

In Need of a Fix: Reforming Criminal Law in Light of a Contemporary Understanding of Drug Addiction



Patrick Eoghan Murray

ABSTRACT

This Comment challenges the assumption that actions associated with drug addiction can be easily classified as either voluntary or involuntary. As an alternative to this black-and-white distinction, this Comment advances the concept of a semi-voluntary act category to describe more accurately a drug addict's choice to use drugs. When limited appropriately to drug addicts rather than all drug users, this category provides an avenue for a partial affirmative defense that would result in a verdict of not guilty but responsible. This verdict would more fairly treat drug addicts who commit crimes while intoxicated by reducing the stigma of a finding of guilt and by demanding that the defendant take responsibility for their drug addiction and seek effective treatment.

AUTHOR

Patrick Eoghan Murray is a Senior Editor for the *UCLA Law Review*, Volume 60, and J.D. Candidate, 2013, at UCLA School of Law.

I would like to thank my adviser, Professor Stuart Biegel, as well as all the members of the 2011 Academic Legal Writing seminar for their encouragement and insight in the drafting of this Comment. Thank you to Todd J. Gilman and Ivy Lee for their very helpful edits. I am so grateful for all the assistance I received from the *UCLA Law Review* board and staff, especially the tireless efforts of my Senior Editor, Madeline Morrison. Finally, I would like to thank my family for their love and support. *Beidh mé buíochas díbh go deo as bhúr dtachaiócht agus bhúr ngrá.*

TABLE OF CONTENTS

INTRODUCTION.....	1008
I. <i>ROBINSON AND POWELL: RELUCTANCE TO PUNISH INVOLUNTARY ACTIONS</i> ASSOCIATED WITH DRUG ADDICTION	1010
A. <i>Robinson v. California: Both Majority and Dissent Are Reluctant</i> to Punish the Involuntary Symptoms of a Disease	1011
B. <i>Powell v. Texas: A Hidden Majority Open to the Proposition</i> That Drug Addiction Causes Involuntary Acts.....	1014
C. Implications of <i>Robinson</i> and <i>Powell</i>	1018
II. CONTEMPORARY UNDERSTANDING OF DRUG ADDICTION.....	1021
A. What Causes Drug Addiction?.....	1022
B. Understanding a Drug Addict's Compulsion to Use Drugs	1025
C. Can Drug Addiction Be Treated?	1027
III. REFORMING CRIMINAL LAW TO AVOID OVERPUNISHMENT AND HARM TO SOCIETY	1028
A. Actus Reus: Binary Notions of Voluntariness	1029
B. Intoxication Defense: Binary Notions of Intoxication	1033
IV. PROCEDURAL FRAMEWORK FOR SEMI-VOLUNTARY ACTS	1034
A. Semi-Voluntary Acts Driven by Drug Addiction	1036
B. Semi-Voluntary Intoxication	1037
C. Intoxication at the Time of the Crime	1038
D. Not Guilty But Responsible: A Verdict for Semi-Voluntary Acts	1038
V. POTENTIAL OBJECTIONS.....	1041
CONCLUSION	1043

INTRODUCTION

“Naked man killed by [p]olice near MacArthur Causeway was ‘eating’ face off victim,” screamed the *Miami Herald*.¹ The story is terrifying: When police arrived at the scene, the growling, naked man—Rudy Eugene—had already gnawed off 75–80 percent of his victim’s face.² Even as the police shot him to death, Eugene refused to stop devouring the victim’s flesh.³

When exposed to such horrifying actions, our natural impulse is to find an explanation. What would cause someone to act in such an inexplicably violent way? Drug usage is an easy answer: Police immediately speculated that cocaine psychosis—a common condition among drug addicts brought on by cocaine overdoses—drove Eugene’s cannibalistic rampage.⁴ This answer suggests a more sympathetic interpretation of the crime: Perhaps because of the helpless condition of intoxication caused by Eugene’s addiction, it is fairer to blame the drugs for his violent act rather than Eugene.⁵

But this reasoning is based on an incorrect understanding of drug addiction. Drug addiction does not cause the addict to lose all control over his choice to use drugs, so he still bears some responsibility for what occurs while intoxicated. While we may never know what caused Eugene’s attack,⁶ drug addiction would not pro-

-
1. Daniela Guzman & Julie K. Brown, *Naked Man Killed by Police Near MacArthur Causeway Was ‘Eating’ Face Off Victim*, MIAMI HERALD, May 27, 2012, <http://www.miamiherald.com/2012/05/26/2818832/naked-man-shot-killed-on-macarthur.html>.
 2. Gilma Avalos & Diana Gonzalez, *Naked Man Mauled up to 80 Percent of Victim’s Face During Attack: Official*, NBC 6 S. FLA. (May 29, 2012, 11:34 AM), <http://www.nbcmiami.com/news/local/MacArthur-Shooting-Captured-on-Camera--154845905.html>.
 3. *Miami Police Shoot, Kill Man Eating Another Man’s Face*, CBS MIAMI (May 26, 2012, 11:30 PM), <http://miami.cbslocal.com/2012/05/26/miami-police-confrontation-men-leaves-1-dead-1-hurt/>; Brittney R. Villalva, *Zombie Attack in Miami Result of Cocaine Psychosis?*, CHRISTIAN POST (May 29, 2012, 11:33 AM), <http://www.christianpost.com/news/zombie-attack-in-miami-result-of-cocaine-psychosis-surveillance-video-75705> (“The guy—he was like a zombie, blood dripping; it was intense,” Larry Vega, a biker [who] was riding nearby and witnessed the incident, told reporters. “I never thought I would see someone eating someone. It was really, really horrific.”).
 4. Villalva, *supra* note 3.
 5. Jacob Sullum, *The Devil in Rudy Eugene*, REASON.COM (June 6, 2012), <http://reason.com/archives/2012/06/06/the-devil-in-rudy-eugene> (“This pattern of credulous reporting, characteristic of drug panics, reflects our perennial readiness to believe that satanic substances hijack people’s souls and compel them to sin.”).
 6. The investigation into Eugene’s crime indicates that he was probably not intoxicated at the time of the assault. See Scott Hiaasen & Nadege Green, *No Bath Salts Detected: Causeway Attacker Rudy Eugene Had Only Pot in His System, Medical Examiner Reports*, MIAMI HERALD, June 27, 2012, <http://www.miamiherald.com/2012/06/27/2871098/mes-report-eugene-had-no-drugs.html> (“But the medical examiner—after seeking help from an outside forensic toxicology lab—could find no evidence of the common components of ‘bath salts’ in Eugene’s system. Nor did the lab find evidence of synthetic marijuana or LSD. The medical examiner also found that Eugene

vide a full explanation in any case. The reasoning that absolves Eugene of guilt because of drug addiction fails to take into account the nature of the drug addict's choice to use drugs. Because the choice to use drugs is not involuntary, there are good reasons not to exonerate drug addicts who commit crimes while intoxicated.

The current criminal law also mischaracterizes drug addiction: When a drug addict uses drugs, the law considers it an entirely voluntary choice. To convict an individual for a crime committed while in a state of intoxication, it is only necessary to show that the defendant voluntarily became intoxicated. If drugs were involved in Eugene's case, it would not matter if his criminal behavior while intoxicated was involuntary, because the choice to use drugs would be considered voluntary. Whether or not he was a drug addict and had lost a large amount of control over the choice to consume drugs would have been legally irrelevant.

This Comment attacks the assumption that a drug addict's choice to use drugs can be accurately classified as either voluntary or involuntary. Today, reliable research demonstrates that drug addiction is not merely a behavior but an identifiable condition caused by drug usage,⁷ genetics,⁸ mental illness,⁹ and other environmental factors.¹⁰ Scientists have found that a drug addict's choice to use drugs falls into a gray area between voluntary and involuntary. Addicts lose a large amount of control over when they can choose to become intoxicated.¹¹

As an alternative to the unscientific voluntary/involuntary distinction in the law, this Comment advances the concept of a semi-voluntary act category to describe more accurately a drug addict's choice to use drugs.¹² This category would provide an avenue for a partial affirmative defense that would result in a verdict of not guilty but responsible. This verdict would treat drug addicts who commit crimes while intoxicated with greater nuance and fairness.

had not ingested cocaine, heroin, PCP, oxycodone, amphetamines or any other known street drug other than marijuana—a drug not known for sparking violence.”)

7. J. Altman et al., *The Biological, Social and Clinical Bases of Drug Addiction: Commentary and Debate*, 125 *PSYCHOPHARMACOLOGY* 285, 287 (1996).
8. See John C. Crabbe, *Genetic Contributions to Addiction*, 53 *ANN. REV. PSYCHOL.* 435 (2002); George R. Uhl & Robert W. Grow, *The Burden of Complex Genetics in Brain Disorders*, 61 *ARCHIVES GEN. PSYCHIATRY* 223, 224 (2004).
9. Alan I. Leshner, *Science-Based Views of Drug Addiction and Its Treatment*, 282 *JAMA* 1314, 1314 (1999); Athina Markou et al., *Neurobiological Similarities in Depression and Drug Dependence: A Self-Medication Hypothesis*, 18 *NEUROPSYCHOPHARMACOLOGY* 135, 158 (1998).
10. See Jordi Camí & Magi Farré, *Mechanisms of Disease: Drug Addiction*, 349 *NEW ENG. J. MED.* 975, 983 (2003).
11. See generally Roy A. Wise, *The Neurobiology of Craving: Implications for the Understanding and Treatment of Addiction*, 97 *J. ABNORMAL PSYCHOL.* 118 (1988) (analyzing the biological bases of drug cravings to explain why addictions are so difficult to break).
12. Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87 *MINN. L. REV.* 269, 361 (2002).

Part I of this Comment addresses the U.S. Supreme Court opinions in *Robinson v. California*¹³ and *Powell v. Texas*.¹⁴ These cases demonstrate the difficulty of finding a just punishment for drug addicts who commit crimes that can be traced to their addictions. Part II describes the current understanding of drug addiction, which has advanced tremendously since these cases were decided and which now considers addiction to be a far more complex and insidious disorder than previously understood. Part III addresses how a semi-voluntary act classification could be applied to actions of a drug addict that are directly linked to the addiction. It then describes the not guilty but responsible verdict, which would apply to semi-voluntary acts. Part IV addresses and responds to some potential objections to this proposal. The Comment concludes by explaining how this verdict might apply to Eugene, in an attempt to assuage the fears of those reluctant to provide an affirmative defense to the most dangerous drug addicts.

I. **ROBINSON AND POWELL: RELUCTANCE TO PUNISH INVOLUNTARY ACTIONS ASSOCIATED WITH DRUG ADDICTION**

Robinson v. California and *Powell v. Texas* are arguably the most important cases in the criminal law to address drug addiction. Both involved individuals who were likely heavy drug users and probably classifiable as addicts. Each defendant challenged a statute that punished him for his drug use: Robinson was punished for his status as a drug addict, while Powell was punished for being drunk in public. The Supreme Court held that Robinson's punishment was unconstitutional, while Powell's was constitutional.

The two cases have come to represent the principle that criminal statutes may punish behavior but not status. They also arguably stand for the proposition that an individual must have committed a voluntary act to deserve punishment.¹⁵ But the two cases also illustrate the problem presented by defendants who suffer from drug addiction and commit crimes that are related to their addiction. As each case demonstrates, this difficulty arises because the actions of a drug addict are not always easily classified as voluntary or involuntary.

13. 370 U.S. 660 (1962).

14. 392 U.S. 514 (1968).

15. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 9.04[C] (6th ed. 2012) (questioning *Powell's* and *Robinson's* precedential weight regarding a constitutional requirement that individuals can only be punished for voluntary acts).

