sometimes both, 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, 2007, 2009).

Using the definition just provided, an addictive drug would be one that has a substantial potential to cause users to persistently seek and use the substance, especially compulsively and with negative consequences. Most users of even the most allegedly addictive substances do not become addicts, but some substances increase the risk. And, as noted, 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, 1986). The substance itself does not account for all the variance in explaining addiction. We would like to think, and it is probably true, that some substances are particularly addictive, holding the agent's set and setting constant, but it is extremely difficult empirically to disentangle these causal variables.

A fascinating, fraught question is whether addiction should be limited to substances. After all, large numbers of people engage persistently and apparently compulsively in various activities, often at quite negative costs. Gambling is the most obvious example. If there are some activities

or non-drug substances that can produce the same "addictive behavior" and negative consequences as drugs, then legal regulation should perhaps be similar by analogy. The author believes for many reasons that the concept of addiction should be expanded beyond drugs, but the analysis in this chapter will be confined to drug-related addictions.

THE JUSTIFICATION FOR LEGAL REGULATION: THE HARM PRINCIPLE AND ITS LIMITS

The general justification for the legal regulation of addictive substances is best summed up in the preamble to the Federal Drug Abuse Prevention and Control Act:

> *The Congress makes the following findings and declarations:*
> *(1) Many of the drugs included within this subchapter have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people.*
> *(2) The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.* **(2010, *Sections* 801*(1) & (2))*.**

Just so. Who would deny that drugs can have beneficial effects, that some recreational (and medical) drug use leads to addiction, and that addicts often harm themselves and others? Even those recreational, "uncontrolled" addictive drugs that are legal to import, manufacture, distribute, possess, and use, such as nicotine and ethanol, are heavily regulated and violations of those regulations are often criminalized. Few people object to civil regulation of potentially dangerous substances, such as laws concerning safe manufacture, taxation and public use. The real debate among all but the most libertarian theorists is therefore about the use of criminal law to prevent people from having unauthorized access to controlled substances (Husak, 2008). Therefore, this discussion will be limited to that topic, although it is clear that both nicotine and ethanol use create vast internalities and externalities.

The state's police power to apprehend, prosecute, convict and punish citizens is the most awesome and afflictive power it exercises. Infliction of such pain requires substantial justification in liberal democracies that seek to protect individual rights and liberty. Afflictive and expensive criminal regulation should be avoided in favor of less intrusive means unless the harm is great, punishment would be deserved for causing it, and criminal prohibition seems necessary to reduce the level of harm and will not unduly impose on other important interests. Criminal law

theorists term these limitations on the state's power to criminalize the "harm principle" (Feinberg, 1984). For example, intentionally inflicting emotional cruelty on others is morally despicable, but such behavior is not criminalized because the harm is insufficient to justify criminal punishment. Socialization by families, religious organizations and schools is reasonably effective to limit such conduct, and regulating such behavior by criminal law might intrude on protected liberties, such as the right to free speech.

There is little debate about the state's justification for prohibiting and punishing traditional crimes against the person, such as homicide and forcible rape, and against property, such as theft and arson, that cause grievous harm. Although individual liberties are precious, no citizen has a right to kill, rape, steal or burn the property of others for private advantage, and the criminal sanction seems morally appropriate and necessary to curb such behavior. Societies can disagree about the scope of appropriate criminalization. For example, there may be reasonable dispute about how much creation of homicidal risk should be necessary to warrant criminal penalties in addition to civil damages or how severely arson should be punished, but the state's power to criminalize great harm to others is uncontroversial.

