

Agency and Answerability

Selected Essays

GARY WATSON

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11 Excusing Addiction

One of the main objections to criminalizing the use of certain addictive (as well as non-addictive "psychoactive") substances is that doing so is illiberal: it interferes unduly with the liberty of citizens to govern their own lives as they will. Another objection is that the "criminals" in this case are typically not in control of their "drug" consumption; they are therefore inappropriate subjects for punishment. (Here the slogan is: "drugs are a medical problem, not a criminal problem".) These arguments are in tension because the first affirms a capacity for individual autonomy on the part of users which the second denies.

What interests me here is an issue raised by the second argument: under what circumstances, and by what rationale, can or should the criminal law treat addictive behavior as less than fully responsible?¹ This issue arises even when drug use itself is not criminal, for example, when a penniless alcoholic steals the money for drink. And certain crimes (say, assault, "peace breaching", or recklessness) often

I want to thank Michael Corrado and Gerald Postema for organizing the stimulating Carolina Workshop in Law and Philosophy, September, 1998, for which this paper was originally prepared. I learned a great deal from the participants on that occasion.

¹ In what follows, I will be exploring the possible rationale for an addiction-based defense, rather than mitigation. (But see the Conclusion.) This distinction is very important for many purposes, but much of what I say will be relevant to both issues. For the proposal that many addicts should be eligible for an "excuse of partial responsibility" (though on the basis of impaired rationality rather than control), see Stephen J. Morse, "Hooked on Hype" [Law and Philosophy 19/1 (2000), 3-49]. Morse argues against duress interpretations of impaired control excuses in "Culpability and Control", *The University of Pennsylvania Law Review*, Vol. 142 (1994), pp. 1587-1660.

result from the psychological effects of using drugs—from getting drunk or high—rather than from the addictive need to use them. If one were not responsible for getting drunk, and if one were not then responsible for certain behavioral effects of intoxication, criminal responsibility would be an issue even if substance-use itself were legal.²

Big "ifs", to be sure. As it stands, the law has been understandably resistant to defenses based on addiction. For one thing, experts continue to disagree substantially about the nature and effects of addictions and indeed about what conditions to include in that category. The courts tend to be conservative in the face of such disagreement. In addition, it is not clear how to interpret the impairments identified by leading theories of addiction in terms of the standard categories of legal exculpation. But the biggest obstacle to an addiction-based defense might be this: almost always, individuals become addicted by their voluntary behavior. Even if addictive conditions are in some (not yet well understood) way responsibility-undermining, addicts are complicit in their own impairment.³

Despite this resistance, the law remains under significant moral and theoretical pressure to extend well-established excuses to addictive crimes—by which I mean, illegal behavior that is predominantly motivated (or in some other way explained)⁴ by addictive needs and cravings. It seems to me that the most plausible way of understanding this pressure is to see addictions as creating circumstances of duress. That, in any case, is the idea I want, eventually, to explore. While the practical prospects of a successful defense along these lines are admittedly dim, the investigation is still theoretically worthwhile. For legal doctrine in this area seems to me especially

² The issue of responsibility for addiction arises in civil law too. For example, it is central to recent litigation involving the tobacco industry.

³ See Sanford Kadish, "Excusing Crime", *California Law Review*, vol. 75 (1987), pp. 257-89.

⁴ Again, if being intoxicated were to result in a tendency to criminal violence, say, then the addictive need that leads to the intoxication would not *motivate* the crime.

undeveloped and ambivalent; it will be of interest to articulate some of these weaknesses.

I. *Some Assumptions about Addiction*

Let's begin with the commonplace that addictions involve *compulsion*. Certainly, popular and technical work on addiction has tended to construe addiction in these terms. In its influential formulation of 1969, the World Health Organization defined 'dependence' (a term that replaced the use of 'addiction' in its earlier declarations) as

a state, psychic and sometimes also physical, resulting from the interaction between a living organism and a drug, characterized by behavioral and other responses that always include a compulsion to take the drug on a continuous or periodic basis in order to experience its psychic effects, and sometimes to avoid the discomfort of its absence.⁵

Recent writers tend to be more guarded. Prompted by the goal of appealing only to "patterns of pathological use that can be objectively quantified", the authors of the Third Edition of the *Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association* departed from previous editions by omitting the phrase 'compelling desire to use a substance' in their definition of 'dependency'. Yet this goal does not prevent them from relying upon the "ability to cut down or stop use" as a diagnostic criterion.⁶ And it is still common to find 'addiction' or 'dependency' defined in terms of 'irresistibility'. For example, James Halikias *et al.* define 'craving', which is taken to be a central

component of addiction, as "an irresistible urge to use a substance that compels drug seeking behavior."⁷

This way of defining addiction or dependency has given rise to a certain amount of skepticism, which has in turn affected legal opinion.⁸ Nevertheless, there is a substantial body of research, from different quarters, in support of George Loewenstein's claim that drug-craving limits the scope for volitional control of behavior. Once the addict is "hooked", and subject to intermittent craving, the scope for volition narrows to the point where it may not be useful, either theoretically or practically, to view the addict's behavior as a matter of choice. . . . As an individual becomes addicted to a drug, . . . there is a progressive loss of volitional control over drug taking.⁹

⁷ "The Measurement of Craving in Cocaine Patients Using the Minnesota Cocaine Craving Scale", *Comprehensive Psychiatry*, 32(1), pp. 22-7. In "Acute and Chronic Pain" (in J. H. Lowinson, P. Ruiz, R. B. Millman, and J. G. Langrod (eds.), *Substance Abuse: A Comprehensive Textbook* (Baltimore: Williams and Wilkins, 3rd edn., 1996), pp. 563-89), Russell K. Portenoy and Richard Payne insist upon a distinction between physical dependence and addiction, defining addiction as a condition in which one is unable to abstain: "Use of the term 'addiction' to describe patients who are merely physically dependent reinforces the stigma associated with opioid therapy and should be abandoned. If the clinician wishes to describe a patient who is believed to have the capacity for abstinence, the term physical dependence must be used" (p. 564).

⁸ The skeptics include Herbert Fingarette, *Heavy Drinking: the Myth of Alcoholism as a Disease* (Berkeley: University of California Press, 1988); Grinspoon and Bakalar, *supra* note 5, and Stanton Peele, *The Meaning of Addiction* (New York: Health, 1985), and *The Disease of America* (Lexington, Mass.: Lexington Books, 1989). For judicial expressions of skepticism that addictions involve volitional impairments of the legally relevant kind, see Justice Leventhal's concurring opinion in *U.S. v. Moore*: "Drug addiction of varying degrees may or may not result in loss of self-control, depending on the strength of character opposed to the drug craving. . . . the difficulty is sharpened by the appreciable number of narcotic addicts who do abandon their habits permanently, and much larger number who reflect their capacity to refrain by ceasing use for varying periods of time. The reasons are not clear but the phenomenon is indisputable. . . ." Sanford H. Kadish and Stephen J. Schulhofer, *Criminal Law and its Processes* (Boston: Little, Brown, 5th edn., 1989), pp. 1071 and 1074. (All references to this edition are hereafter cited as "Kadish and Schulhofer".)

⁹ George Loewenstein, "A Visceral Account of Addiction", in Jon Elster and O. J. Skog (eds.), *Getting Hooked: Rationality and Addiction* (Cambridge and New York: Cambridge University Press, 1999). See also Loewenstein's "Out of Control: Visceral

⁵ Quoted in Grinspoon and Bakalar, *Cocaine: A Drug and its Social Evolution* (New York: Basic Books, 1976), p. 177.