A. *Robinson v. California: Both Majority and Dissent Are Reluctant to Punish the Involuntary Symptoms of a Disease*

In *Robinson*, the Supreme Court considered the constitutionality of a California statute that criminalized the status of being a drug addict. The statute at issue, California Health and Safety Code Section 11721, stated the following:

No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics. . . . Any person convicted of violating any provision of this section is guilty of a misdemeanor¹⁶

The defendant, Lawrence Robinson, had been a passenger in a car that was stopped by a Los Angeles police officer.¹⁷ The police officer became suspicious of the driver and proceeded to question Robinson.¹⁸ In the course of this investigation, the police officer noticed that Robinson had “what appeared to be numerous needle marks and a scab which was approximately three inches below the crook of the elbow on [his] left arm.”¹⁹ The police officer testified that Robinson admitted to being a narcotics user²⁰—something Robinson later denied saying.²¹ The officer then arrested Robinson and placed him in custody.²² The next morning, another police officer, who possessed ten years of experience investigating drug crimes, corroborated the existence of these scars and made a determination that they were the result of the nonsterile use of narcotics.²³ He noted that the drug use had not occurred recently because Robinson did not appear to be under the influence of drugs and did not seem to be suffering from withdrawal symptoms.²⁴ Robinson claimed at trial that his scars were the result of an allergic reaction and denied ever having used narcotics or being a narcotics addict.²⁵

The trial judge instructed the jury that the portion of the statute that referenced addiction did not require a particular act but rather that addiction was a chronic condition that could be “ascertained from a single examination, if the characteristic reactions of that condition be found present.”²⁶ The trial judge fur-

16. *Robinson*, 370 U.S. at 660 n.1 (quoting CAL. HEALTH & SAFETY CODE § 11721 (repealed 1972)).

17. Appellant's Opening Brief at 4, *Robinson*, 370 U.S. 660 (No. 554), 1962 WL 115380, at *4.

18. *Id.* at 5.

19. *Robinson*, 370 U.S. at 661 (internal quotation marks omitted).

20. *Id.*

21. *Id.* at 662.

22. *Id.* at 661–62.

23. *Id.*

24. *Id.* at 662.

25. *Id.*

26. *Id.* at 662–63.

ther clarified that all that was required for a guilty verdict was either “that the defendant did use a narcotic in Los Angeles County, or that while in the City of Los Angeles he was addicted to the use of narcotics.”²⁷ Thus, even if the jury did not believe there was adequate evidence to prove that the defendant had ever used narcotics in Los Angeles, it could nonetheless convict him based on his status as an addict.²⁸ The judge declined to explain the meaning of the term “under the influence of narcotics” since there was no evidence that Robinson had violated this part of the statute.²⁹ The jury found Robinson guilty.³⁰ An appellate court affirmed the judgment and upheld the statute against Robinson’s constitutional challenge.³¹

On these facts, the Supreme Court invalidated the statute: Punishing Robinson for his drug addiction was unconstitutional because criminalizing addiction did not proscribe a particular action but rather punished individuals on the basis of a status.³² The majority found it to be cruel and unusual to imprison a drug addict who had “never touched any narcotic drug within the State or been guilty of any irregular behavior.”³³ The court emphasized the unfairness of punishing someone solely for having a disease, saying, “[e]ven one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”³⁴

Justice Douglas’s concurrence was a broader indictment of the use of punitive measures against drug addicts. His opinion emphasized his belief that drug addiction is a disease.³⁵ Justice Douglas suggested that “compulsions not capable of management without outside help” do not deserve punishment, since such punishments would stigmatize an individual for having a disease.³⁶ But he remained

27. *Id.* at 663.

28. *Id.* at 665.

29. *Id.* at 662 n.3 (internal quotation marks omitted).

30. *Id.* at 663.

31. *Id.* at 664.

32. *Id.* at 666–67 (“[I]n the light of contemporary human knowledge, a law which made a criminal offense of [mental illness, leprosy, or a venereal disease] would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. We cannot but consider the statute before us as of the same category.” (citation omitted)).

33. *Id.* at 667. The majority’s conclusion here assumes that the jury convicted Robinson for being a drug addict and not simply because he had used drugs in Los Angeles, despite the fact that ample evidence was presented at trial to support the latter conclusion. *Id.* at 686 n.3 (White, J., dissenting) (“The evidence was that [Robinson] lived and worked in Los Angeles. He admitted before trial that he had used narcotics for three or four months, three or four times a week, usually at his place with his friends. He stated to the police that he had last used narcotics at 54th and Central in the City of Los Angeles on January 27, 8 days before his arrest.”).

34. *Id.* at 667.

35. *Id.* at 676 (Douglas, J., concurring) (“The addict is a sick person. He may, of course, be confined for treatment or for the protection of society. Cruel and unusual punishment results not from confinement, but from convicting the addict of a crime.” (footnote omitted)).

36. *Id.* at 671.

open to punishing “acts of transgression” that could be harmful to others in the community.³⁷ While Justice Douglas did not define “acts of transgression” or how they would be distinguished from “compulsions not capable of management without outside help,” his suggestion emphasizes the importance of acknowledging a distinction between symptoms and deliberate acts.

Justice Harlan’s concurrence was more cautious. He stated that “the present state of medical knowledge” was not conclusive on whether “narcotics addiction is something other than an illness.”³⁸ Instead, he made sure to limit his holding to a prohibition on statutes that criminalize only “a bare desire to commit a criminal act”³⁹—the implication being that he might consider it constitutional to punish an action that was uncontrollable.

Justice Clark’s and Justice White’s dissenting opinions highlight the difficulties of classifying drug addiction as a status that causes uncontrollable actions. Justice Clark found the statute to be constitutional because it punished something that Robinson could control. “There was no suggestion that the term ‘narcotic addict’ [in the California statute at issue] included a person who acted without volition or who had lost the power of self-control.”⁴⁰ Justice White also rejected the notion that Robinson was punished based on his status as an addict. According to Justice White, addiction was only an indicator of “[frequent use of] narcotics in the recent past.”⁴¹ Justice White therefore did not consider punishment based on a defendant’s status as a drug addict troubling because it was merely an evidentiary shortcut to punishing use.⁴² Both dissenting Justices believed that Robinson had not lost the power to control his acts.⁴³

37. *Id.* at 674.

38. *Id.* at 678 (Harlan, J., concurring).

39. *Id.* at 679.

40. *Id.* at 680 (Clark, J., dissenting).

41. *Id.* at 686 (White, J., dissenting).

42. *Id.*

43. *Id.* at 684 (Clark, J., dissenting) (“Even if it could be argued that § 11721 may not be limited to volitional addicts, the petitioner in the instant case undeniably retained the power of self-control and thus to him the statute would be constitutional. Moreover, ‘status’ offenses have long been known and recognized in the criminal law. A ready example is drunkenness, which plainly is as involuntary after addiction to alcohol as is the taking of drugs.” (citation omitted)); *id.* at 687 (White, J., dissenting) (“I agree with my Brother Clark that there was no evidence at all that appellant had lost the power to control his acts.”).

B. *Powell v. Texas*: A Hidden Majority Open to the Proposition That Drug Addiction Causes Involuntary Acts

In *Powell*, the Court considered whether alcoholism was an affirmative defense to a public intoxication ordinance. The Texas statute in question read as follows:

Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars.⁴⁴

The defendant, Leroy Powell, had a serious alcohol problem.⁴⁵ In December of 1966, he was arrested for appearing in public while drunk.⁴⁶ The arresting officer said that while Powell had not been violent or uncooperative, he was staggering around on a public road. When questioned by the police, “he smelled strongly of alcohol, and . . . his speech was slurred.”⁴⁷ This was not unusual. In fact, Powell had been arrested about one hundred times previously for being drunk in public.⁴⁸ His lawyers had to loan Powell money so frequently for these offenses, that they became exasperated and advanced the defense of alcoholism.⁴⁹

Powell argued that, as applied, the Texas statute violated the principle underlying *Robinson*—it punished him for the status of being a drug addict, since, according to Powell, being drunk and in public were intrinsic to his alcoholism.⁵⁰ The trial focused on Powell’s ability to resist getting drunk and on whether alcoholism was considered a disease.⁵¹

At trial, both the expert testimony and Powell’s testimony were ambiguous regarding whether Powell had control over his drinking. Dr. David Wade, a highly qualified expert witness in psychiatry,⁵² testified that Powell had an uncontrollable compulsion to drink and could not control his actions once he became in-

44. *Powell v. Texas*, 392 U.S. 514, 517 (1968) (quoting TEX. PENAL CODE ANN. art. 477 (repealed 1973)).

45. *See id.* at 519.

46. *Id.* at 517.

47. David Robinson, Jr., *Powell v. Texas: The Case of the Intoxicated Shoeshine Man: Some Reflections a Generation Later by a Participant*, 26 AM. J. CRIM. L. 401, 404 (1999).

48. *Id.* at 403.

49. *See id.* at 404 (“According to his former lawyer, Mr. Don L. Davis, the firm had ‘tired of lending him money to get out of jail.’ . . . [Davis] proceeded to create a formidable record for a legal challenge to the ‘revolving door’ of arrest, detention, and release in which Powell seemed caught.”).

50. *See Powell*, 392 U.S. at 517.

51. *See id.* at 517–20.

52. *Id.* at 517–18 (“The principal testimony was that of Dr. David Wade, a Fellow of the American Medical Association, duly certificated in psychiatry. His testimony consumed a total of 17 pages in the trial transcript. Five of those pages were taken up with a recitation of Dr. Wade’s qualifications.”).

toxicated.⁵³ Although he noted that alcoholism exerted a compulsion that was very difficult to resist, Wade admitted that Powell's sober choice to take his first drink was a "voluntary exercise of his will."⁵⁴

Powell's testimony was similarly ambiguous. On direct examination, Powell testified that he could not control his drinking and that once he became intoxicated he could not control his actions.⁵⁵ But on cross, he testified otherwise. Powell mentioned that he had taken a drink before appearing in court and that he had been able to stop at one drink:

Q. You took that one at eight o'clock because you wanted to drink?

A. Yes, sir.

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

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

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

A. Yes, sir, that's right.

Q. So you exercised your will power and kept from drinking anything today except that one drink?

A. Yes, sir, that's right.

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

A. Yes, sir.

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

A. No, sir.

Q. Not today?

A. No, sir.

Q. So you only had one drink today?

53. *Id.* at 518.

54. *Id.* (internal quotation marks omitted).

55. *Id.* at 519.

A. Yes, sir.⁵⁶

On redirect, however, he clarified that the only reason that he stopped at one drink was because he had no money to buy any more:

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

A. Well, that was just give to me.

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

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

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

A. Yes, sir.

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

A. No, sir.⁵⁷

Powell's trial testimony is not just an example of a layman being led in different directions by skillful lawyers, it also illustrates the difficulty of articulating the level of control addicts have over their addictions.

There was no majority opinion in *Powell*. Justice Marshall wrote the Court's plurality opinion affirming Powell's conviction, and in doing so he limited the potentially far-reaching implications of *Robinson*.⁵⁸ Marshall's view was that *Robinson* was a mere ban on statutory language that explicitly criminalizes status.⁵⁹ Justice Marshall expressed concern about allowing *Robinson* to become a "wide-ranging new constitutional principle"⁶⁰ under which "a person may not be punished if the condition essential to constitute the defined crime is part of the pattern of his disease and is occasioned by a compulsion symptomatic of the disease."⁶¹ This con-

56. *Id.* at 519–20.

57. *Id.* at 520.

58. *See id.* at 532–37.

59. *See id.* at 532 ("The State of Texas thus has not sought to punish a mere status, as California did in *Robinson* Rather, it has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards, both for appellant and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community. This seems a far cry from convicting one for being an addict, being a chronic alcoholic, being mentally ill, or a leper" (quoting *Robinson v. California*, 370 U.S. 660, 666 (1962) (internal quotation marks omitted))).