The harm principle suggests caution before criminalization, however, under the following conditions: when the harm is primarily inflicted on oneself; when the harm is primarily moral and not physical, psychological or economic; when using criminal law to prevent the harm appears to intrude on important rights; or when criminalization appears unnecessary to effectively reduce the harmful behavior. In liberal societies, the right of the state to criminally prohibit actions that harm primarily the actor (so-called legal paternalism or legal moralism) is more controversial than the right to prohibit harm to others. Respect for individual liberty and autonomy generally entails that citizens have greater liberty to harm themselves than to harm others (Feinberg, 1986, 1988). Such liberty is arguably most extensive and the state's right to regulate criminally most questionable when the threatened harm to self is apparently solely moral and no other harm to self or to others can be discerned. Most liberal theorists reject the state's power to use criminal law solely for the purpose of enhancing the moral perfection of its citizens. Such goals are arguably not the business of the state and should be achieved by other, less intrusive means.

Even within liberal regimes, the permissible scope of paternalism and moralism may vary, although both require more substantial justification than criminalizing harm to others. Consideration of the state's justifiable use of criminal law to regulate recreational drug use because it may lead to addiction, however, must attend to the appropriate limits of state power within a particular political regime. The remainder of this chapter

assumes that the regime considering its policies concerning drugs and addiction is liberal.

DRUG USE AND RIGHTS

It is often assumed that there is no right, no liberty interest to use drugs recreationally, and, consequently, that the state has appropriate authority to use criminal law to prevent such use. Such an assumption is seldom supported with cogent argument, however, and it is not easy to give compelling moral and political reasons for rejecting such a right, even if exercise of that right may sometimes lead to ruinous addiction (Husak, 1992).

Sensible discussion must begin with the recognition that people take drugs recreationally because they desire the pleasurable effects produced by consuming substances that alter mood and cognition. It seems clear, however, that the state has no justifiable interest in criminal prohibition simply because the primary or even sole goal of behavior is pleasure or because the behavior involves consumption of a substance that can alter mood or cognition. Many people might consider it wrong to engage in activities solely for pleasure, especially if alteration of mood and cognition were involved and there were some danger of dependence on the activity, but a liberal society does not interfere with a citizen's right to make autonomous choices to engage in such potentially dangerous activities. Citizens surely have a prima facie right to seek pleasure for its own sake, and it is very difficult to imagine a secular, liberal argument suggesting that such a goal is immoral or harmful per se, even if some danger might sometimes be involved.

For example, suppose that a citizen engages in meditation solely for recreational purposes. No persuasive liberal moral or political theory would justify criminal prohibition of meditation, even if some citizens became dependent on meditating. Recreational drug use involves the consumption of a substance, but it is hard to imagine why the source of the recreation alone should make a difference. Currently illegal drugs produce pleasure by altering mood and cognition, but so do many legal activities, including meditation, mountain climbing, riding motorcycles, playing bridge, and the consumption of legal drugs such as caffeine, ethanol and nicotine. The state's right to criminalize alterations of mood and cognition per se is questionable because such alterations are not per se immoral or harmful.

Citizens appear to have a prima facie right to engage in recreational alteration of mood and cognition by drug consumption and the state surely has the burden of justifying criminal prohibition of such recreation by powerful arguments. No right is absolute, however, and the possible

right to pursue recreational drug use must yield to a powerful state interest in preventing such use, especially the undoubted state interest in curtailing the threat that drugs will cause substantial harm by producing addiction, drug-related harms and their associated costs. Nonetheless, harm limitation counsels caution before using the criminal law.

Illegal drug use is often considered a "crime without a victim" because the person potentially most harmed—the user—in effect consents to the threat. Indeed, virtually no recreational user, including those who begin use in adolescence, is unaware of the risk of addiction. Of course, younger people often tend to be foolish risk takers who do not sufficiently appreciate potential dangers and anyone can be in denial about the risks to him or herself. However, everyone is at least intellectually aware of the risk that use may lead to addiction and that virtually no action affects only the agent. As a result of its effect on mental states and of its potential to produce addiction, recreational drug use sometimes threatens families and communities with economic, psychological and physical harms. Many of these harms may be paradoxically produced or enhanced by criminal prohibition itself, but many surely are not. Moreover, harms one consents to suffer are nonetheless harms. The question is whether the harms to others or to self that drugs produce are sufficient to trump the individual's prima facie right to use drugs and thus to warrant criminalization of drug use.