⁶ See John Kuehule and Robert Spitzer, "DSM III Classification of Substance Use Disorders", in J. H. Lowinson and P. Ruiz (eds.), *Substance Abuse: A Comprehensive Textbook* (Baltimore: Williams and Wilkins, 2nd edn., 1992), pp. 22-3.

Loewenstein adds: "Once addicted, behavior is periodically driven by craving, which overwhelms rational deliberations concerning self-interest."¹⁰ Surely these claims are *prima facie* relevant to moral and criminal responsibility. If the law excludes considerations of addiction altogether, it does so despite substantial evidence that addictive behavior can be out of control and hence less than fully morally responsible.

II. *Addiction and the Law*

For the purposes of philosophical argument, I will assume that Loewenstein and others are right to claim that addiction, at least in advanced stages, leads to "loss of volitional control over drug taking". Consider then the following case for exculpating (some) addictive crimes.¹¹

Suppose there is a law against drinking alcohol in public. Imagine an alcoholic defendant, D, who is homeless, that is, who has no legal access to anything but "public space". Thus:

1. D is a severe alcoholic.
2. Severe alcoholics lack control over their alcohol consumption.
3. Therefore, D lacks control over his alcohol consumption.
4. Criminal sanctions should not be imposed for behavior over which an individual has no control.
5. Therefore, criminal sanctions should not be imposed on D for drinking in public.

Influences on Behaviour", *Organizational Behavior and Human Decision Processes*, 65(3) (1996), pp. 272-92. For a judicious overview of this issue, see Jon Elster, "Rationality and Addiction": "... most addictive behavior can be traced back to irrationality in the choice, the belief formation, or the information acquisition of the agent", typescript, p. 1.

¹⁰ "Out of Control", p. 40.

¹¹ I do not here attribute to Loewenstein any particular view about the implications of his work for legal responsibility. I am using his theories, which I find plausible, to fix ideas for the purposes of my argument. See note 21 below.

What's wrong with this argument? The example partially parallels *Powell v. Texas* which came before the U.S. Supreme Court in 1968. The constitutional issue was whether punishing for alcoholic behavior is "cruel and unusual", hence prohibited by the Eighth and Fourteenth Amendments. That punishing addiction *per se* was unconstitutional for this reason had been found in *Robinson v. California*, 1962. In the actual case, Powell was not homeless, and his appeal was rejected partly on this ground. But what is interesting here is the reasoning accepted by both Justice White, who concurred in the denial of the appeal, and by Justice Fortas *et al.*, who dissented. "If it cannot be a crime to have an irresistible compulsion to use narcotics", White argued, "I do not see how it can constitutionally be a crime to yield to such a compulsion. Punishing an addict for using drugs convicts for addiction under a different name."¹² Thus, White accepts premise 2 of the above argument,¹³ and contends that if Powell had been "unable to stay off the streets on the night in question", the rationale in *Robinson* would have applied.¹⁴

Fortas *et al.* formulate this rationale in this way: "Criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change", a principle they take to be "the foundation of individual liberty and the cornerstone of the relations between a civilized state and its citizens."¹⁵ Of course, this is, more or less, the fourth premise of the argument under consideration.

However, the majority opinion in *Powell* construes the thrust of *Robinson* much more narrowly. The constitutional defect in the California law was simply that it criminalized a *status* rather than an act. Whatever the merits of premise 4 as a substantive principle of criminal responsibility, the court was not willing to find it or any other doctrine of accountability in the Constitution.

¹² Kadish and Schulhofer, p. 1066.

¹³ For a challenge to the conception of alcoholism employed in this reasoning, see Herbert Fingarette, "The Perils of *Powell*: In Search of a Factual Foundation for the 'Disease Concept of Alcoholism'", *Harvard Law Review* 83 (1970).

¹⁴ It should be noted that White himself had dissented from the majority in *Robinson*.

¹⁵ Kadish and Schulhofer, p. 1068.

It is doubtful that the implications of *Robinson* can be so narrowly contained. The court there likens criminalizing addiction to making leprosy or mental illness a crime, something that would "be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."¹⁶ The court leaves the basis of this thought unexplained. An obvious explanation is that punishing people for leprosy is punishing them for something over which they have no control, and that looks cruel. Without an alternative story, we are led back to the very principle cited by Fortas *et al.*

III. Obstacles to an Addiction-Based Defense

We have seen that the idea that addiction might diminish criminal responsibility is far from absurd. Nevertheless, apart from doubts about our assumptions about addiction, the law's reluctance to recognize such a defense has two sources: equity, and the needs for social regulation.

(i) The second need is practical. The criminal law aims to protect citizens against certain harms and aggressions by means of a fair system of prohibitions and punishments. This seems to require that citizens not be punished unless they are responsible for violating legal requirements. Thus one constitutive aim of the law is to track the responsibility of defendants. But the pursuit of this aim must be balanced against protective concerns. In legal practice, the law tends to be conservative, recognizing a defense only when, as Meir Dan-Cohen puts it, it "is both of a rare kind and is generally perceived to be clearly convincing. By insisting on these two conditions, the law affirms its commitment to fairness (or justice) without significantly

diminishing its effectiveness."¹⁷ The defense of addiction is not thought to meet these conditions.

These considerations are clearly to the fore in *U.S. v. Moore* (U.S. Court of Appeals, District of Columbia, 1973), where the Court considers the appellant's contention that his "overpowering need to use heroin" resulted in "substantial impairment of his behavior controls . . . relevant to his criminal responsibility for unlawful possession. . . ." ¹⁸ In his concurring opinion, Justice Leventhal concludes (contrary to the claims of Fortas *et al.* in *Powell*) that there is no broad common law principle of exculpation on ground of lack of control but rather a series of particular defenses staked out in manageable areas, with the call for justice to the individual confined to ascertainable and verifiable conditions, and limited by the interest of society in control of conduct. . . .

Leventhal goes on to insist that many people are held responsible despite

substantial impairment and lack of capacity due, say, to weakness of intellect that establishes susceptibility to suggestion; or . . . loss of control of the mind as a result of passion, whether the passion is of an amorous nature or the result of hate, prejudice or vengeance; or . . . a depravity that blocks out conscience as an influence on conduct.¹⁹

Any acceptable defense on the basis of impairment of control would have to "discern a demarcation . . . that keeps the defense within verifiable bounds that do not tear the fabric of the criminal law as an instrument of social control. . . ." ²⁰ Thus Leventhal rejects premise 4 of the argument with which we began the last section.

Something like this point is made again and again in legal discussions of addiction and related defenses. Perhaps addictions *are* sources of volitional impairments, the courts seem to grant. Nevertheless,

¹⁷ "Actus Reus", Sanford Kadish (ed.), *Encyclopedia of Criminal Justice* (New York: Free Press, 1983). Quoted in Kadish and Schulhofer, p. 1077.

¹⁸ Kadish and Schulhofer, p. 1071.

¹⁹ Kadish and Schulhofer, p. 1074.

²⁰ Kadish and Schulhofer, p. 1073.

¹⁶ Kadish and Schulhofer, p. 1056.

unless there is a way to "demarcate" the kind of impairment involved in addiction from the ways in which passions, prejudices, undue influenceability, weakness of will, etc. diminish control (impairments that may well affect the "vast bulk of the population"), acknowledging this defense "threatens to tear the fabric of the criminal law as an instrument of social control". So it is not that claims of addiction do not draw upon powerful legally relevant principles; it is that the law cannot see a way of keeping this defense within predictable and reasonable bounds.