60. *Id.* at 521.

61. *Id.* (quoting *id.* at 569 (Fortas, J., dissenting)).

cern was based partially on the fact that the medical community had not agreed on whether alcoholism was a disease that caused uncontrollable compulsions⁶² and partially on the fear that precluding punishment in favor of treatment would have large social costs without actually improving the problem of alcoholism in society.⁶³ Justice Marshall also argued that if Powell could use this defense, there was no principled way of preventing defendants with other compulsions from using it to defend more serious crimes.⁶⁴

But there is a hidden majority—four dissenting Justices and Justice White—who supported a slightly broader constitutional rule proscribing the punishment for involuntary acts, not just the punishment for being in a status.⁶⁵ While these opinions do not agree regarding whether Powell had control over his actions,⁶⁶

62. *Id.* at 522–24.

63. *Id.* at 529 (“Yet the medical profession cannot, and does not, tell us with any assurance that, even if the buildings, equipment and trained personnel were made available, it could provide anything more than slightly higher-class jails for our indigent habitual inebriates. Thus we run the grave risk that nothing will be accomplished beyond the hanging of a new sign—reading ‘hospital’—over one wing of the jailhouse.”).

64. *Id.* at 534 (“If Leroy Powell cannot be convicted of public intoxication, it is difficult to see how a State can convict an individual for murder, if that individual, while exhibiting normal behavior in all other respects, suffers from a ‘compulsion’ to kill, which is an ‘exceedingly strong influence,’ but ‘not completely overpowering.’ Even if we limit our consideration to chronic alcoholics, it would seem impossible to confine the principle within the arbitrary bounds which the dissent seems to envision.” (footnote omitted)).

65. See *Jones v. City of Los Angeles*, 444 F.3d 1118, 1133 (9th Cir. 2006) (“[A]s five Justices would later make clear in *Powell*, *Robinson* also supports the principle that the state cannot punish a person for certain conditions, either arising from his own acts or contracted involuntarily, or acts that he is powerless to avoid.”), *vacated*, 505 F.3d 1006 (9th Cir. 2007). But see JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 9.04[C] (4th ed. 2006) (“None of the justices involved in *Powell* still sit on the bench. In light of the more conservative nature of the present-day Supreme Court, it is foolhardy to assume that today’s high court would constitutionalize a voluntariness requirement . . . if the proper case came along. Therefore, the only safe proposition [is that *Powell* and *Robinson* require at least involuntary conduct by the defendant.]”); Recent Case, *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), 120 HARV. L. REV. 829, 832 (2007) (“The [Ninth Circuit] should have heeded Justice Marshall’s warning that unless the Eighth Amendment’s protections are confined to status, there can be no principled way to limit the scope of those protections, or else it should have proven Justice Marshall wrong by articulating some other conception of Eighth Amendment involuntariness that excludes most of what seems uncontroversially criminal.” (footnote omitted)).

66. In his concurrence, Justice White was not convinced of Powell’s inability to go out in public: “For the purposes of this case, it is necessary to say only that Powell showed nothing more than that he was to some degree compelled to drink and that he was drunk at the time of his arrest. He made no showing that he was unable to stay off the streets on the night in question.” *Powell*, 392 U.S. at 553–54 (White, J., concurring). Compare this to the dissenting opinion, which accepted as fact that Powell was a chronic alcoholic who “cannot resist the constant excessive consumption of alcohol.” *Id.* at 570 (Fortas, J., dissenting) (internal quotation marks omitted).

they agree on the general principle that uncontrollable actions could not be the basis for constitutional punishment.⁶⁷

C. Implications of *Robinson* and *Powell*

Powell adheres to the theory of tracing to justify punishment. While Powell may not have had control over the actions that immediately led to the crime, his responsibility can be traced to the moment when he voluntarily consumed the alcohol that led to the intoxicated state in which he acted criminally: appearing drunk in a public place. This method of ascribing criminal responsibility to an intoxicated individual can be represented as follows:⁶⁸

- (1) Agent A did something x without control at t₁;
- (2) A performed action y with control at t₀;
- (3) A's action y at t₀ made A have property P; and,
- (4) P explains why A lacked control at t₁ and why A did x.⁶⁹

Both the *Powell* dissenters and Justice White seem to employ this approach to moral responsibility by focusing their reasoning on these factors. They came to different conclusions because they parted ways on the factual issues of whether Powell controlled the action of taking his first drink (action y) while he was sober, and whether his subsequent crime of appearing drunk in public (x) could be traced back to the decision to take a first drink.⁷⁰

67. See *id.* at 548–49 (White, J., concurring) (“Punishing an addict for using drugs convicts for addiction under a different name. Distinguishing between the two crimes is like forbidding criminal conviction for being sick with flu or epilepsy but permitting punishment for running a fever or having a convulsion. Unless *Robinson* is to be abandoned, the use of narcotics by an addict must be beyond the reach of the criminal law. Similarly, the chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or for being drunk.”); *id.* at 567 (Fortas, J., dissenting) (“*Robinson* stands upon a principle which, despite its subtlety, must be simply stated and respectfully applied because it is the foundation of individual liberty and the cornerstone of the relations between a civilized state and its citizens: Criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change.”).

68. See Matt King, *Traction Without Tracing: A (Partial) Solution for Control-Based Accounts of Moral Responsibility*, EUR. J. PHIL. (forthcoming 2013) (manuscript at 1–2), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-0378.2011.00502.x/pdf> (articulating the canonical approach to tracing and suggesting an alternative model that would explain moral responsibility for drunk drivers in terms of negligence and recklessness).

69. *Id.* (manuscript at 2).

70. The dissenters found that Powell was unconstitutionally punished because he could not “resist the constant excessive consumption of alcohol and [did] not appear in public by his own volition but under a compulsion which is part of his condition.” *Powell*, 392 U.S. at 570 (Fortas, J., dissenting) (internal quotation marks omitted).

But it is questionable whether Powell's decision to take a first drink was entirely under his control.⁷¹ As I discuss below, an addict's ability to control his compulsion to use a drug is reduced but likely not to the point where he loses all control. For a narrow subset of drug addicts, I argue that this loss of control is significant enough to warrant different treatment under the law, especially given the concerns about punishing uncontrollable actions associated with drug addiction in both *Robinson* and *Powell*.

These two decisions suggest that punishment of the involuntary actions of drug addicts and alcoholics is unconstitutional. *Robinson* requires the statute to criminalize a particular action: Being a drug addict or an alcoholic is not enough to face criminal sanctions. In *Powell*, the dissenters and Justice White agree that a defendant could be punished only if there was at least one traceable voluntary action. This hidden majority in *Powell* parted ways on whether Powell's decision to take his first drink was voluntary or involuntary.

According to the above schema, if an individual is not able to control action *y* (injecting narcotics or drinking alcohol) that leads to state *P* (intoxication or drunkenness), then the punishment is not justified. This principle is a challenging one and, at first blush, is one that is difficult to apply. After all, how does one define voluntariness? Since both cases involve individuals who had incomplete but not entirely diminished control of their actions, the facts of the decisions do not provide much guidance.

It is troubling that Powell would face criminal charges but Robinson would not, since both individuals seem to have about the same level of control over their ability to abstain from using drugs. Both individuals had a dependence on a chemical (Robinson on narcotics, Powell on alcohol), combined with an inability to cease all consumption. If Powell had not taken the stand and stumbled during cross-examination, and had instead rested on the expert testimony that said he had no control over appearing drunk in public, would he have escaped punishment?⁷² That Powell faced criminal sanctions leads to the disturbing inference that he was punished based on his inability to articulate his lack of control.

It is perhaps more worrisome that a nonaddict defendant in Powell's position might escape criminal punishment when he did have some control over his actions just by pointing to the fact that he used drugs frequently. As evidenced by both *Robinson* and *Powell*, it is difficult to determine at what point an individual has

71. It is also interesting to consider that the relevant timepoint should have been at the beginning of his 40-year struggle with alcohol when Powell voluntarily decided to drink enough to trigger his alcoholism. See *infra* note 85; see also *Robinson*, *supra* note 47, at 403 (“[Powell] traced his drinking back over a period of forty years . . .”).

72. See *Powell*, 392 U.S. at 519–20.

switched from being a frequent drug user to an addict with a severely diminished level of control over drug consumption. Since all individuals are driven by differing motivations and desires, Powell's overwhelming compulsion to consume drugs might be hard to distinguish from another defendant's mere desire to use drugs or, even more troubling, another defendant's overwhelming desire to embezzle, rape, or murder.⁷³ A broad interpretation of *Robinson* is potentially dangerous because this slippery slope leads to a dismantling of the justice system's ability to protect the public from dangerous individuals and combat pressing social problems.⁷⁴

When a judge makes a decision on a close case similar to *Powell* or *Robinson*, the cost of an erroneous ruling is high—either an individual is branded a criminal for actions beyond his control, or public safety is threatened as a potentially dangerous individual is released into society. This dilemma is in part caused by the criminal law's inability to recognize the gray area between voluntary and involuntary acts. There is currently no middle road for a judge to take, even though the addictions that plagued Robinson and Powell are not fairly characterized as entirely voluntary or entirely involuntary. Since classifying these acts as involuntary would lead to no criminal liability, the compulsions of addicts go ignored to preserve public safety.

This Comment aims to balance the desire to avoid punishing individuals for actions that are the product of drug addiction with the preservation of the criminal law. To accomplish this goal, this Comment promotes the recognition of a semi-voluntary act classification. This will provide a path for judges to take when dealing with drug-addicted defendants who have lost most of their control over the ability to stop using drugs and who have committed crimes while intoxicated. This category allows judges to recognize the concerns articulated in *Robinson* and affirmed in *Powell* regarding administering punishments to addicts who will not be deterred by the punishment and could not control their criminal behavior—without sacrificing social safety or the government's ability to combat drug usage.

73. *See id.* at 545 (Black, J., concurring) (“[E]ven if we were to limit any holding in this field to ‘compulsions’ that are ‘symptomatic’ of a ‘disease,’ . . . the sweep of that holding would still be startling. . . . A wide variety of sex offenders would be immune from punishment if they could show that their conduct was not voluntary but part of the pattern of a disease.”).

74. *See id.* at 533 (plurality opinion) (“[U]nless *Robinson* is . . . viewed [as a mere prohibition on the criminalization of status] it is difficult to see any limiting principle that would serve to prevent this Court from becoming . . . the ultimate arbiter of the standards of criminal responsibility . . . throughout the country.”).

II. CONTEMPORARY UNDERSTANDING OF DRUG ADDICTION

Drug addiction continues to be a hotly debated topic among scientists. There is no consensus on any one theory of addiction—and a comprehensive discussion of the nature of drug addiction is beyond the scope of this Comment—but a few salient points can be drawn from the existing research: (1) Drug addicts represent a small subset of drug users for whom the choice to use drugs is drastically different from that of nonaddicts; (2) advances in science are approaching the point where drug addiction can be objectively identified; (3) the compulsion to use drugs is traceable to a rewiring of the brain that changes the way an individual makes choices; and (4) drug addiction can potentially be treated. Much more research is needed to truly understand drug addiction. However, enough progress has been made to seek reform for how the criminal justice system treats drug addicts.