The next section on cost–benefit analysis considers the harms drugs produce, but liberal societies often permit dangerous behavior in order to protect the right of citizens to pursue their own visions of how life should be led. Such dangerous behavior is regulated non-criminally, if at all. For example, consider the immense costs to many users and to society at large that flow from the consumption of ethanol and nicotine. Again, the state can appropriately regulate many aspects of such substance consumption to reduce the consequent harms, including the use of criminal law for egregiously harmful forms of misuse, such as drunk-driving. For many reasons, however, importantly including the right to make one's own choices unencumbered by undue state interference, criminal prohibition of the consumption of ethanol and nicotine by the state is considered unwarranted and the attempt to prohibit the former in the USA was a failed social policy, although it admittedly produced some health benefits.

If drugs produce great harms and no one has a right to use drugs recreationally, or if that right is insubstantial at best, then the only question for analysis is whether criminal regulation is justified by the benefits it achieves. However, if there is a weighty liberty interest in making choices about how to live one's life, including potentially unwise and dangerous choices about drugs, then the potential creation of harm is insufficient per se to warrant criminalization. Some dangerous behaviors

must be permitted to protect liberty and must be regulated primarily civilly, including money damages and other impositions when addiction produces externalities. Any adequate analysis of the regulation of drug use by criminal law must therefore include consideration of the strength of the liberty interest, and it appears that in liberal societies, the right is substantial. Empirical analysis of the consequences of various behaviors under various regulatory regimes is necessary to inform decisions about the appropriate scope of criminalization and decriminalization of drugs, but the question of rights cannot be avoided.

COST–BENEFIT ANALYSIS OF CRIMINAL REGULATION OF DRUG USE

This section of the article is a composite drawn from a number of leading commentators. For those who oppose decriminalization, see Falco (1992), Jacobs (1990) and Wilson (1990). For those who propose decriminalization, see Nadelmann (1989), Husak (2002) and Global Commission on Drug Policy (2011). For non-partisan analyses that reach different conclusions, see Husak (1992), Kleiman (1992), MacCoun and Reuter (2001), Moore (1991) and Zimring and Hawkins (1992).

The outcome of criminal justice regulation of drug use will be indeterminate because many of the data are unavailable or unreliable, or fluctuate, and because the costs and benefits of an alternative regime are speculative. Also, historical and cross-cultural comparisons are of extremely limited value because social variables, which vary radically intertemporally within a society and across different societies, immensely affect the consequences of drug use and regulation. The rest of this section raises a number of issues, but readers should recognize that this is an intensely complicated issue and that this chapter can only touch on some of the considerations.

Harms from Drugs and the Benefits of Criminalization

Much debate about criminal regulation mistakes the probability and extent of the risks drugs pose. For example, most people who use most drugs recreationally do not become addicted and the moderate recreational use of drugs is not per se dangerous if the drug is pure and properly consumed. Nonetheless, the ease of access to drugs following decriminalization would surely increase the prevalence of use, abuse and addiction, and their further harmful consequences. The harms might be especially great in poorer and minority communities, where the prevalence of drug use is no higher than in other communities, but where the effects have been more devastating. Some responsible observers believe

that decriminalization may effectively destroy poorer and minority communities already ravaged by drug abuse and addiction.

The relation between drug addiction and other criminal activity and health harms is fraught because it is difficult to disentangle the effects of criminalization itself from the independent effects of drug use. Some drugs, especially if used heavily, can substantially impair judgment, facilitate impulsivity and have other effects that increase the risk of criminal offending and other dangerous behavior, such as careless driving, sharing needles for intravenous injection and unprotected sex. Increased drug use, especially heavy use and addiction, will raise the rates of such undesirable behavior.