This worry is aggravated by George Loewenstein's theory, according to which addiction is only one among a number of other prevalent "visceral" factors that diminish volitional control, including cravings arising from "extreme hunger, thirst, pain, anger, sleepiness . . .", as well as sexual desire.²¹ Granted that the addict is in some sense out of control, so are the hot tempered and the horny. Lord Cooper gave voice to the same concern regarding a general diminished responsibility defense as it was developing in England in 1945:

... it will not suffice in law, for the purpose of this defence of diminished responsibility, merely to show that an accused person has a very short temper, or is unusually excitable and lacking in self-control. *The world would be a very convenient place for criminals, and a very dangerous place for other people, if that were the law.*²²

Here Lord Cooper was anticipating the kind of worry created by the English Homicide Bill of 1957, which reduced a charge of murder to manslaughter if the accused

was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent

causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts or omissions in doing or being a party to the killing.²³

Under this law in 1959, Patrick Byrne pled diminished responsibility to a charge of rape/murder, claiming to suffer from an "abnormal sexual impulse . . . so strong that he found it difficult or impossible to control", a claim that nowadays would be cast in terms of sexual addiction.²⁴

(ii) Often, then, the aim of fair treatment of individuals, of tracking individual responsibility, gives way to the goal of maintaining an effective protective apparatus. However, these last remarks point to a consideration that is more than strategic. That someone's behavior is "out of control" is more often an accusation than an exculpation. The concern is not just that the plea itself becomes widely available, but that it wrongly lets some of us off the hook. Citizens have a standing legal duty to develop and maintain sufficient capacities of self-control to enable them to conform to the law. As a 19th century American court put it: "It is the duty of men who are not insane . . . to control their evil passions and violent tempers or brutal instincts and if they do not do so, it is their own fault, and their moral and legal responsibility will not be destroyed or avoided by the existence of such passions. . . ." ²⁵ Even if addicted defendants were in a demonstrably responsibility-impaired state, it seems wrong to excuse them just for

²³ Walker, *Crime and Insanity in England*, p. 150.

²⁴ See *Crime and Insanity in England*, p. 155. According to Ariel Goodman ("Sexual Addiction" in *Substance Abuse*, pp. 340-54), "Sexual addiction is defined as a condition . . . characterized by two key features: (a) recurrent failure to control sexual behavior and (b) continuation of the behavior despite significant harmful consequences" (p. 342). As it turns out, the majority of sexual addicts are men, who experience the "onset" of the affliction "prior to age 18"; the condition "typically peaks between the ages of 20 and 30, and then gradually declines" (Goodman, p. 342). In other words, sexual addiction is the condition of prolonged male adolescence that is so familiar from frat house to White House, a condition known to our moral traditions as philandering, intemperance, promiscuity, or debauchery, as the case may be.

²⁵ *Fitzpatrick v. Commonwealth of Kentucky* (1883).

²¹ "A Visceral Account of Addiction", p. 3. Again, I should say that Loewenstein himself does not address the legal implications of his position. In "Out of Control", he acknowledges the issue about policy. "Although we hold people accountable for their behavior as a matter of policy", he thinks that "sexually motivated behaviour often seems to fall into 'the gray region' between pure volition and pure compulsion" (p. 286).

²² Quoted in Nigel Walker, *Crime and Insanity in England* (Edinburgh: Edinburgh University Press, 1968), p. 156 (my emphasis).

this reason. The legal duty to maintain self-control means that we allow ourselves to become addicted at our own peril.

To be sure, the idea that people become addicted knowingly and willingly is somewhat simplistic. As Loewenstein brings out, people systematically underestimate "the force of the craving they will experience if they try to stop taking the drug, [and] . . . overestimate their own future ability to stop taking the drug. Early drug-taking behavior, therefore, results from a decision that is distorted by biased expectations."²⁶ Moreover, these misestimates often occur in adolescence when prudential skills are poorly developed. But these sorts of limitations of rationality are hardly grounds for exculpation in our legal and moral tradition.

But aren't there circumstances in which the law should allow that a person's lack of self-control was not her fault, that she could not reasonably have been expected to become a fully law-abiding citizen?²⁷ At least one case (*U.S. v. Lyons* (1984)) involved evidence attributing the defendant's addiction to the innocent use of prescribed pain medication. The *Robinson* court had acknowledged this possibility: "not only may addiction innocently result from the use of medically prescribed narcotics, but a person may even be a narcotics addict from the moment of his birth. . . ." ²⁸ The position that addicts are responsible for their diminished control should be a rebuttable assumption.

That the assumption is generally true has been challenged by recent research on the "Reward Deficiency Syndrome". Certain individuals are born, according to these studies, with genetic abnormalities affecting the dopamine system in such a way that the individual cannot find

²⁶ "A Visceral Account . . .", p. 3.

²⁷ The so-called "rotten social background" defense suggests one attempt to define a class of exceptions to the standing obligation to conform to the law. For a sympathetic consideration of this issue, see Richard Delgado, "Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?, in *Law and Equality* 3, 1985.

²⁸ Quoted in Kadish and Schulhofer, p. 1057, note 9.

enjoyment, satisfaction, "positive reinforcement", without resorting to the kind of stimulation provided by the use of addictive substances.²⁹

This would be an instance of what Paul Robinson calls a "chromosomal abnormality defense". No such defense has ever succeeded, Robinson notes. He sketches a defense along these lines in this way:

. . . An actor is excused for his conduct constituting an offense if, as a result of (1) chromosomal abnormality, (2) the actor . . . is not sufficiently able to control his conduct so as to be held accountable for it.³⁰

As I understand them, some RDS theorists claim that these conditions are met by many individuals involved in substance abuse.

It is an understatement to say that at this point these claims have not been made out to the satisfaction of the scientific community. Furthermore, whatever the chromosomal findings, the difficulty is to justify claims such as (2).³¹ It will not suffice to show that the probability of substance abuse is significantly higher for those with the abnormality in question. For higher probability does not entail or even suggest diminished control in the sense relevant to accountability. Even where there is good reason to believe that individuals with the abnormality have a harder time of it than those without it (again, this is not entailed by the probabilities), this on its own would not place

²⁹ See Kenneth Blum et al., "Reward Deficiency Syndrome", *American Scientist* 84 (1996), pp. 132-45. For a popular report, see J. Madeleine Nash, "Addicts", *Time* 149(18) (1997), pp. 69-77.

³⁰ *Criminal Law Defenses*, Vol. 2 (St. Paul: West Publishing Co., 1984), pp. 444-5.

³¹ According to Nash, "Americans tend to think of drug addiction as a failure of character. But this stereotype is beginning to give way to the recognition that drug dependence has a clear biological basis" ("Addicts", p. 70). The fact that addiction has a biological basis is neither surprising nor clearly relevant to our question. What should strike us here is the crudity of the contrasts, as though having a "biological basis" precludes failure of character; as though we must think that the natural appetites cannot have a "biological basis", if we think they can be implicated in vice.

In "Disordered Appetites" [Ch. 3, this volume], I argue that there is nothing about the ways in which addictions impair agency to distinguish them *in kind* from natural appetites. I think this is also a feature of Loewenstein's visceral theory.

them in a category calling for special legal consideration.³² It would not distinguish them, for example, from those whose environments, or natural appetites, made it abnormally hard to attain temperance.