The definition of “drug addiction” is much debated among those who study the phenomenon.⁷⁵ Some uses of the term are broad and implicate all individuals who frequently use drugs.⁷⁶ For purposes of this Comment, “drug addict” is defined as an individual who has suffered a rewiring of his brain that compels him to value using drugs at the expense of other physical, social, or legal consequences. This definition relies on objective evidence of addiction, not on the user’s subjective experience.⁷⁷ A number of biological indicators associated with drug addiction⁷⁸ can potentially serve as objective markers of a drug addict.⁷⁹ Additionally, brain-scanning technology, although still in its infancy,⁸⁰ can detect lesions in reward cen-

75. For the purposes of this Comment I use the term “drugs” loosely to include any substance that can potentially cause both intoxication and addiction. This term could encompass alcohol, some types of prescription drugs, and illicit drugs such as heroin, cocaine, LSD, amphetamines, and barbiturates.

76. See, e.g., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 175–272 (4th ed. 1994); WORLD HEALTH ORG., THE ICD-10 CLASSIFICATION OF MENTAL AND BEHAVIOURAL DISORDERS: DIAGNOSTIC CRITERIA FOR RESEARCH (1993); see also Wise, *supra* note 11, at 118 (“There has been, and there remains, substantial disagreement among experts as to what constitutes an adequate definition of addiction.”).

77. Part of the difficulty with defining drug addiction concretely is that definitions are often based on the subjective feelings of the user. This kind of a definition would be far too difficult to apply and would lend itself to abuse by defendants who were drug users but not drug addicts.

78. Altman et al., *supra* note 7, at 321–22 (reviewing a number of physical characteristics including variations in heart rate, galvanic skin response, and blood platelet composition that can be associated with different types of drug addiction).

79. See Nora D. Volkow & Ting-Kai Li, *Drug Addiction: The Neurobiology of Behaviour Gone Awry*, 5 NATURE REV. NEUROSCIENCE 963, 964 fig.1 (2004) (showing “images of the brain . . . in a healthy control and in an individual addicted to a drug” that reveal pronounced differences in the addicted brain versus the healthy brain).

80. See, e.g., Teneille Brown & Emily Murphy, *Through a Scanner Darkly: Functional Neuroimaging as Evidence of a Criminal Defendant’s Past Mental States*, 62 STAN. L. REV. 1119 (2010) (warning of the dangers of employing functional magnetic resonance imaging (fMRI) technology in criminal trials).

ters of the brain that are common to individuals who have a skewed reward structure from the repeated use of drugs.⁸¹

These individuals experience intense cravings and drastically reduced ability to control their consumption of drugs.⁸² I do not venture as far as to say that drug addicts have lost control over their ability to abstain from drugs in the same way that an epileptic loses control over their bodily functions during a seizure. Were this the case, these actions would be clearly involuntary and the defendant should be absolved of all criminal liability for actions performed while intoxicated. Instead, I take the position that some individuals who can be classified as drug addicts have lost a sufficient degree of control to warrant different treatment under the law.

A. What Causes Drug Addiction?

Although much about addiction is still unknown, the advances in our understanding in recent years have been dramatic.⁸³ Today we understand that drug

But, it should be noted that while fMRI measures a fleeting mental state, evidence of drug addiction would be more durable and could be detected by structural magnetic resonance imaging.

81. See Rita Z. Goldstein & Nora D. Volkow, *Drug Addiction and Its Underlying Neurobiological Basis: Neuroimaging Evidence for the Involvement of the Frontal Cortex*, 159 AM. J. PSYCHIATRY 1642 (2002); Nora D. Volkow et al., *Role of Dopamine, the Frontal Cortex and Memory Circuits in Drug Addiction: Insight From Imaging Studies*, 78 NEUROBIOLOGY LEARNING & MEMORY 610, 614 (2002) (comparing brain images of drug abusers and control subjects and marking a notable difference in receptors associated with natural reward centers); Murat Yücel & Dan I. Lubman, *Neurocognitive and Neuroimaging Evidence of Behavioural Dysregulation in Human Drug Addiction: Implications for Diagnosis, Treatment and Prevention*, 26 DRUG & ALCOHOL REV. 33, 35 (2007) (demonstrating a difference in the brains of drug addicts and healthy control subjects when both undertake the performance of a cognitive interference task). However, note that this technology is effective at comparing two different populations of individuals: drug addicts and non-drug addicts. While promising for future use, this technology has not yet developed to the point of being able to classify a single individual as either a drug addict or a non-drug addict definitively.
82. See Altman et al., *supra* note 7, at 287 (“Addiction is restricted to the extreme or psychopathological state where control over drug use is lost. Dependence refers to the state of needing a drug or drugs to function within normal limits; it is often associated with tolerance and withdrawal, and with addiction as defined above.” (emphasis omitted)); Camí & Farré, *supra* note 10, at 975 (“Drug addiction is a chronic, relapsing disorder in which compulsive drug-seeking and drug-taking behavior persists despite serious negative consequences.”); Barry J. Everitt & Trevor W. Robbins, *Neural Systems of Reinforcement for Drug Addiction: From Actions to Habits to Compulsion*, 8 NATURE NEUROSCIENCE 1481, 1485 (2005) (“Crucial to drug addiction is the persisting quality of these habits, which has been likened to the subjective state of ‘wanting’, but which we would suggest corresponds more obviously to the subjective state of ‘must do!’—although this subjective response could arise *post hoc* as a rationalization of the ‘out-of control’ habitual behavior rather than being the driving influence.” (footnote omitted)); Leshner, *supra* note 9, at 1314 (“While addiction traditionally has been thought of as simply using a lot of drugs or as just physical dependence on a drug, advances in both science and clinical practice have revealed that what matters most in addiction is often an uncontrollable compulsion to seek and use drugs.”).
83. Since the formation of the National Institute on Drug Abuse in 1974, there has been a definitive identification of the specific proteins that interact with the chemicals of almost every major drug of

addiction is a disorder caused by many factors: chronic use of a drug, genetics, age, personality, and the prevalence of the drug in the individual's environment.⁸⁴

Chronic drug use is almost always a necessary factor for the development of drug addiction. Addiction develops through several stages: initial use,⁸⁵ recreational use, and dependent use.⁸⁶ The most extreme stages of dependent use are considered addiction.⁸⁷ As Alan Leshner articulates in his review of literature regarding the treatment of drug addiction, "Although the onset of addiction begins with the voluntary act of taking drugs, the continued repetition of voluntary drug taking begins to change into involuntary drug taking, ultimately to the point that the behavior is driven by a compulsive craving for the drug."⁸⁸

Not all individuals who use drugs become dependent on them or develop addictions.⁸⁹ Characteristics of the substance can contribute to the development of an addiction. For example, a substance that reaches the brain quickly and gives the

abuse. See Eric J. Nestler, *Historical Review: Molecular and Cellular Mechanisms of Opiate and Cocaine Addiction*, 25 *TRENDS PHARMACOLOGICAL SCI.* 210, 211 (2004) (listing the particular protein transporters and receptors targeted by opiates, cocaine, amphetamine, ethanol, nicotine, cannabinoids, phencyclidine, and hallucinogens that have been characterized in the past thirty years).

84. See *supra* notes 7–10.

85. First drug use often occurs during adolescence. *E.g.*, Fernando A. Wagner & James C. Anthony, *From First Drug Use to Drug Dependence: Developmental Periods of Risk for Dependence Upon Marijuana, Cocaine, and Alcohol*, 26 *NEUROPSYCHOPHARMACOLOGY* 479, 481, 482 & fig.1 (2002). This is not surprising given the slow development of the ability to assess risk or control impulse in the brain. See L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations*, 24 *NEUROSCIENCE & BIOBEHAVIORAL REV.* 417 (2000). This initial use of drugs might be a relevant time point for finding criminal liability, since this is almost always a voluntary choice. However, since the initial use often occurs long before the criminal behavior in question has been committed and the individual is unable to foresee the potential harm of his actions, it is not clear that this could fairly be used as a relevant voluntary act for tracing purposes. See Manuel Vargas, *The Trouble With Tracing*, 29 *MIDWEST STUD. PHIL.* 269, 270 (2005) ("Real-world assessments of responsibility can, of course, be considerably more complicated [W]e might think it matters whether [a defendant] was free and responsible for having acquired his addiction.").

86. See Altman et al., *supra* note 7, at 287.

87. See generally *id.* ("The path through dependence to addiction in humans has been characterized as occurring in several key epochs or stages, although progress from one to the next is not inevitable. The first stage is initiation or acquisition, which may lead to heavy, habitual use, dependence and sometimes loss of control.").

88. Leshner, *supra* note 9, at 1314.

89. See THE DRUG ABUSE COUNCIL, *THE FACTS ABOUT "DRUG ABUSE"* 5–6 (1980) ("While the use of psychoactive drugs is pervasive, misuse is much less frequent. . . . This is particularly true in the case of illicit drugs. For example, while millions of [young Americans] have experimented with various drugs and many use some of them regularly, clearly the majority exercises personal restraint or obeys social controls in drug-taking behavior. To state this in another way, the number of young Americans who are in serious personal difficulty because of the misuse of drugs is relatively small." (emphasis omitted)).

user an intense high is more likely to be abused and eventually lead to addiction than a less potent drug.⁹⁰

Genetics are also an important factor in the development of a drug addiction.⁹¹ Many genes have been implicated as potentially contributing to addiction to specific drugs,⁹² and others have been associated with addiction in general.⁹³ Because the possibility of genetic predisposition to addiction exists, individuals who are addicted to one substance also exhibit a higher likelihood of being addicted to other illicit substances.⁹⁴

Many drug addicts also have a mental illness.⁹⁵ The drug addiction and the associated mental illness often share a cyclical relationship in which each condi-

-
90. Dorothy K. Hatsukami & Marian W. Fischman, *Crack Cocaine and Cocaine Hydrochloride: Are the Differences Myth or Reality?*, 276 JAMA 1580, 1582 (1996).
91. See Crabbe, *supra* note 8; Uhl & Grow, *supra* note 8.
92. See, e.g., HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 3527 (Dan Longo et al. eds., 18th ed. 2011) ("Genes that promote risk for addiction have begun to emerge from large family and populations studies, but all genes identified to date represent only a very small fraction of the overall genetic risk for addiction. The best established susceptibility loci are regions on chromosomes 4 and 5 containing GABA_A receptor gene clusters linked to alcohol use disorders and the nicotinic acetylcholine receptor gene cluster on chromosome 15 associated with nicotine and alcohol dependence."); Mary Jeanne Kreek, *Drug Addictions: Molecular and Cellular Endpoints*, 937 ANNALS N.Y. ACAD. SCI. 27, 41 (2001) (identifying a genetic variant that is "close to possibly being associated with opioid dependency"); Ming D. Li & Margit Burmeister, *New Insights Into the Genetics of Addiction*, 10 NATURE REV. GENETICS 225 (2009); Anne Emilia Tammimäki & Pekka T. Männistö, *Are Genetic Variants of COMT Associated With Addiction?*, 20 PHARMACOGENETICS & GENOMICS 717, 717 (2010) ("It is unlikely that there would be any single gene that could be designated as 'the addiction gene.' Rather, there seems to be a great number of genes that are associated with addiction . . .").
93. See, e.g., Ernest P. Noble, *D2 Dopamine Receptor Gene in Psychiatric and Neurologic Disorders and Its Phenotypes*, 116B AM. J. MED. GENETICS (NEUROPSYCHIATRIC GENETICS) 103 (2003) (identifying a gene linked to multiple kinds of drug use including alcoholism, nicotine addiction, illicit drug abuse, and polydrug use); Jack C. Sipe et al., *A Missense Mutation in Human Fatty Acid Amide Hydrolase Associated With Problem Drug Use*, 99 PROC. NAT'L ACAD. SCI. U.S. 8394 (2002) (identifying one gene mutation that contributes to an increased likelihood of addiction to both recreational drugs and alcohol).
94. See Altman et al., *supra* note 7, at 288 ("Most addicts seeking treatment have a preference for one drug but many will consume a great variety."); Richard R. Clayton, *Multiple Drug Use: Epidemiology, Correlates, and Consequences*, in 4 RECENT DEVELOPMENTS IN ALCOHOLISM 7, 18–28 (Marc Galanter ed., 1986) (presenting data on the extent of multiple drug use); Francesco Leri et al., *Understanding Polydrug Use: Review of Heroin and Cocaine Co-use*, 98 ADDICTION 7, 8 (2003).
95. See R. Andrew Chambers et al., *Neonatal Amygdala Lesions: Co-occurring Impact on Social/Fear-Related Behavior and Cocaine Sensitization in Adult Rats*, 121 BEHAVIORAL NEUROSCIENCE 1316, 1316 (2007) ("Substance use disorder comorbidity in mental illness spans differential psychiatric diagnoses and drugs of abuse. In many treatment settings, these 'dual diagnosis' presentations are the majority of cases, associated with increased medical and psychiatric morbidity and mortality, financial destitution, and criminal incarceration"); Leshner, *supra* note 9, at 1314 (noting that such individuals are "often more challenging for the clinician" and tend to use drugs to self-medicate their underlying disorder); Markou et al., *supra* note 9, at 136.

tion exacerbates the other.⁹⁶ These individuals tend to use drugs in an attempt to self-medicate, and they get stuck in a cycle that becomes harder and harder to reverse or control.⁹⁷

B. Understanding a Drug Addict's Compulsion to Use Drugs

Drug addicts who pursue the consumption of drugs at the expense of their health, finances, and the wellbeing of loved ones are often difficult to empathize with. For a judge or jury to get inside the mind of a drug addict requires understanding this mysterious and self-destructive compulsion that has no analog for nonaddicts.