Criminalization of drugs inhibits use generally and consequent addiction by making production, sale, possession and use more expensive and dangerous and by sending the clearest possible message that drug use is wrong. For example, there might have been both rights-based and consequential reasons to repeal Prohibition in the USA, but the data suggest that consumption and addiction-related diseases such as cirrhosis of the liver both decreased when most alcohol production and sale were illegal. Criminalization also helps to prevent drug use by minors. Although minors regrettably have access to and consume drugs in a regime of criminalization, ease of access generally would also increase use, as would potential addiction among minors who are already developmentally predisposed to take unwarranted risks.

The use of criminal law to regulate drug use and addiction is obviously not fully successful by any standard and it is immensely expensive, but the proponents of continued criminalization argue that the current regime provides greater benefits than costs and that the unknown benefits, if any, of decriminalization would pale in comparison to the costs of inevitably increased use and abuse.

The Costs of Criminalization

Criminal law enforcement, including imprisonment, is an especially intrusive and expensive form of regulation of any behavior. The cost–benefit critique of criminalization argues that such costs are not outweighed by the benefits because criminal law makes only a small dent in the use of drugs and because criminalization itself creates avoidable harms.

The attempt to eradicate drug use by criminal prohibition cannot fully succeed because large numbers of people want recreational drugs for the pleasure or relief they provide, and it is widely recognized that the dangers of drugs are sometimes exaggerated. Given the powerful factors that motivate the desire for drugs, the criminal sanction appears ineffective. The criminal justice system cannot prosecute and imprison more than a tiny fraction of the enormous numbers of people involved in the

illegal drug trade unless the justice system massively diverts resources from other, undisputed criminal law needs and abandons civil liberties protections. The criminal courts of the USA are already clogged with drug cases. It is hard to enforce laws that such large numbers of people wish to violate and that often have no immediate or complaining victim. Furthermore, public hypocrisy about drugs inevitably undermines law enforcement. Western society is not nearly as monolithically anti-drug as many claim, as public policy toward ethanol and nicotine indicates. Even spending vastly more money seemingly will provide only limited benefit. Fluctuations in drug usage appear far more related to major social, cultural and economic forces than to criminal law enforcement. Despite billions spent on drug enforcement each year, undoubted law enforcement successes and the huge numbers of people in prison for drug-related offenses, drugs are still freely available, and in many cases increasingly stronger and cheaper. Of course, the latter observations are open to the interpretation that criminalization is succeeding and forcing dealers to offer better product more cheaply.

Criminalization also threatens its own effectiveness and creates other problems. For example, criminal prohibitions raise the price on a good or service: the so-called "crime tariff". This ensures that there will be an endless supply of producers and dealers who seek to realize their profits by any means necessary, including violence, and that many users, especially addicts, will be impoverished and driven to a life of further crime simply to support themselves and to obtain drugs. The immense profits facilitate the growth and power of domestic and international organized crime and can be used to corrupt law enforcement and politicians. Criminalization decreases the probability that drug consumption will occur under conditions safest to health. Finally, primary emphasis on criminal law virtually ensures that fewer resources will be devoted to investigating and implementing less intrusive and potentially more effective means to reduce the prevalence of addiction and the other harms it causes.

The Benefits of Decriminalization

Specific decriminalization proposals would produce different benefits, but the potential benefits of decriminalization are the opposites of the costs of criminalization. They include an increase in personal liberty; probable law enforcement cost savings; decrease in the crime, violence and corruption that criminalization produces; increased respect for law enforcement; and increased attention to possibly more effective means, such as education, treatment and civil regulation, to reduce use and consequent addiction and its related harms. However, the relation between drug use and criminal activity is extremely complicated. For example,

drug use has not abated in recent years in the USA, but crime rates, especially violent crime rates, have fallen substantially. Nevertheless, criminalization produces a significant amount of criminal activity by definition and as a consequence. In a regime of decriminalization, criminal law would be used only to prohibit particularly dangerous drug-related activities such as drugged-driving or selling to minors. Such traditional use of the criminal law would receive broad public support.