As a general matter, then, the prospect of excusing addiction raises serious practical and moral qualms. Nevertheless, in particular instances, the intuitive case for special consideration can seem quite powerful. As I have said, this case can best be understood in terms of the category of *duress*. But before we take up this point, it will be instructive to consider the possibility of a defense on grounds of insanity.

IV. *Addiction as Insanity*

Some addicted defendants have attempted to present an insanity defense.³³ At least on those versions of the defense that depart from M'Naughton in allowing for "irresistible impulse" or "volitional incapacity", the case is *prima facie* plausible. The Model Penal Code's version is perhaps the most commonly cited of these:

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law. . . .³⁴

³² For a good discussion of this point, see Christopher Boorse, "Premenstrual Syndrome and Criminal Responsibility", in *Premenstrual Syndrome: Ethical and Legal Implications in a Biomedical Perspective* (New York: Plenum Press, 1987), pp. 81-124. As Boorse points out, that one (probably) wouldn't have committed robbery if one had been middle-aged, or committed murder if one had not been male is not taken to be extenuating. "Causal influence of a factor, even when mediated by an endocrine process, does not negate and may not even limit criminal responsibility. On the contrary, criminal law expects everyone to meet stress with increased self-control, and it must take more, not less, care to punish anti-social acts where typical temptation to them is strong" (p. 102).

³³ See *U.S. v. Freeman* (1966), and *U.S. v. Lyons* (1984).

³⁴ Section 4.01 of the 1985 Model Penal Code, quoted in Kadish and Schulhofer, p. 981.

The failure of these attempts reflects a loss of confidence during the last several decades in MPC-type rules generally. The attitude of the *Lyons* Court, quoting from the *American Psychiatric Association's* "Statement on the Insanity Defense", is typical:

There is . . . no objective basis for distinguishing between . . . the impulse that was irresistible and the impulse not resisted, or between substantial impairment of capacity and some lesser impairment. . . . We see no prudent course for the law to follow but to treat all criminal impulses—including those not resisted—as resistible. To do otherwise in the present state of medical knowledge would be to cast the insanity defense adrift upon a sea of unfounded scientific speculation. . . .³⁵

This conclusion reflects an understandable general concern about the obscurity of the notion of volitional impairment.³⁶ And as we've seen, some opinions in particular are suspicious of addiction-based insanity pleas. But of more theoretical interest is Leventhal's point in *Moore*³⁷ that an addiction defense does not meet the requirement that the incapacity result from a disease or defect. Whether or not one takes addiction to be a "disease", the important lesson to me is that the disease-requirement is not really cogent. Imagine that someone satisfies the M'Naughton cognitive test, say, but without any showing of disease. It is morally absurd to differentiate between two equally incapacitated individuals solely on the grounds that one of the conditions could be traced to a disease. Surely it is that condition itself, not

³⁵ Kadish and Schulhofer, pp. 998-9.

³⁶ I think the Court's confidence in the comparative clarity and objectivity of the "cognitive" part of the insanity standard is misplaced; the claim that " . . . psychiatric testimony about volition is more likely to produce confusion for jurors than is psychiatric testimony concerning a defendant's appreciation of the wrongfulness of his act" (Kadish and Schulhofer, p. 998) seems to me highly doubtful.

³⁷ Although the defendant in *Moore* did not officially offer an insanity defense, he claimed his addiction resulted in substantial impairment of his "behavior controls" (specifically a loss of self-control over the use of heroin) that is sufficient in common law for exculpation.

its causes, that constitutes the individual's incompetence from a legal standpoint.³⁸

The problem with the disease-requirement then is that it is either unnecessary or insufficient. Any formulations of the conditions for legal insanity, say the M-test or the MPC-test, *sans* requirement, either identifies sufficient conditions for legal incompetence or it does not. If so, their causal origins do not matter. If these conditions are not sufficient, then requiring that they be caused by disease will not ensure incompetence, and we have an inadequate test.

Causal origins *do* matter, it might be replied, because it matters whether the individual is responsible for his impairment. Very well—but the disease-clause does not answer to this concern. For someone might be responsible for incurring the disease. In any case, as far as I know, the law has never been open to evidence bearing on this question in the case of the insanity defense.³⁹

Hence I disagree with Justice Leventhal when he denies (in the *Moore* case, cited above) that "because one condition (mental

³⁸ Admittedly, the foregoing may be hard to imagine. But that is because to meet the M-test is to be "defective" or "diseased" in an important sense. In that case, the requirement of "caused by a disease" is superfluous. Compare the gloss on "mental disease" in *McDonald v. United States*: "... a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behaviour controls" (Kadish and Schulhofer, p. 1010). Again, any impairment of mental, emotional, or volitional processes is bound to be abnormal in *some* sense, thus obviating a causal inquiry. (But consider adolescence!)

³⁹ Note the recommended standard of the American Psychiatric Association, which not only excludes a defense of volitional incapacity, and narrows the understanding of cognitive impairment, but explicitly excludes any conditions that result from voluntary drug-use: "A person charged with a criminal offense should be found not guilty by reason of insanity if it is shown that as a result of mental disease or mental retardation he was unable to appreciate the wrongfulness of his conduct at the time of the offense. As used in this standard, the terms mental disease or mental retardation include only those severely abnormal mental conditions that grossly and demonstrably impair a person's perception or understanding of reality and that are not attributable primarily to the voluntary ingestion of alcohol or other psychoactive substances." (Kadish and Schulhofer, p. 1003.)

disease) yields an exculpatory defense if it results in impairment of and lack of behavioral controls the same result follows when some other condition impairs behavior controls."⁴⁰ I think it *does* follow—unless (unlike other causes) a "mental disease" is something by its nature for which the individual could not be responsible. But it is not.

I suspect that the disease-clause of the insanity tests is a flat-footed attempt to honor some considerations of justice—namely, to exculpate dramatically impaired moral actors—while screening out countless further pleas too difficult to substantiate and too widely available. But the resulting doctrine is incoherent, for it reflects a lack of confidence in the criteria of competence identified in those tests. If those criteria are not indeed sufficiently clear to identify those whom it would be wrong to hold criminally responsible, then it does not advance this aim at all to tie them to a requirement that they be brought about in a certain way.

I conclude that an addiction-based insanity defense should not be ruled out by the disease-requirement. For that requirement is unreasonable. Nonetheless, 'insanity' is not, in my view, the proper category in which to understand the exculpating tendency of addiction. Indeed, I think in general it was a moral and conceptual error to attempt to fashion a single plea out of the disjunction of volitional and M'Naughton-type impairments. These considerations are simply too disparate. Instead, volitional impairments are better understood as grounding a defense of duress.⁴¹

⁴⁰ Kadish and Schulhofer, p. 1072.

⁴¹ I should say that what I have in mind by volitional impairments are not merely defects of something called the will, as distinct from reason or intellect. As I see them, impairments of the kind typified by addictions characteristically involve cognitive distortions of various kinds. The ability to see things straight, and in focus, is not entirely separable from the ability to respond to the reasons one knows one has. In contrast, in "Addiction as Defect of the Will: Some Philosophical Reflections", *Law and Philosophy*, 18/6 (1999), R. Jay Wallace wishes to isolate defects of will from defects of reason. I am not sure this can be done. Otherwise, I find Wallace's account congenial and insightful.

V. *Addiction and Compulsion*

Let's return to the initial thought that addictions diminish responsibility (when they do) because they are sources of compulsive motivation. In what sense can desires be "compulsive" and how is that sense relevant to moral and legal culpability?