Fortunately, neuroscience research has not only provided deep insights into how drug addiction is developed but is approaching the point of describing how it is experienced. While each drug is different in its effects, the addictive components are regulated by a common brain mechanism: the dopamine pathway.⁹⁸ This pathway is the body's natural mechanism for reinforcing positive behavior and is necessary to survival and reproduction.⁹⁹ The feeling of joy that one gets from eating a new and delicious food while hungry, hearing a moving piece of music, laughing at a particularly funny joke, drinking a refreshing glass of water, reaching orgasm, or falling in love is partly caused by the release of the chemical dopamine.¹⁰⁰ The body regulates this pathway carefully, releasing enough dopa-

96. See David J. Kavanagh et al., *Substance Misuse in Patients With Schizophrenia: Epidemiology and Management*, 62 *DRUGS* 743, 746 (2002).

97. See *Comorbid Drug Abuse and Mental Illness*, NAT'L INST. ON DRUG ABUSE, <http://www.drugabuse.gov/sites/default/files/comorbid.pdf> (last updated Oct. 2007) (“[R]esearch shows that mental disorders can increase vulnerability to subsequent drug abuse and that drug abuse constitutes a risk factor for subsequent mental disorders.”); see also Bethany Phoenix Kasten, *Self-Medication With Alcohol and Drugs by Persons With Severe Mental Illness*, 5 *J. AM. PSYCHIATRIC NURSES ASS'N* 80, 80 (1999); Edward V. Nunes & Frederic M. Quitkin, *Treatment of Depression in Drug-Dependent Patients: Effects on Mood and Drug Use*, in *TREATMENT OF DRUG-DEPENDENT INDIVIDUALS WITH COMORBID MENTAL DISORDERS* 61, 61 (Lisa Simon Onken et al. eds., 1997), available at http://archives.drugabuse.gov/pdf/monographs/monograph172/061-085_Nunes.pdf.

98. See Volkow & Li, *supra* note 79, at 964. Although the dopamine pathway is the best-characterized brain pathway in the field of drug addiction, there are many others that affect the development of drug addiction. See, e.g., Nestler, *supra* note 83, at 214 (reviewing research that “confirmed the importance of the VTA-NAc pathway as a major rheostat of reward, and further emphasized the key roles played by related limbic circuits . . . in controlling the particularly long-lived features of addiction that are central to relapse.”).

99. See Wise, *supra* note 11, at 119 (“[P]ositive reinforcers are stimuli that elicit a variety of species-typical, biologically primitive reactions, including eating, drinking, copulation, nest building, and others.”).

100. See Camí & Farré, *supra* note 10, at 980 (“Both natural rewards (food, drink and sex) and addictive drugs stimulate the release of dopamine from neurons of the presynaptic ventral tegmental area into

mine to give the feeling of euphoria in small doses—just enough to develop memories that will encourage the individual to seek out these experiences in the future.¹⁰¹

Now imagine the most intense euphoria generated by these aforementioned experiences multiplied five to tenfold.¹⁰² This is the feeling that some first-time drug users experience when their brains are flooded with dopamine.¹⁰³ The chemicals in the drug work to override the human brain's carefully wired system of rewards to give an overwhelmingly positive feeling.¹⁰⁴ This feeling lasts longer and is of much greater intensity than any positive reinforcement created by the natural release of dopamine.¹⁰⁵

Overriding the brain's natural reward system results in serious damage that dulls the user's ability to experience joy from natural positive reinforcement,¹⁰⁶ and over time the user requires more and more of the drug to experience the same pleasurable effects.¹⁰⁷ The drug addict's neurological reward system becomes drastically reordered. While nonaddicts are motivated by the natural dopamine release that has primed us to survive and reproduce, the drug addict's brain places these goals far below the goal of obtaining more drugs. Each use of the drug teaches the brain that the drug is a source (and eventually the only source) of happiness, and a powerful craving begins to develop.¹⁰⁸ This craving is the result of a memory of

the nucleus accumbens, causing euphoria and reinforcement of the behavior.”); Gaetano Di Chiara, *Drug Addiction as Dopamine-Dependent Associative Learning Disorder*, 375 EUR. J. PHARMACOLOGY 13 (1999).

101. See Camí & Farré, *supra* note 10, at 980.

102. See Wise, *supra* note 11, at 120–21 (describing how drugs increase dopamine levels in the brain).

103. See *id.* While all drugs of abuse affect the dopamine pathway, the degree of this effect varies depending on the drug. See Camí & Farré, *supra* note 10, at 980–81 (reviewing the mechanisms of opioids, cannabinoids, ethanol, cocaine and amphetamines, and other substances).

104. “If drugs of abuse activate positive reinforcement mechanisms directly and centrally, they may do so with much greater intensity than can ever be summoned by environmental stimuli like food, water, or the reinforcing beauty of nature, art, or music.” Wise, *supra* note 11, at 127; see also Terry E. Robinson & Kent C. Berridge, *Incentive-Sensitization and Addiction*, 96 ADDICTION 103 (2001).

105. See Wise, *supra* note 11, at 127.

106. “To the degree that drug reinforcers compete successfully with more natural reinforcers, they constitute a serious risk to health and to social institutions as we know them. They have the potential to seduce us from what is good for us, and they can do so without satisfying either a normal or an acquired physiological need.” *Id.*

107. See George F. Koob & Michel Le Moal, *Drug Abuse: Hedonic Homeostatic Dysregulation*, 278 SCIENCE 52, 53 (1997).

108. See Wise, *supra* note 11, at 125 (“Cravings based on the positive reinforcing effects of a drug will vary in strength with the memories for past reinforcements; these memories, in turn, will vary with the presence of secondary reinforcing stimuli or drug-associated incentives in the environment. They will remain long after any temporary discomfort associated with the physiological rebound effects that define physiological dependence syndromes.”).

the positive feelings that the drug created and was able to imprint on the brain, and it lasts for years after the user has stopped using drugs.¹⁰⁹

Continued drug use has severe side effects. Many drugs have a parallel negative reinforcement mechanism, which causes discomfort and even pain when the user abstains.¹¹⁰ As users progress in the spiral downward toward addiction, they experience less of the positive feeling created by the drug and more of the negative feeling of not having enough. Eventually, the user must use drugs merely to escape the extreme discomfort of withdrawal.¹¹¹

To make matters worse, many drugs affect the portion of the brain responsible for cognition and restraining compulsions.¹¹² This impairs the addict's ability to recognize that his actions are self-destructive. Even when he does come to this realization, his ability to resist the impulse to use drugs is drastically reduced.¹¹³

C. Can Drug Addiction Be Treated?

Individuals who develop addictions find it "almost impossible . . . to stop the spiraling cycle of addiction on their own without treatment."¹¹⁴ Fortunately, drug addiction is a treatable condition.¹¹⁵ Not only can treatment benefit the individual, it also reduces the amount of crime committed by drug users.¹¹⁶ With outside

109. *See id.*

110. *See generally* HARRISON'S PRINCIPLES OF INTERNAL MEDICINE, *supra* note 92, at 3526–27 ("[W]hen drug intake is terminated abruptly, a withdrawal syndrome emerges. Withdrawal from alcohol or other sedative-hypnotics causes nervous system hyperactivity, whereas withdrawal from psychostimulants produces fatigue and sedation."); Thomas R. Kosten & Patrick G. O'Connor, *Management of Drug and Alcohol Withdrawal*, 348 *NEW ENG. J. MED.* 1786 (2003) (describing the physical manifestations of various types of withdrawal syndrome); Eric J. Nestler, *Molecular Basis of Long-Term Plasticity Underlying Addiction*, 2 *NATURE REV. NEUROSCIENCE* 119 (2001) (describing certain molecular changes that could contribute to the nearly permanent changes in behavior associated with addiction).

111. *See* George F. Koob & Michel Le Moal, *Drug Addiction, Dysregulation of Reward, and Allostasis*, 24 *NEUROPSYCHOPHARMACOLOGY* 97, 111 (2001).

112. *See* Teresa R. Franklin et al., *Decreased Gray Matter Concentration in the Insular, Orbitofrontal, Cingulate, and Temporal Cortices of Cocaine Patients*, 51 *BIOLOGICAL PSYCHIATRY* 134 (2002); Goldstein & Volkow, *supra* note 81; Nora D. Volkow & Joanna S. Fowler, *Addiction, a Disease of Compulsion and Drive: Involvement of the Orbitofrontal Cortex*, 10 *CEREBRAL CORTEX* 318 (2000).

113. *See* Steven E. Hyman & Robert C. Malenka, *Addiction and the Brain: The Neurobiology of Compulsion and Its Persistence*, 2 *NATURE REV. NEUROSCIENCE* 695, 696 (2001).

114. Leshner, *supra* note 9, at 1315.

115. *See id.* at 1314 ("There is a widespread misperception that drug abuse treatment is not effective, which may account for the reluctance of physicians to even broach the subject of drug abuse or treatment with their patients.")

116. *See* Mireia Joffe-Bonet & Jody L. Sindelar, *Drug Treatment as a Crime Fighting Tool*, 4 *J. MENTAL HEALTH POL'Y & ECON.* 175, 187 (2001) ("Our findings broadly suggest that drug treatment may be an effective crime-fighting tool. Treatment reduces not only the crime of drug possession, but also crime-for-profit. Current public policy emphasizes use of the criminal justice system, and

assistance, a drug addict can become a productive member of society¹¹⁷ and avoid diseases associated with drug use, such as HIV.¹¹⁸

To be successful, drug treatment needs to be tailored to the particular needs of the individual.¹¹⁹ The best treatment programs constantly monitor and assess the progress of individuals as they struggle with overcoming their addictions.¹²⁰ Because drug cravings can be triggered by stimuli associated with drug use long after the withdrawal effects are experienced, the best treatment programs involve long-term monitoring of patients as they experience repeated spikes in cravings triggered by their surroundings.¹²¹

III. REFORMING CRIMINAL LAW TO AVOID OVERPUNISHMENT AND HARM TO SOCIETY

Currently, the criminal law favors binary distinctions when it comes to drug users and intoxication. Acts are considered either voluntary or involuntary, and the former receives punishment while the latter typically does not. Similarly, intoxication is considered either voluntary or involuntary, with only the limited distinction of involuntary intoxication as a viable defense.¹²² Because of these black-and-white distinctions, drug addicts whose criminal acts are something less than voluntary are overpunished. Conversely, individuals who are involuntarily intoxicated by a drug that does not render their actions entirely involuntary are underpunished. To avoid these incongruities, the current doctrines of *actus reus*

incarceration in particular, as a mechanism to combat crime. Given the huge and growing expense of the criminal justice system, drug treatment might be a policy to expand relative to incarceration for some drug users.”).