In the past few decades, there has been a vigorous debate in the USA and Western Europe about criminal law regulation of drug use. Decriminalization has become a "respectable" position. For example, a prestigious international group, the Global Commission on Drug Policy, has issued a report calling for decriminalization (2011). Some countries and localities have engaged in decriminalization experiments or regimes. Nonetheless, criminalization is still the dominant form of regulation and most countries spend far more on law enforcement aimed at preventing all drug use than they do on prevention and treatment programs for drug abuse prevention and treatment.

CRIMINAL RESPONSIBILITY AND INVOLUNTARY CIVIL COMMITMENT

This section considers the criminal responsibility of addicts, diversion from the criminal justice system to specialized drug courts of addicts accused of non-violent crimes and involuntary civil commitment of addicts.

In *Robinson v. California* (1962), the US Supreme Court held that it was unconstitutional to convict and punish a person for being an addict. The rationale was that addiction is simply a status, and it is not fair to blame and punish people in the absence of a culpable act, a rationale that applies to attempted criminalization of any status. In *Powell v. Texas* (1968), the Supreme Court rejected a claim that, roughly, an alcoholic is constitutionally entitled to a "lack of control" defense to disorderly conduct in public as a result of alcoholism. In two later cases, the Court held that states may constitutionally bar defendants from introducing evidence of voluntary intoxication (*Montana v. Egelhoff*, 1996) and mental disorder (*Clark v. Arizona*, 2006) to negate the mental state criteria required by the definitions of crimes (mens rea), criteria that the Constitution requires the prosecution to prove beyond a reasonable doubt. The Supreme Court has never held that the defense of legal insanity is constitutionally required and it has upheld the constitutionality of the narrowest possible insanity defense (*Clark v. Arizona*, 2006). In sum, there are few constitutional limits on criminal responsibility and jurisdictions are free to adopt virtually any responsibility doctrines they wish,

including those that may be more permissive than those the Supreme Court has approved.

Although proponents have suggested that there ought to be an independent addiction defense to crime or that addiction should be a proper basis for an insanity defense, courts and legislatures faced with such claims have almost uniformly rejected them (e.g. *United States v. Moore*, 1973). Moreover, control tests for legal insanity, which are usually considered the most natural claim for excuse based on addiction, have been exceedingly disfavored for many decades on the grounds that they are poorly conceptualized and operationalized. In the USA, there is no generic doctrine of mitigation available at trial that an addict might employ. At most, sentencing judges with discretion to consider addiction for purposes of sentencing may do so, but addiction is a knife that cuts both ways. It may seem either to reduce or to enhance culpability depending on how addiction is viewed, and it may be a risk factor for dangerousness (Monahan et al., 2001).

The unforgiving response of US criminal law that denies or limits an excuse or mitigation for addiction may seem harsh, but there is justification for it. The criteria for crimes always require action and actions can always be morally evaluated, even if an action is allegedly the sign or symptom of a disorder. The generic excusing conditions in US criminal law are lack of rational capacity and lack of control capacity. The question is whether criminal behavior motivated in whole or in part by addiction meets either condition. No criminal behavior, other than possession or use itself, is a sign or symptom of the "disease" of addiction. Even if it were, a genuine excusing condition, such as lack of rational capacity or lack of control capacity, would have to be independently demonstrated. Also, there is substantial dispute about whether addicts have diminished culpability for their criminal conduct on rationality or control grounds, especially for property crimes or crimes of violence that may be committed either to support an addict's habit or as part of a general criminal lifestyle associated with addiction. (For recent treatments, compare Levy, 2011, Morse, 2011, and Yaffe, 2011.) Moreover, addicts may be considered responsible for failing to take steps, such as entering treatment programs, that may prevent them from becoming less responsible. Finally, providing a defense to crime for addiction may establish perverse incentives that encourage drug use, and may increase addiction-related offending.