Aristotle's discussion of "voluntary" action in *Nicomachean Ethics* is a helpful starting point. Here Aristotle distinguishes different ways (or senses) in which "force" might negate voluntariness. He defines voluntary action, that is, behavior for which individuals are open to praise or blame, as behavior which is neither forced nor done in ignorance. "What is forced", he says, "has an external origin, the sort of origin in which the agent or victim contributes nothing—e.g. if a wind or human being who controls him were to carry him off."⁴² He goes on to consider a different kind of force, namely what we would call duress or coercion.

Suppose, e.g. a tyrant tells you to do something shameful, when he has control over your parents and children, and if you do it, they will live, and if not, they will die. . . . The same sort of thing . . . happens with throwing cargo overboard in storms; for no one willingly throws cargo overboard, unconditionally, but anyone with any sense throws it overboard . . . to save himself and the others.⁴³

Such behavior resembles the first category of forced behavior because it is in a way unwilling. The agent is forced to do something "evil" whatever she does. But here what she does depends on her choice. Hence the "origin" is not just external. And she might choose well or badly, and consequently be open to praise or blame for what she does. Aristotle notes, however, that "In some cases there is no praise, but there is pardon, whenever someone does a wrong action because of conditions of a sort that restrain human nature, and that no one would endure."⁴⁴

⁴² *Nicomachean Ethics*, Book 3.1, 1110a1–4, translated by Terence Irwin (Indianapolis: Hackett, 1985).

⁴³ *Nicomachean Ethics*, 3.1, 4–12.
⁴⁴ 1110a25 f.

Inquiry into whether you are blameworthy for having caused harm or violated a law therefore might have three types of conclusion.

1. *Literal Force* There is no choice or agency exercised at all. You are blameless because you did nothing.

The wind or some hooligan literally forces you into others, knocking them down.

2. *Choice Among Evils* In an emergency, you are faced with terrible options, and choose what you judge to be the lesser evil.

Here again there are two cases, depending on whether or not the difficult choice-situation is created by human design. (We normally speak of "coercion" only in the first type of case, but I will ignore this distinction in speaking of "coercive predicaments".)

2a. Hooligans threaten you: "unless you knock the other into the ditch, we'll kill this child".

2b. A runaway truck is heading directly toward another, creating the following circumstance: unless you knock the other down, he will be crushed.

You cannot be blamed for causing harm *per se*, but you will be blamed if you choose badly—that is, do not choose to knock the other down.

3. *Duress*:⁴⁵ One chooses wrongly but in circumstances in which choosing the right thing is too difficult to expect of one another. One is therefore not blameworthy (or not as blameworthy).

For example, a battered woman participates in a bank robbery, under the command of her abusive lover who threatens to kill her unless she goes along.⁴⁶ (There are undesigned examples here as well.)

Whether or not behavior falls into the category of literal force is normally fairly straightforward. The categories of duress and

⁴⁵ I use 'duress' here in a non-technical sense. The legal usage is much more restrictive, as we'll see.

⁴⁶ See *People of California v. Romer* (1992), in which the defendant pleaded duress to charges of robbery and attempted robbery on the grounds that she was threatened with death unless she participated. I discuss this case further in the next section.

justification, however, raise more complicated conceptual and normative questions. Some might think that the woman's participation in the bank robbery was justifiable in the circumstances. Further, the categories might overlap as follows: apart from the question of whether participating in the robbery in those circumstances is the right thing to do, it would "overstrain" human nature to expect people to withstand the threat. Now the idea of being too difficult to expect of one another is not easy to explain. In the remainder of the essay, I want to explore the proposal that addiction compromises responsibility in just this way, by creating circumstances of duress.

To begin with, one thing is clear: the sense that addictions can be overpowering forces should not mislead us into locating the excuse in Aristotle's first category, as though our defendant were like the man blown about by the wind. The problem with this idea is not that Aristotle restricts the first category to forces *external* to the body. (After all, behavior that results from epileptic seizures has, in some sense, "internal" origins.) The relevant notion of 'external', for this category, is independence from the will. If we could stand to our desires as to external forces, then to be compelled by a desire would not be a case of volitional incapacity, any more than being blown about by the wind would. It would not be to act at all.⁴⁷ Compulsive desire is not a force that moves me independently of my will; it is a "force" that leads me to make certain choices.⁴⁸ The appropriate interpersonal counterpart is not the thug who literally tosses me out of the room, but the one who *threatens* to beat me up unless I leave.

⁴⁷ On a conception of irresistible impulse as a force that overpowers the agent's will, it would be especially wrong-headed to think of that notion of compulsion as the non-cognitive prong of an insanity test. On this conception, the person's moral agency is not in that case undermined but bypassed; he is a passive bystander to internal forces. There is then no *actus reus*. It belongs again in Aristotle's first category.

⁴⁸ I elaborate this argument in "Disordered Appetites" [Ch. 3, this volume]. Robert Schopp also questions this conception of addictive desire in *Automatism, Insanity, and the Psychology of Criminal Responsibility* (Cambridge and New York: Cambridge University Press, 1991), p. 249.

(Or is it, in the case of addiction, rather like someone who seduces me to stay?)

This notion of compulsion is a normative one. Those who are subject to compulsive desires (in contrast to those who are merely weak of will) are those who could not reasonably be expected to hold out.⁴⁹ But this thought is subject to significantly different interpretations, as we'll now see.

VI. Two Interpretations of Duress

The legal category of duress is fraught with confusion and controversy. Duress is commonly thought to have a peculiarly dual character, appearing both excuse-like and justification-like. I think this appearance is due in part to a conflation under one heading of two distinct grounds of exculpation. This has given rise to two interpretations of the plea.

On the most common conception, duress is an excuse because coercive circumstances limit or compromise one's capacities for self-control. But a quite different idea is that circumstances of duress create special reasons in virtue of which criminal sanctions are inappropriate. On both defenses, it is unreasonable or unfair to expect a person to comply with the law under certain situations, and

⁴⁹ I suggest a normative account in "Skepticism about Weakness of Will", *The Philosophical Review*, April, 1977 [Ch. 2, this volume]. The idea is that weakness is the manifestation of a vice; someone is a victim of compulsion if she is subject to motivation that even a person of exemplary self-control could not resist.

See also Patricia Greenspan, who argues that the victim of motivational compulsion is "unfree because he is faced with a kind of threat, like a robbery victim coerced at gunpoint, with intense discomfort as his only option to compliance." "Behavior Control and Freedom of Action", *The Philosophical Review* 87 (1978), pp. 225-40, reprinted in John Fischer (ed.), *Moral Responsibility* (Ithaca: Cornell University Press, 1986), p. 196 of the reprinting. Greenspan's discussion focuses on those who are subjected to aversive behavioral control (such as the character Alex, in Anthony Burgess's *A Clockwork Orange*).

this makes it difficult to tell in some contexts which interpretation is at work. On the idea of duress as diminished capacity, the dire circumstances of the lawbreaker make it too difficult for even the decent citizen to comply with the law. On the second conception, those circumstances make it reasonable for one to act illegally. In the second case, the accused might well be responding fully and appropriately to the reasons he has, whereas in the other, the predicament makes it too difficult to expect even a person of good character to think straight or to act well.