117. See D. Dwayne Simpson & Barry S. Brown, *Treatment Retention and Follow-Up Outcomes in the Drug Abuse Treatment Outcome Study (DATOS)*, 11 *PSYCHOL. ADDICTIVE BEHAV.* 294, 300–03 (1997).
118. See David S. Metzger & George E. Woody, *Drug Abuse Treatment as AIDS Prevention*, 113 *PUB. HEALTH REP. (SUPPLEMENT 1)* 97 (1998) (observing that intravenous drug users who remain in treatment are much less likely to contract HIV than those who do not get treatment).
119. See Leshner, *supra* note 9, at 1314 (“Of course, not all drug abuse treatments are equally effective, and there is no single treatment appropriate for all patients.”); see also *id.* at 1315 (listing the components of comprehensive addiction treatment).
120. *Id.* at 1316; see also ANGELA HAWKEN & MARK KLEIMAN, *MANAGING DRUG INVOLVED PROBATIONERS WITH SWIFT AND CERTAIN SANCTIONS: EVALUATING HAWAII’S HOPE* (2009), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/229023.pdf> (finding that a program that employs frequent monitoring and swift and immediate—but not severe—sanctions was effective at ensuring compliance with probation orders imposed on drug abusers).
121. See Camí & Farré, *supra* note 10, at 983.
122. See sources cited *infra* note 153.

and intoxication should be supplemented by Deborah Denno's conception of semi-voluntariness.¹²³

A. Actus Reus: Binary Notions of Voluntariness

Despite the near-universal actus reus requirement that an individual can be punished only for criminal behavior that involves at least one "voluntary act or . . . omission to perform an act of which he is physically capable,"¹²⁴ the definition of "voluntariness" is far from settled.¹²⁵ The Model Penal Code (MPC) defines voluntariness negatively by setting forth paradigmatic involuntary acts:

- actions caused by a reflex or convulsion,
- actions performed while unconscious or asleep,
- actions performed while under hypnosis,
- any other action that is not "a product of the effort or determination of the actor, either conscious or habitual."¹²⁶

Acts that are not on the list are presumed to be voluntary. These exceptions were included by the drafters of the MPC out of a desire to adopt the most up-to-date understanding of human psychology and science;¹²⁷ unfortunately, this formerly

123. See Denno, *supra* note 12, at 361–63.

124. MODEL PENAL CODE § 2.01(1) (1962); see also WAYNE R. LAFAVE, CRIMINAL LAW § 6.1(c) (4th ed. 2003); Deborah W. Denno, *A Mind to Blame: New Views on Involuntary Acts*, 21 BEHAV. SCI. & L. 601, 604 (2003) ("In the United States, the criminal law's voluntary act requirement, while rooted in English history, has been particularly shaped by the American Law Institute's Model Penal Code. Many American law professors view the Model Penal Code as the 'principal text' in reaching criminal law because the Code's impact on American law has been so pervasive." (citation omitted)); Denno, *supra* note 12, at 354–55 (arguing that the voluntary act requirement is a basic principle of the criminal law on which other doctrines are built, that it protects Eighth Amendment rights to be free of cruel and unusual punishment, and that it gives the public clear notice of what behavior can be punished).

125. See Denno, *supra* note 12, at 281–82 ("In sum, there is no clear consensus on how states implement a voluntary act requirement, although most states have one designated explicitly."); see also FREEDOM AND RESPONSIBILITY: READINGS IN PHILOSOPHY AND LAW 106 (Herbert Morris ed., 1961); LAFAVE, *supra* note 124, § 6.1(c) ("Just what is meant by the term 'voluntary' has caused the theorists considerable difficulty."); Denno, *supra* note 12, at 277–82 (discussing how various states treat the "voluntary act requirement").

126. MODEL PENAL CODE § 2.01(2); see also Denno, *supra* note 12, at 288 ("Although the MPC explains that these examples emphasize 'conduct that is within the control of the actor,' it provides little additional guidance and is otherwise vague. For example, the MPC Commentaries never discuss what would constitute a 'conscious' bodily movement and do not define the term 'unconsciousness,' preferring to leave such interpretations to the courts." (footnote omitted)). *But see* State v. Case, 672 A.2d 586, 589 (Me. 1996) (adopting a more restrictive list of involuntary actions including "the result of reflex, convulsion, or other act over which a person has no control").

127. See Denno, *supra* note 12, at 287 ("The MPC's voluntary act requirement . . . was impressively progressive in its attempt to incorporate the science of the times when the MPC was developed (the 1950s) and later when its Commentaries were updated in the 1970s.").

cutting-edge research is now out of date.¹²⁸ More recent research reveals that even some of these exceptions are not entirely involuntary, but they are also not entirely voluntary.¹²⁹

Decades of research have revealed that myriad human actions do not fit neatly into the binary notions of voluntary and involuntary or conscious and unconscious but rather exist on a spectrum.¹³⁰ To adjust criminal law doctrine to fit this contemporary understanding of voluntary acts and consciousness, Denno presented a novel third category: semi-voluntary acts. Denno created this concept to allow for a more just treatment of individuals who act with a degree of control that cannot be accurately described as either voluntary or involuntary. “Semi-voluntary acts would include two main groups of individuals: those who acted involuntarily or semi-voluntarily but demonstrate the potential to be dangerous again . . . , and those who acted semi-voluntarily but appear to have relatively greater control over their behavior than ‘true’ involuntary actors.”¹³¹ Without the semi-voluntary act option, judges must choose to label the ambiguous act as voluntary and risk punishing an individual who does not deserve it or to label the act as involuntary and risk endangering society by releasing a potentially dangerous individual.¹³² The

-
128. *Id.* (“[T]he failure to revise the MPC further has resulted in an antiquated provision that reflects the ‘modern’ science of the 1950s, not the modern science of today.”); *id.* at 300–01 (“Many references in the MPC Commentaries that depict the voluntary act requirement draw upon psychoanalytic, medical/legal, and philosophical literature published four to six decades ago, primarily between the 1940s and 1960s” (footnotes omitted)).
129. *See, e.g.*, GLANVILLE WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 12 (2d ed. 1961) (“[Sleepwalking] is a difficult case, because the conduct of a sleep-walker may be purposive (though not recollected on waking)”); A. McCall Smith & C.M. Shapiro, *Sleep Disorders and the Criminal Law*, in *FORENSIC ASPECTS OF SLEEP* 29, 32 (Colin Shapiro & Alexander McCall Smith eds., 1997); Mike Horn, Note, *A Rude Awakening: What to Do With the Sleepwalking Defense?*, 46 B.C. L. REV. 149, 154 (2004) (“Researchers also disagree about the clinical classification of sleepwalking as automatism, which is a non-reflex act without conscious volition.”); *see also* Stephen LaBerge, *Lucid Dreaming: Psychophysiological Studies of Consciousness During REM Sleep*, in *SLEEP AND COGNITION* 109, 110, 115 (Richard R. Bootzin et al. eds., 1990) (using physiological evidence to verify the phenomenon of “lucid dreaming,” where the sleeping subject is “continuously conscious during the transition from wakefulness to sleep”).
130. *See* BERNARD J. BAARS, *A COGNITIVE THEORY OF CONSCIOUSNESS* 12 fig.1.1 (1988); JOHN R. SEARLE, *THE MYSTERY OF CONSCIOUSNESS* 5 (1997); JOHN G. TAYLOR, *THE RACE FOR CONSCIOUSNESS* 28–31 (1999).
131. Denno, *supra* note 12, at 361 (footnote omitted).
132. *See id.* at 360; Stephen J. Morse, *Diminished Rationality, Diminished Responsibility*, 1 OHIO ST. J. CRIM. L. 289, 295–96 (2003) (“The capacity for rationality, the ‘hardness’ of choice, and the capacity for control are all continuum concepts. Nonetheless, with precious few exceptions, present criminal law contains doctrinal all-or-nothing, bright line tests: the defendant was or was not legally insane; the defendant did or did not act under duress. Moreover, the criteria for such tests tend to be quite narrow, allowing few defendants to succeed with an excuse. Lesser rationality or control problems, or less grievous threats, may be considered only as a matter of discretion at sentencing.”).

semi-voluntary act category would enable judges to make more nuanced determinations regarding the voluntariness of a given act.¹³³

Denno does not endorse the extension of the semi-voluntary act category to actions driven by drug addiction: “[T]here must be some limits on the reach of the meaning of the word ‘control’ so that it cannot include such out of control behavior as addiction or dangerous sexual offenses.”¹³⁴ However, Denno’s unqualified exclusion of drug addicts ignores the concerns raised in *Robinson*¹³⁵ and *Powell*.¹³⁶ If jurors are given the option to apply the semi-voluntary act label in some cases, it seems odd to deny them the opportunity to hear evidence on compulsion rooted in addiction or even in sexual deviancy. Denno’s theory generally advocates for a more rigorous examination of the internal causes of behavior to avoid prejudgments on behavior that is poorly understood by both society and science. By excluding addiction and sexual deviancy, Denno’s proposal is perhaps more palatable, but it is robbed of the flexibility that makes it so compelling.

Denno’s stance on drug addiction deviates from her progressive views on the capacity for sleepwalkers,¹³⁷ those with brain cysts,¹³⁸ those suffering from encephalitis,¹³⁹ and even some individuals who have consumed “legal, therapeutic drugs (apart from alcohol)” to engage in voluntary acts.¹⁴⁰ Each of these conditions leads to behavior that in the past was considered deserving of punishment.¹⁴¹ With a better understanding of these conditions, the criminal law has

133. See Denno, *supra* note 12, at 290 (“In terms of establishing liability . . . the voluntary act requirement’s all-or-nothing approach is unusual and artificially categorical. Typically, criminal law doctrine assesses liability according to hierarchical categories or ‘degrees,’ such as the four levels of culpability.”).

134. *Id.* at 359 (footnote omitted).

135. *Robinson v. California*, 370 U.S. 660 (1962).

136. *Powell v. Texas*, 392 U.S. 514 (1968).

137. See Denno, *supra* note 12, at 366–69 (arguing that because a defendant’s behavior was categorized as a “gray area” that it should be classified as semi-voluntary to “preclude an unqualified acquittal . . . , but, at the same time, avoid the injustice of putting [him] in an institution for the criminally insane”); *id.* at 369–72; see also *supra* note 129.

138. See Denno, *supra* note 12, at 377–81.

139. *Id.* at 381–84.

140. *Id.* at 374–77 (“Unlike alcohol, taking therapeutic psychotropic drugs can often have unforeseeable effects that involve changes in people’s conscious levels of awareness as well as their circumstances.”).

141. Throughout American history, many of the conditions that Denno mentions have been viewed as the result of a moral failing and treated with punishment. See *Robinson v. California*, 370 U.S. 660, 668 (1962) (Douglas, J., concurring) (discussing past treatment of those with mental illness); CHARLES A. KIESLER & CELESTE G. SIMPKINS, *THE UNNOTICED MAJORITY IN PSYCHIATRIC INPATIENT CARE* 13 (1993) (describing the practice in a Colonial American mental hospital where the mentally ill “were chained to the wall in bolted prison cells in the cellar, and the cell keeper regularly carried a whip and used it freely”). Even what is now recognized as a rare form of encephalitis has recently been linked to what was once considered demonic possession.

come to treat them as factors that reduce blame, and Denno's semi-voluntary act distinction reduces the chance that an individual with one of these conditions would be unjustly punished. Scientific understanding of drug addiction is compelling enough that it should similarly allow a factfinder to seriously consider whether some actions of drug addicts should be treated as semi-voluntary.