Given the disputes about the nature of addiction and the proper moral and legal response to it, limiting defenses based on addiction is not an irrational legislative or judicial judgment. The author's view is that most addicts do not satisfy the excusing criteria and those who do may be held diachronously responsible based on an earlier failure to prevent their own condition of excuse. Nonetheless, even if addiction should not be a defense, sensible criminal justice reforms and other social

interventions involving drugs and addiction, to which the discussion will return in the next section, would be wise and just social policy.

Many US jurisdictions have established specialized drug courts to which addicts accused of non-violent crimes may be diverted in appropriate cases (see generally, Nolan, 2002). The details vary but, in essence, the diverted defendant must agree to treatment programs and to strict behavioral controls. If the addict successfully completes the program, the criminal charge is typically dropped. If the addict fails, then prosecution resumes. These courts are controversial on empirical and normative grounds. It is not clear whether they are cost-effective in reducing recidivism and other harms associated with addiction and there are questions about whether they are sufficiently well-theorized and just (see Wild et al., this volume, Chapter 8).

Some jurisdictions permit traditional involuntary civil commitment of addicts, but others have special forms of commitment for substance abusers (Parry, 2010). The criteria and procedures for these two types of commitment may differ, which the Supreme Court has ruled does not necessarily offend equal protection if the jurisdiction has a justifiable rationale for distinguishing addicts (*Heller v. Doe*, 1993). In many cases, the criteria are similar, however, and require a finding that the substance abuser is a danger to self or others or is gravely disabled. There are no good data about how many people are civilly committed because they are addicts, but the number is not likely to be large. On the other hand, temporary protective custody for those who are incapacitated as a result of addiction or substance abuse is apparently common.

The justification for these commitments is that the addict is not responsible for being dangerous or gravely disabled, a rationale in some tension with the criminal law's refusal to recognize non-responsibility based on substance abuse or addiction. Responsibility standards in the criminal and civil justice systems need not be the same because the two systems do not have the same goals. Nonetheless, criminal blame and punishment is the most severe infliction the state can impose on citizens and one would think the state would be more forgiving about responsibility in such cases than in the case of a person who has committed no crime and would like to be at liberty. As argued in the next section, provision of adequate treatment in the community rather than involuntary civil commitment is the wiser course to deal with addiction.

LEGAL REFORMS TO MINIMIZE COSTS ASSOCIATED WITH ADDICTION

Even if the view is correct that most addicts most of the time can fairly be held responsible for the crimes they commit, including those such as buying and possessing controlled substances that are central criteria for

their disorder, it does not follow that the criminal justice policies our society pursues toward addicts and other users is wise. Indeed, the author firmly believes that society should decriminalize purchase and possession for personal use and use itself (Morse, 2009). Political liberalism and public health considerations suggest that criminal justice is not the optimum or even a sensible means to address these phenomena. Indeed, using criminal justice in such cases may be simply cruel. Moreover, doctrines of mitigation should be expanded to cover some cases when addicts commit other crimes that are not a part of personal use itself (Morse, 2003). Vastly more treatment ought to be available to those addicts who would benefit, including reducing their risk of criminal behavior. This would be cost-effective in itself and certainly more cost-effective and less liberty depriving than involuntary civil commitment. Further, it would not be unconstitutional or unwise to make entering a treatment program a condition for probation or parole or for more lenient conditions in prison. If these and similar policies were adopted, it is likely that the personal and social costs of addiction and substance abuse would decrease markedly and criminal justice would operate more fairly.

CONCLUSION

Whether and how potentially addictive substances should be legally regulated, especially by criminal law, are complicated, fraught questions that involve considerations of individual rights and issues of public health and welfare. Whether addiction should be a defense to crime and whether addicts should be subject to involuntary civil commitment are equally difficult issues. Many debatable and reasonable choices for public policy are possible, but some reforms would do much to ease the burdens on individuals and communities that current criminal and civil law regulation impose.

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