The tendency to conflate these grounds is reinforced by technical features of the legal notion of justification. Take again the case of *People of California v. Romer*, in which the defendant pleaded duress to charges of robbery and attempted robbery on the grounds that she was threatened with death unless she participated. Suppose we think she has a defense on the second ground just mentioned. Still, this would not be a justification in the legal sense. As that defense is standardly defined, the illegal conduct must serve a greater good or avoid a greater harm, *from the standpoint of the law's general aims*, than that involved in the violation.⁵⁰

Self-defense law illustrates this point. From a public policy point of view, it is better for the aggressor to be killed than the intended victim. The same point holds when you seek shelter from a deadly storm by trespassing on my property. Although you have technically broken the law, you are not a wrongdoer. As Joshua Dressler puts it, "Justification defenses amend the law. . . ."⁵¹

However, this condition is not clearly satisfied by the coerced participation in a bank robbery which exposes a number of citizens

⁵⁰ Section 3.02 of the MPC (1985) formulates the defense in this way: "... conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that the harm or evil to be avoided by the conduct is greater than that sought to be prevented by the law defining the offense charged [and the actor's choice situation isn't due to her own negligence or recklessness]."

⁵¹ "Exegesis and the Law of Duress: Justifying the Excuse and Searching for its Proper Limits", *Southern California Law Review* 62(5) (1989), p. 1374.

to grave risks. As Dan Kahan and Martha Nussbaum⁵² explain, a woman (as in the *Romer* case)

may be morally entitled (perhaps even morally obliged) to prefer her or her family's welfare to that of strangers, and may thus have a defense of duress. But given the risk that her actions create for innocent third parties, it cannot necessarily be said, from a consequentialist point of view, that her participation in the robbery results in a preferred state of affairs.⁵³

The point turns on a distinction between justification from a legal/public point of view, and justification from a personal/private point of view. Thus, those who violate the law in these circumstances are, in one plain sense, justified in doing so: they act for sufficient reasons. But their conduct is not justifiable from the point of view of the general aims and values of the law. It would not be unreasonable for an individual in this predicament to refuse to subordinate her fundamental interests to that of the public. In effect, to recognize the defense of duress, on this conception, is to recognize a space in which compliance with the law is optional; it is to affirm the legal significance of what Samuel Scheffler⁵⁴ calls in other contexts *agent-centered prerogatives*.⁵⁵

⁵² "Two Conceptions of Emotion in Criminal Law", *Columbia Law Review* 96(2) (1996), pp. 269-374, p. 337. I have learned a lot from this perceptive essay, which I discuss further below.

⁵³ But this explanation doesn't explain why cases such as *State of New Jersey v. Toscano* (1977) would not be tried under a justification defense. Would it really be preferable or ideal from a public/legal point of view for the defendant to allow himself and his family to suffer death or severe injury rather than to falsify a medical report? I doubt it. This rationale needs more work.

⁵⁴ *The Rejection of Consequentialism* (Oxford: Clarendon Press, 1982). The idea is that morality permits us to act in a less than "optimistic" way when certain "personal" concerns are at stake. We recognize in morality that the standpoint of what is preferable from a moral point of view might be something the morally decent person has no overriding reason to adopt in a particular case.

⁵⁵ In their paper, Kahan and Nussbaum note that agent-centered reasons are important to their idea of duress as distinct from both justification and excuse. Dressler also notes that coercive predicaments might create a distinctive justification based on "self-interested" reasons ("Exegesis of the Law of Duress", p. 1356), though

Potentially, then, coercive predicaments provide three distinct bases for defence: an *impairment defense*, a *prerogative defense*, and a full justification (in the legal sense). The latter two are sometimes grouped under the heading of 'necessity'. Prerogative defenses, like legal justifications, raise the issue of whether the defendant's choice was reasonable, rationally defensible. A successful defense must show that it was. The impairment defense grants that this exercise of agency was defective, but argues that it was compatible with the commitments and virtues of the law-abiding citizen. The choice may have been faulty,⁵⁶ but that shouldn't be held against him. Therefore, both defenses require normative judgments at different points.

A particular predicament might ground all three defenses at once. The exigency of self-defense might plausibly provide a legal justification, create an agent-centered prerogative, and diminish a person's capacity to respond rationally at the same time.⁵⁷ A prerogative defense is neither a legal justification nor an excuse because it cites neither a legally sufficient reason nor an impairment.

Thus I agree in part with Kahan and Nussbaum, who argue that "... duress exculpates not because (and when) threats vitiate a person's moral agency, but because (and when) a person's fear expresses a rational and morally appropriate assessment of her circumstances...."⁵⁸ The authors make a convincing case for the conclusion that the law often exculpates defendants in coercive

he argues that in legal practice, the defense of duress is best understood as an excuse. Alan Wertheimer argues that "duress is best understood as an agent-relative justification" (*Coercion* (Princeton, N.J.: Princeton University Press, 1987), p. 168).

⁵⁶ In saying this, I want to distinguish faulty conduct from innocent conduct that (accidentally, say) has bad consequences. Faulty conduct in my sense is open to criticism.

⁵⁷ However, for arcane reasons, self-defense could not in law ground a duress defense (on either interpretation). For one thing, in most jurisdictions, a defense of duress is not available in homicide cases. (I discuss this below.) For another thing, the defense is usually available only where the crime is a fulfillment of the coercive threat. For example, someone who escapes prison to avoid rape or other forms of brutality might have a justification defense rather than a duress defense; whereas the latter might be available if his tormentors threatened to kill him unless he escaped. See *People of Illinois v. Unger* (1977), discussed in Kadish and Schulhofer, pp. 903 ff.

⁵⁸ "Two Conceptions of Emotion in Criminal Law", p. 336.

situations out of respect for their reasons. But it doesn't follow that coercive circumstances cannot also be destructive of self-control in a way that is properly registered by the criminal law.⁵⁹

The impression that duress is at once justification and excuse-like thus reflects these different overlapping conceptions. Clearly, the view of addictions that is most relevant to our topic is the impairment conception. But it is worth dwelling on the relatively neglected prerogative defense because it exhibits a principle of legal authority of the first importance: that the criminal law can be legitimate only if it is justifiable to those who are subject to its demands. And it can meet this condition only if its subjects have reason to comply. The recognition of the space of agent-centered prerogatives, I suggest, is the law's acknowledgment of the limits of its own moral jurisdiction. To punish in circumstances of duress (so interpreted) would be to treat the defendant in a way that could not be justified to him as a practical agent; it would be to treat him on grounds that he could reasonably reject. It would be a violation of his autonomy.

I am not claiming that this principle is explicitly and unequivocally endorsed by criminal law. But inasmuch as something like this ideal is arguably an axiom of modern liberal culture, it would be surprising if it failed to find significant (if guarded) expression, in one form or another, in Western European legal thought and practice.⁶⁰

This ideal figures, I think, in the importance we attach to the criminal law as a distinct form of social regulation. We do not think of this system merely as the most effective way of regulating behavior.

⁵⁹ Their thesis reflects Kahan's and Nussbaum's larger argument on behalf of an "evaluative" rather than a "mechanistic" conception of emotions in understanding criminal law. The argument seems to me to rest on an overly simple contrast: emotions are either evaluations, and hence reasonable or unreasonable, or they are brute, nonrational forces that impede moral agency. In fact, emotions are both evaluative states and states that potentially interfere with rational control in various ways. It is therefore not surprising that coercive predicaments give rise to defenses expressing both of these truths.

⁶⁰ One could find expressions of this ideal in other parts of the law—for example, in making room for "conscientious objection". This ideal manifests itself, I suspect, only in relatively stable contexts where concerns for justice as distinct from social control come to the fore.