One of Denno's concerns about allowing actions spurred by drug addiction to be classified as semi-voluntary acts is that these individuals have "[chosen] to consume a drug."¹⁴² In the case of true addicts, it is not at all clear that this choice is made in the same way that it was before they became addicts.¹⁴³ The choice to become an addict is often far removed from the criminal behavior, and its connection with the criminal behavior is considerably attenuated. While recreational use of a drug is often necessary for drug addiction, it is but one factor in the development of drug addiction.¹⁴⁴ An individual who chooses to use drugs recreationally does not choose to become an addict. If the law were to trace the criminal behavior of an addict to the voluntary choice to first consume a drug, it could end up tracing back many years to an individual to whom the specific criminal activity was a remote possibility.¹⁴⁵

Another distinction between drug addiction and the conditions that Denno highlights is the fact that drug addiction is linked primarily to behavior related directly to drug consumption—purchasing, possessing, and ingesting the drug of choice.¹⁴⁶ By contrast, a condition like sleepwalking is more of a general unconsciousness. As discussed below, this Comment limits the application of the semi-voluntary act designation to acts that are directly attributable to a defendant's drug addiction.¹⁴⁷ Thus applied, the semi-voluntary act category seems well suited to addressing particular acts associated with drug addiction: Its more nuanced caveats concerning the nature of control greatly reduce both the public-safety

Guillaume Sebire, *In Search of Lost Time From "Demonic Possession" to Anti-N-Methyl-D-Aspartate Receptor Encephalitis*, 67 ANNALS NEUROLOGY 141, 141–42 (2010). Those suffering from this form of encephalitis would have faced stigma for their illness since demonic possession among some Christians has been associated with the sinfulness of the possessed. See, e.g., MALACHI MARTIN, HOSTAGE TO THE DEVIL: THE POSSESSION AND EXORCISM OF FIVE CONTEMPORARY AMERICANS xx (1992) ("[E]ven in the worst conditions, no person can be Possessed without some degree of cooperation on his or her part. It is extremely important to be aware of at least some of the factors that are likely to facilitate collaboration between a possessing demon and the Possessed.").

142. Denno, *supra* note 12, at 374.

143. While most drug addicts were once recreational users who made the choice to start using drugs voluntarily, these past choices are often far removed, and thus harder to trace. See *supra* Part II.B.

144. See *supra* Part II.B.

145. See, e.g., Robinson, *supra* note 47, at 403 (discussing Leroy Powell's decades-long struggle with alcohol addiction).

146. See *supra* Part II.B.

147. See *infra* Part IV.

concern attached to full exoneration of drug addicts and the risk of unconstitutionally punishing those who lack significant control of their actions.

B. Intoxication Defense: Binary Notions of Intoxication¹⁴⁸

Under the common law, intoxication can be a complete defense against specific intent crimes.¹⁴⁹ The Supreme Court held in *Montana v. Egelhoff*,¹⁵⁰ however, that a court may forbid a defendant from presenting evidence of voluntary intoxication.¹⁵¹ The line between involuntary and voluntary acts in the case of intoxication is clearer than it is in the actus reus context and excludes most instances where an individual consumes an intoxicating substance with knowledge of its effects.¹⁵² This typically excludes evidence of intoxication of chronic alcoholics and narcotic addicts even though they have a diminished ability to foresee the negative effects of their consumption.¹⁵³

In light of the concerns presented by *Robinson* and *Powell*,¹⁵⁴ the *Egelhoff* rule ought to change. But merely expanding the involuntary intoxication doctrine to include intoxicated drug addicts is not the answer. Although a majority of the Justices in *Powell* found it unconstitutional to punish acts that were intrinsic to the condition of being a drug addict, it is not clear that intoxicated behavior fell

148. This Comment uses the term intoxication to include any mental impairment caused by an illicit drug.

149. LAFAVE, *supra* note 124, § 9.5(a) (“Intoxication is a defense to crime if it negatives a required element of the crime; and this is so whether the intoxication is voluntary or involuntary.” (footnote omitted)).

150. 518 U.S. 37 (1996).

151. In *Egelhoff*, the defendant was found guilty of murdering his drinking buddies. *Id.* at 41 (plurality opinion). The trial court forbade the jury from considering his extreme intoxication (he possessed a 0.36 percent blood alcohol content over an hour after his arrest) when determining whether or not the defendant had the necessary mens rea to be convicted under the Montana murder statute. *Id.* at 40–41. The defendant contested the judge’s ruling on the intoxication issue, and the U.S. Supreme Court held that the defendant did not have a due process right to present evidence of his voluntary intoxication. *Id.* at 56. The Court reasoned that since the inclusion of evidence regarding a defendant’s voluntary intoxication was not deeply rooted in the common law, states should be granted sufficient flexibility to determine “doctrines of actus reus, mens rea, insanity, mistake, justification, and duress.” *Id.* at 56.

152. Involuntary intoxication is usually limited to situations in which the individual has mistakenly ingested a substance he or she did not know to be intoxicating, has become intoxicated under duress, has become intoxicated by a substance prescribed by a doctor, or has taken an amount of the intoxicant that he or she did not know would cause an adverse reaction. LAFAVE, *supra* note 124, § 9.5(g).

153. *Id.* (“The mere fact the defendant is an alcoholic or addict is not sufficient to put his intoxicated or drugged condition into the involuntary category.” (footnotes omitted)); *see also* *Hernandez v. Johnson*, 213 F.3d 243 (5th Cir. 2000); *Evans v. State*, 645 P.2d 155 (Alaska 1982); *See v. State*, 757 S.W.2d 947 (Ark. 1988); *State v. Palacio*, 559 P.2d 804 (Kan. 1977); *State v. Cote*, 560 A.2d 558 (Me. 1989); *Commonwealth v. Sheehan*, 383 N.E.2d 1115 (Mass. 1978); *State v. Bishop*, 632 S.W.2d 255 (Mo. 1982).

154. *See supra* Part I.

into this category. Justice White argued in his concurrence that actions that are the foreseeable result of the intoxication should not be free from punishment, because the defendant could have taken steps to avoid this behavior.¹⁵⁵

Even if extreme alcoholism or drug addiction became a category of involuntariness, the problems posed by a binary notion of voluntariness would still exist. The exact nature of alcoholism and addiction is elusive and difficult for nonaddicts to understand, and it may be difficult for judges to sympathize with an addict's compulsion.¹⁵⁶ Judges would be forced to make all-or-nothing decisions about individuals whose mental state did not quite fit into the category of either voluntary or involuntary intoxication.

This Comment supports extending Denno's concept of semi-voluntariness to the intoxication doctrine. Just as the acts compelled by drug addiction—ingesting the drug for example—would be considered semi-voluntary, so too would the intoxicated behavior that followed. This extension of the intoxication doctrine would allow judges to recognize the impaired nature of addicts while avoiding a complete exoneration of an individual who could cause harm to society. This proposal would also have the benefit of not upending the jurisprudence on intoxication or allowing it to function as a complete defense against some criminal charges.

IV. PROCEDURAL FRAMEWORK FOR SEMI-VOLUNTARY ACTS

Professor Denno did not define a procedure for handling semi-voluntary acts.¹⁵⁷ In this Part, I offer a procedural framework for how a defendant would use the semi-voluntary act category as an affirmative partial defense. To derive the elements of this defense, I have used the tracing doctrine to illustrate a scenario where a drug addict defendant (D) is charged with committing a crime (x) at t_1 after becoming intoxicated at t_0 .

- (1) D did x without control at t_1 ;
- (2) D was addicted to drugs and consumed these drugs at t_0 ;
- (3) D's consumption of drugs at t_0 made D become intoxicated; and,

155. See *Powell v. Texas*, 392 U.S. 514, 551–52 (1968) (White, J., concurring) (“It is also possible that the chronic alcoholic who begins drinking in private at some point becomes so drunk that he loses the power to control his movements and for that reason appears in public. The Eighth Amendment might also forbid conviction in such circumstances, but only on a record satisfactorily showing that it was not feasible for him to have made arrangements to prevent his being in public when drunk and that his extreme drunkenness sufficiently deprived him of his faculties on the occasion in issue.”).

156. See *supra* Part II.B.

157. Denno, *supra* note 12, at 388 (“This Article offered no recommendations concerning how these three-part categories should be handled procedurally because that topic, while very important, is fodder for a much larger inquiry than can be handled here.”).

- (4) The intoxication explains why D lacked control at t_1 and why D did x.

This framework focuses the factfinder's attention on three relevant questions: (1) Is the defendant's consumption of drugs semi-voluntary because it was driven by drug addiction? (2) Was the intoxication that stemmed from this consumption not voluntary? And (3) was the criminal act performed while the defendant was intoxicated?

If these questions can be answered in the affirmative, the link between the crime and the defendant's last voluntary choice is too tenuous to justify punishment under the tracing doctrine. This is because there are no voluntary acts proximal to the criminal activity, merely semi-voluntary and involuntary acts that I argue are insufficient for a guilty verdict. In these cases, I advocate for the application of a verdict of not guilty but responsible as an appropriate description of the criminal liability an individual should face for semi-voluntary acts. This label will promote a more just punishment for drug addicts, preserve societal safety, and promote better understanding of the effects of various drugs and their relation to crime.

It should be noted that a finding of semi-voluntariness is not a negation of criminal liability in the same way that a finding of involuntariness would be.¹⁵⁸ As Denno implied, the semi-voluntary act label would provide a middle path—not the full punishment that would be associated with voluntary acts, but not the full exoneration that would be associated with involuntary acts.¹⁵⁹ Also, it would not necessarily trigger the application of civil commitment associated with a finding of insanity.¹⁶⁰ Judges would be relieved of the pressure of having to classify the choices of drug addicts as voluntary or involuntary.¹⁶¹

One danger of introducing the semi-voluntary act designation is that because voluntariness is such a nebulous concept,¹⁶² all human actions could conceivably be moved into the semi-voluntary act category, thus upending the criminal law.¹⁶³ While an understanding of consciousness should inform the crafting of all criminal law, I attempt to define only a small set of actions by a subset of drug users that

158. See *supra* Part III.A.

159. See Denno, *supra* note 12, at 286 (advocating for the semi-voluntary framework because the current binary approach results in “an unqualified acquittal if someone is determined to have acted involuntarily, or prolonged institutionalization if they are determined to be insane. Even graver, it can result in a death sentence or a lengthy incarceration if the defendant is found to have acted voluntarily” (footnote omitted)).

160. See *id.*

161. See *id.* (describing the concerns that judges have when considering voluntariness).

162. See *supra* note 130.

163. See David Eagleman, *The Brain on Trial*, ATLANTIC, July/Aug. 2011, <http://www.theatlantic.com/magazine/archive/2011/07/the-brain-on-trial/8520/2/#> (envisioning a criminal justice system of tailored punishment for all individuals based on their particular brain chemistry and structure).

would trigger the verdict of not guilty but responsible. For my purposes, semi-voluntary acts would be limited to those suffering from drug addiction, not merely to those who frequently use drugs.