As T. M. Scanlon puts it: "The law is not simply an organized system of threats. It also provides rules and standards which good citizens are supposed to 'respect', that is, to employ as a way of deciding what to do—not simply as a way of avoiding sanctions but as a set of norms which they accept as reason-giving."⁶¹

This conception bears upon the capacities that are presumed by the criminal law. To adapt a point that R. Jay Wallace makes about moral blame, since the criminal law is not purely strategic, legal obligations and corresponding sanctions are "fully intelligible only to people who are themselves capable of grasping the reasons that support those obligations."⁶² So the non-strategic function of criminal law presumes that those subject to the law be capable of *appreciating* the validity of the norms to which they are being held accountable. This stronger requirement of normative competence is reflected in less conservative interpretations of the cognitive requirements of the McNaughton rule.⁶³

VII. Duress as Impairment

Let us focus on the idea of duress as impairment. The general standard by which incapacity is measured is what we can demand of

the decent citizen of "reasonable firmness". The idea, as I've said, is that the kind of weakness manifested by conduct under duress is not weakness with respect to the law-abiding virtues, but weakness to which even the "resolute and well-disposed" are liable.⁶⁴ People who act illegally in coercive predicaments might well have satisfied all reasonable standards of self-control. To punish them would therefore be unfair.

However, in most jurisdictions, this excuse is sharply circumscribed in a number of ways. The restrictions that concern me are these: 1) The coercive predicament must be created by human design. That is, one's illegal conduct must be required by another's threat of grave harm to oneself or one's loved ones. 2) The defense is not valid in cases of murder. Section 2.09 of the MPC (1985) drops the second restriction but not the first:

It is an affirmative defense that the actor engaged in the conduct . . . because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, which a person of reasonable firmness in his situation would have been unable to resist.

Does it make sense to restrict the defense of duress to non-homicide crimes? Suppose we think that persons of ordinary fortitude will have steeled themselves against killing another under duress, that for a decent person such conduct will have become unthinkable. Then we will think, with Aristotle, that "there are some things we cannot be compelled to do, and rather than do them we should suffer the most terrible consequences and accept death."⁶⁵ The exclusion of a duress defense to homicide might reflect such a judgment in our community.⁶⁶ On the other hand (or also), it might reflect

⁶⁴ For this phrase, see the British case, *Lynch v. Director of Public Prosecutions*, quoted in Leo Katz, *Bad Acts and Guilty Minds* (Chicago and London: University of Chicago Press, 1987), p. 64.

⁶⁵ *Nicomachean Ethics*, 1110a27.
⁶⁶ Wertheimer points out that the exclusion would also make sense on the justification-interpretation of duress; it might reflect the judgment that nothing could justify taking the life of a non-aggressor. See *Coercion*, p. 155. This shows again how normative judgment is involved on both interpretations of the duress defense.

⁶¹ *What We Owe to Each Other* (Cambridge: Harvard University Press, 1998), p. 266.

⁶² *Responsibility and the Moral Sentiments* (Cambridge: Harvard University Press, 1994).

⁶³ For discussions of the notion of normative competence in general, see Wallace, *Responsibility and the Moral Sentiments*, as well as Paul Benson, "Freedom and Value", *Journal of Philosophy* 84(9) (1987). Normative competence, according to Benson, is "an ability to criticize courses of action competently by relevant normative standards" (p. 469). Susan Wolf uses this phrase to describe the kind of "sanity" that she takes to be presumed by our moral practices: "the minimally sufficient ability cognitively and normatively to recognize and appreciate the world for what it is." ("Sanity and the Metaphysics of Responsibility", in Ferdinand Schoeman (ed.), *Responsibility, Character, and the Emotions* (Cambridge and New York: Cambridge University Press, 1987), p. 56.)

policy considerations of the kind that worried the British court in *Abbot v. the Queen*: a duress defense in murder cases looks like "a charter to terrorists, gangleaders and kidnappers. . . . Is there no limit to the number of people you may kill to save your life and that of your family?"⁶⁷

When the coercive circumstances are created by design, the goal of discouraging the coercers might be thought to override the exculpatory force of the agent's plight. Note, however, that this rationale has no relevance in the case of duress by natural causes. The restriction of the defense to human coercion seems to me very difficult to justify on grounds either of deterrence or justice.⁶⁸

VIII. *Addiction as Duress*

Assume, then, that what matters primarily in duress is that the defendant is subject to coercive circumstances sufficient to compromise her capacity for self-control. It shouldn't matter whether these circumstances result from human design or natural forces. Let's now ask whether it should matter whether the coercive circumstance is created by a peculiarity of the agent's psychology. Such conditions include not only addictions, but phobias and similar volitional impairments. Suppose someone threatens to lock another in a dark, rat-infested cellar unless he commits a certain crime, for example. Inasmuch as this prospect is as frightful to certain phobics as a life-threatening injury is to the rest of us, it seems that such individuals should be equally entitled to exculpation. Isn't it as plausible to think of the intensely felt compulsive needs of (some) addictions as capable

of creating coercive circumstances which an individual could not reasonably be expected to resist?⁶⁹

The biggest obstacle to this defense is once again the issue of individual responsibility. A defense of duress presumes that the defendant is not responsible for his coercive predicament.⁷⁰ This issue distinguishes the case of addiction from phobias and other volitional deficiencies in that category, for addicts almost always play a role in their own impairment, whereas, I suppose, this is seldom true of these other afflictions.

To sharpen the issue, let's assume that a particular lawbreaker is indeed innocent in the initial process of getting hooked. Perhaps an abusive parent forces her to use heroin to the point of severe substance dependence. Suppose she has no legal access to money in the near future, and her intense cravings for heroin lead her to steal enough money to buy the drug. These admittedly artificial assumptions are at least imaginable. Would she now have a plausible duress defense to the charge of theft? It would be at least as plausible as a defense based on the claim that one was suffering from extreme deprivation of food or water, or under credible threat of serious harm by another.

⁶⁹ I know of no official attempt to offer an addiction-based defense of duress. But the defendant in *Moore* (cited above) claimed his addictive condition to be "on the same footing" as "a person forced under threat of death to inject heroin" (quoted in Kadish and Schulhofer, p. 1072).

Michael Moore seems to place addiction in the same category as other coercive circumstances, broadly conceived: "External threats, external but natural necessity, internal emotional turmoil, or passionate cravings [such as those of addiction] are different from one another, yet all make a choice difficult. Each at least mitigates the actor's responsibility because of the difficulty of refraining from doing what he ought not to do." *Law and Psychiatry* (Cambridge and New York: Cambridge University Press, 1984), p. 87.

⁷⁰ The MPC (1985) makes this explicit in the second clause of its codification of the defense: "The defense . . . is unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subject to duress. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged."

⁶⁷ Quoted in Katz, *Bad Acts and Guilty Minds*, p. 68.

⁶⁸ Here I agree with Dressler; Dressler rejects the blanket exclusion of defenses to murder as well—"Exegesis of the Law of Duress", p. 1071. Wertheimer, *Coercion*, also questions the rationale for the exclusion of homicide (pp. 155-6).

Duress pleas require the defendant to show that she had no feasible alternative to breaking the law. In interpersonal coercion, for example, a defendant would have to show that he could not have avoided the threat by going to the police. (See *State of New Jersey v. Toscano* (1977), for opinions on this issue.) Here the addicted defendant would have to show that no alternative way of dealing with her addiction existed, or at least that she could not reasonably have been expected to have considered the alternatives under the circumstances.

This requirement suggests an important difference between addiction-based defenses and the legal paradigms of duress. To be addicted (on our assumptions) is to be disposed, perhaps episodically, to volitional impairment under certain circumstances, whereas in the standard case, the duress is a one-shot deal. And this difference complicates issues about responsibility even further. For the question is not just about the individual's responsibility for becoming addicted initially; that is, for becoming prone to coercive pressures; but about her responsibility for encountering these circumstances of duress in the future. The addict, on our assumptions, is like one who lives in a social/political environment in which one might expect to encounter coercive threats on a regular basis.⁷¹ (Perhaps one should not have been hanging out in that neighborhood, or with that abusive character.) The question is to what extent one can reasonably be expected to change one's overall, long-term surroundings in the relevant ways. It is commonly supposed that the addict can with help do this. I am not sure what to say on this point; as far as I know, inexpensive and effective drug treatment programs are not available on every corner.

Now it might be thought that the fact that addiction is a standing disposition to episodes of diminished self-control creates problems for the application of the "reasonable firmness" standard. Does it make sense to ask whether the temperate and resolute citizen would have resisted an addictive craving for drugs of that intensity? Our

assumption that our defendant is innocent in acquiring her affliction blocks the reply that a responsible man or woman would not have become addicted in the first place. Nevertheless, someone might argue that to be disposed to episodes of diminished self-control is incompatible with temperance and resolution; the well-disposed citizen is *ipso facto* not subject to such breakdowns.

However, this claim is very doubtful. A lot depends on what is meant by 'such breakdowns'. Addictions do not necessarily erode moral character in some general way.⁷² And the likelihood that they will dispose one to loss of control is a contingent matter; whether and how often the addict's special vulnerability is indeed realized depends largely on social norms and her economic circumstances.⁷³ I'm told that it is possible for a well supplied and well regulated heroin addict to live an otherwise healthy and productive life. (Cocaine and amphetamines are another matter.)

In any case, imagine that this is so for a certain severely addictive substance, S, and that in a certain culture, otherwise similar to ours, the use of S is not only tolerated but respected as highly spiritually beneficial. This culture regards the dependency on this substance, which again entails a vulnerability to various kinds of diminished self-control in circumstances of deprivation, as a small price to pay for the enrichment of human life provided by S. Fortunately, S is readily obtainable, perhaps even socially subsidized by the society for religious reasons.

This fantasy makes it clear that the moral and legal significance of an individual's volitional weaknesses depends not only on judgments about individual responsibility and the limits of human endurance but on judgments about the meaning and value of those vulnerabilities. In our imagined society, both the use of and

⁷² If George Ainslie is right, however, *some* addictive substances have the property of rendering individuals self-absorbed in a disturbing way. See "A Research-Based Theory of Addictive Motivation" [*Law and Philosophy*, 19/1 (1998), pp. 77–115]. Can't something similar be said of certain meditative/religious practices?

⁷³ The remarks in the next few paragraphs are adapted from my "Disordered Appetites" [Ch. 3, this volume].

⁷¹ But notice that this simile assumes a social climate in which the drug in question is liable to be in short supply. This factor is obviously affected by social policy.

dependency on S are regarded as entirely fitting and normal, on a par with the appetites for food and drink. Someone who acquires the addiction to S has not thereby run afoul of any social or legal obligation to maintain self-control. The threat of being deprived of one's S is here on a par with the coercive predicament created by the prospect of imminent starvation. This threat would provide as credible an excuse for certain kinds of legal wrongdoing as the fear of starvation could for us. Liability to such breakdowns would not be inconsistent with the standard of 'reasonable firmness'.

It will be noted that our legal tradition has not looked kindly upon pleas of starvation either. This might be due to a general prejudice against the poor; their plight is taken to be their own fault, either because they are responsible for their impoverishment or because there are thought to be legally available forms of relief. It has also been argued that recognizing this plea places the system of private property in jeopardy. Clearly the empirical plausibility of these points, as well as the social norms some of them invoke, are contestable. In any case it is surely possible that responsible citizens (by whatever standards) find themselves in dire straits with respect to the satisfaction of their natural appetites.⁷⁴ Many such cases would be grounds for justification; in other cases we might reasonably conclude that their capacities to conform to legal requirements have been impaired in a legally relevant way.

The reluctance to recognize an addiction-based excuse stems as much from norms about the value of addictive dependencies as from judgments about responsibility. We tend to see them as demeaning

rather than as conditions for meaningful human activity. We see them as impairments. For this reason, even if we don't favor criminalization, we expect people to avoid those conditions, and we see their plights as their own fault.

No substance in our culture has the role of S exactly, but there are instructive examples of parallel acquired dependencies which we encourage and honor. I have in mind the various relationship-attachments exemplified by having children, or being in love. Like addictions, to be attached in these ways is to be vulnerable to coercive predicaments that are sometimes the basis for paradigmatic pleas of duress (one was forced to falsify the document to protect one's child or lover from harm). We generally play some role in the acquisition of these attachments. But since there is no expectation that one is to avoid these relationships and their inherent liabilities, the issue of individual responsibility is of little or no importance here.

The judgment that one *impairs* oneself in cultivating some dependencies turns not only on the judgment that one has diminished one's autonomy in the abstract sense but on a conception of normal activity. Hence, if we deny the possibility of a plea on the grounds of addiction, it is not just because addicts have contributed to their own diminished self-control.

I am not arguing that addictions of any kind should be valued in the way we value the dependencies I just mentioned. Perhaps we are right as a culture to disrespect addiction. That deserves a separate discussion. My point is that the issue of excusing addiction turns as much on our sense of choiceworthy forms of human life as on questions of individual responsibility and the limits of human nature.

IX. Conclusion

I have done what I can to make a case for the moral and legal force of the duressful circumstances of some addicts. The law's resistance to

⁷⁴ In a suggestive article, Gold, Johnson, and Stennie argue that the reward system activated by addictive drugs is the same system that responds to the "primitive species reinforcers" food, thirst, and sex. What happens is that these drugs come to "acquire the organismic significance attributed to food. They become an acquired primary drive equated with survival." See "Eating Disorders", in *Substance Abuse*, Third Edition, p. 320. As they put it, in addiction, "the fundamental processes of reward of primitive species survival drives" are "usurp[ed] . . . by exogenous agents" (p. 319). This conjecture accounts for the sense of urgency and alarm that is common to the experience of addictions and natural appetites.

addiction-based defenses runs counter to substantial evidence that addictive behavior can be less than fully responsible in legally pertinent ways. Nonetheless, the moral and practical reasons for resisting this defense are in the end probably decisive. Of course, this sort of conflict is not unusual; indeed it is inevitable. In order to do its job, the criminal law is severely limited in its capacity to respond to the merits of individual cases. We need legal institutions to be more or less heavy-handed.

But in this case, the heavy-handedness can be somewhat ameliorated by the compromise proposed in Stephen Morse's essay, "Hooked on Hype".⁷⁵ The introduction of a verdict of "guilty but partially responsible". This verdict would hold the defendant legally responsible but provide a systematic way to allow or require appropriate mitigation in sentencing. The details and implications of this proposal need to be developed. If it worked, it would allow us to record the defendant's complicity in her own plight and, at the same time, to do at least some justice to the special difficulties under which she labors.

⁷⁵ *Law and Philosophy*, 19/1 (2000). Once again, I do not follow Morse in construing the addict's "partial responsibility" as due to an impairment in rationality rather than in control.

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