A. Semi-Voluntary Acts Driven by Drug Addiction

The use of certain chemicals is forbidden as a matter of law. Crimes of public intoxication, possession, and inebriation are usually petty, and they do not carry a large prison term. For addicted individuals like Leroy Powell, however, repeated arrests and convictions carry a great burden. Drug addiction at its most basic level is the inability to resist the compulsion to use these addictive substances.¹⁶⁴

To prove that the semi-voluntary act label should apply to actions associated with drug addiction, the individual needs first to prove to the factfinder that he suffers from a drug addiction as opposed to merely using drugs frequently.¹⁶⁵ This requirement assures that those benefitting from this label will be the type of people for whom incarceration or fines are not effective deterrents. It also sets an important check on judicial overreaching, since without this requirement the doctrine could serve as a tool for judges to circumvent drug laws that they disagree with.¹⁶⁶

The modern understanding of addiction has allowed for the collection of more convincing evidence of an addiction than Powell was able to demonstrate. While the testimony of clinical experts would still be important, objective evidence such as genetic analysis and MRI data may bolster a defendant's argument that he is addicted to a drug. The burden that the defendant would have to meet would depend on the type of addiction he was trying to prove. If the defense implicates a highly physically addictive substance such as heroin or cocaine, there should be a lesser showing required than for substances commonly thought to be less physically addictive, such as marijuana or khat.¹⁶⁷

164. See *supra* Part II.B.

165. Defendants should be able to present any probative and relevant evidence regarding their drug addiction, including their own testimony, eyewitness statements, expert testimony, MRI data, relevant physical traits that are recognized as being associated with drug addiction, and genetic traits that are associated with addiction. See *supra* notes 85–88, 96, 100 and accompanying text. This evidence would be limited by the factors set out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). But see Frederick Schauer, *Can Bad Science Be Good Evidence? Neuroscience, Lie Detection, and Beyond*, 95 CORNELL L. REV. 1191 (2010) (arguing that although a technique or technology might not yet yield high-quality results for scientists, it might be reliable enough for legal purposes).

166. See JAMES P. GRAY, *WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT: A JUDICIAL INDICTMENT OF THE WAR ON DRUGS* (2001) (identifying numerous judges across the United States who have serious misgivings about the current U.S. drug policy).

167. See David Nutt et al., *Development of a Rational Scale to Assess the Harm of Drugs of Potential Misuse*, 369 LANCET 1047 (2007).

Evidence that the defendant previously planned to commit the criminal behavior—as opposed to having just planned to consume drugs—would be enough to prevent the defendant from raising this claim in the semi-voluntary intoxication context. Engaging in planning would presumably be voluntary and would be enough for a finding of guilt under the tracing schema. In this case, the use of drugs would not be the cause of the criminal behavior.

A factual finding of drug addiction to an intoxicating substance would establish that the drug use at t_0 was a semi-voluntary act and therefore not sufficient to justify punishment for later criminal behavior via the tracing doctrine.

B. Semi-Voluntary Intoxication

A great number of crimes are committed by individuals who are under the influence of drugs or alcohol.¹⁶⁸ Even actions less grotesque than those committed by Rudy Eugene can be disturbing and challenging to deal with since intoxicated defendants can cause terrible harm to others. Under the tracing theory, we justify punishing intoxicated individuals because, while their criminal actions may not have been voluntary, their choice to use the drugs that can be traced to the crime was voluntary.

While the first step of the inquiry focuses on the effect of addiction, this step requires the factfinder to examine the nature of the effect the drug has on the defendant. A defendant who wishes to apply the semi-voluntary label to his intoxicated actions would have to prove that his intoxication put him in either an involuntary or a semi-voluntary state. The evidence would have to demonstrate that the intoxication that the individual experienced caused impairment in his ability to control his actions and resulted in the criminal behavior. While the first step of the analysis would focus on the addictive properties of the drug in question, this step would focus on the intoxicating qualities of the substance.¹⁶⁹ A factual finding that the intoxication produced a semi-voluntary state would establish that the criminal behavior committed at t_1 was semi-voluntary.

168. CHRISTOPHER J. MUMOLA & THOMAS P. BONCZAR, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: SUBSTANCE ABUSE AND TREATMENT OF ADULTS ON PROBATION, 1995 (1998), <http://bjs.ojp.usdoj.gov/content/pub/pdf/satap95.pdf> ("In the first national survey of adults on probation, conducted in 1995, nearly 70% of probationers reported past drug use; 32% said they were using illegal drugs in the month before their offense; and 14% were on drugs when they committed their offense.").

169. See Nutt et al., *supra* note 167.

C. Intoxication at the Time of the Crime

The final element of this affirmative defense would be whether the defendant was intoxicated at the time of committing the criminal act. Once a defendant establishes that he suffers from a drug addiction, and that this drug causes an intoxicated state that impairs his judgment, he must then show that he was intoxicated by this drug while committing the crime. This is the most straightforward of the three questions, since it would be proven by toxicology reports after the fact¹⁷⁰ and by observations of law enforcement officials at the time of the defendant's arrest. This type of evidence is currently used in court to determine that an individual was intoxicated at the time of a crime.

D. Not Guilty But Responsible: A Verdict for Semi-Voluntary Acts

The three possible verdicts for criminal defendants are guilty, not guilty, and not guilty by reason of insanity. Stephen Morse has proposed a fourth verdict, guilty but partially responsible.¹⁷¹ Morse's label fits nicely with Denno's proposal of a semi-voluntary act classification since it proposes a process that addresses situations in which an individual has reduced culpability but perhaps not enough to warrant a complete exoneration. This Comment draws on Morse's proposal to craft a novel iteration: the not guilty but responsible verdict.

Morse's verdict was designed to protect against the danger of overpunishing individuals who have a diminished capacity to reason and control their actions but who do not reach the level of mental impairment required for the verdict of not guilty by reason of insanity.¹⁷² His proposal has two requirements: first, that the individual be "non-culpably impair[ed]," and second, that the defendant's impairment affected his practical reasoning concerning the crime charged.¹⁷³ Morse envisions this to be a partial affirmative defense¹⁷⁴ that would result in a fixed sentence reduction set by the legislature.¹⁷⁵

170. See e.g., Craig Freudenrich, *How Breathalyzers Work*, HOWSTUFFWORKS.COM, <http://electronics.howstuffworks.com/gadgets/automotive/breathalyzer.htm> (last visited Mar. 23, 2013).

171. Morse, *supra* note 132, at 299.

172. See *id.* at 305 ("Mental disorder, however, is not the only cause of non-culpable rationality impairments. Stress, grief, fatigue, and low intelligence not amounting to retardation, for example, may also non-culpably cause impairments.").

173. *Id.* at 300–02.

174. *Id.* at 302 (leaving the question open as to whether the state or the individual would bear the burden of persuasion).

175. *Id.* at 303–04 ("It is crucial, however, that the reduction should be legislatively fixed and not left to judicial discretion. . . . Adoption of GPR would at least have the virtue of forcing sentencing judges to reduce sentences when the jury, the representative of the community, has decided that mitigation

Morse states that “voluntary ingestion of mind-altering substances, including ethanol (alcohol), is culpable and would not furnish the basis for mitigation.”¹⁷⁶ But he leaves to “legislative judgment or the common law process to identify which rationality-diminishing factors would be justified.”¹⁷⁷ Morse is correct in his argument that a sentence that lies somewhere between guilty and not guilty should be limited by the individual’s culpability in order to prevent defendants from making bogus and fraudulent claims of mental illness to escape just punishment. In the case of drug addicts, however, the consumption of drugs can no longer be fairly characterized as voluntary. Certainly in most cases, drug addiction began with voluntary usage. But by the time drug addiction has developed, the last voluntary usage is too temporally removed from the crime to bootstrap culpability.¹⁷⁸ Therefore, addicted individuals should be able to benefit from a middle-road affirmative defense.

But there are flaws with how Morse’s proposal would treat semi-voluntary acts. Since the individual is still declared guilty and incarcerated, Morse’s proposal does not reduce the social stigma of the defendant’s impairment.¹⁷⁹ This is particularly problematic for drug addicts, as the stigma of drug addiction causes a variety of real harms by way of retributive punishment: (1) drug convictions prevent poor drug addicts¹⁸⁰ from receiving government aid,¹⁸¹ (2) even brief periods of incarceration for drug use can cause the breakdown of the family unit,¹⁸² and (3) incarceration for drug use contributes to gender and racial inequality in society.¹⁸³

is appropriate. Nonetheless, leaving the amount of reduction entirely to judicial discretion would produce private and usually unprincipled sentences.”)

176. *Id.* at 301. Elsewhere Morse has stated his reluctance to extend mitigation to those who suffer from drug addiction. See Stephen J. Morse, *Culpability and Control*, 142 U. PA. L. REV. 1587 (1994).

177. Morse, *supra* note 132, at 301.

178. The principles that underlie the statute of limitations bolster this argument: While a voluntary act may have taken place a long time ago, the value of retribution fades over time and the deterrent effect is not as pronounced for a punishment that takes place long after the crime took place.

179. See Morse, *supra* note 132, at 304 (“Would GPR reduce stigma as well as reducing punishment? The GPR proposal would find a defendant guilty of the crime charged, but simply less responsible. It is therefore possible that stigma reduction would not ensue.”).

180. Drug use is particularly common among the poor. See Volkow & Li, *supra* note 79, at 965.

181. KAARYN S. GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY 55 (2011) (“The federal welfare legislation encourages states to adopt rules excluding adults with drug felony convictions from receiving aid. . . . In fifteen states, including California, all drug-related charges—from possession of small quantities to major trafficking—will disqualify an individual from welfare receipt for life.”).

182. Individuals who have an unstable family life are at a higher risk to start using drugs. See Volkow & Li, *supra* note 79, at 965.

183. Women have increasingly been incarcerated for drug-related offenses. RITA J. SIMON & HEATHER AHN-REDDING, THE CRIMES WOMEN COMMIT: THE PUNISHMENTS THEY RECEIVE 73 (2005) (“[W]omen have been disproportionately subjected to some of the harshest and most punitive criminal sentencing policies ever implemented over the past century. The recent trend in

Additionally, the stigma prevents the development of an effective medical treatment for drug addiction.¹⁸⁴

The second problem with applying Morse's verdict to drug addicts is that while the mechanistic reduction of incarceration may fit the level of culpability, it does not address the danger posed to society. While the statement that "the criminal justice system ought to bear the reasonable costs of adjudication and society should bear the costs of some increase in threat"¹⁸⁵ is academically sound, it ignores the practical pressures a judge will face when determining the fate of a potentially dangerous individual. As Denno cautions, judges are strongly influenced by the fear that an individual may go on to harm society, even if he lacks culpability for an involuntary act.¹⁸⁶ Morse's proposal of merely reducing the time spent in prison would fail to get at the root problem of drug addiction and would merely pass individuals through the system faster.

For the application to semi-voluntary acts, I propose the creation of a verdict of not guilty but responsible. This would differ from Morse's guilty but partially responsible verdict in two major ways: First, it would more aggressively aim to reduce the stigma associated with punishment for drug addiction. Second, instead of a mechanistic reduction in incarceration, it would call on the judge to work with probation officers and medical specialists to craft an effective treatment schedule to which the individual would have the responsibility of adhering.¹⁸⁷ The individual would be forced to take full responsibility for their addiction and the harm that he caused. This would mean that the individual would not have to go to prison, but he would have to submit to a tailored and effective treatment program that

draconian laws that were designed to deter and incapacitate criminals or would-be criminals has nearly tripled the number of women incarcerated for drug offenses."). Since poor black mothers are often the sole caretakers of their children, even a short-term incarceration can result in a breakdown of the remaining stability to these families. See Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1481 (2012) ("Locking up black mothers transfers racial disadvantage to the next generation."). These children are then at a higher risk to start using drugs and developing their own addiction, furthering the cycle that the incarceration was meant to break.

184. Although there are several medications that are being used to help treat various types of addictions, pharmaceutical companies are slow to develop new treatments—in large part because of the stigma attached to the disorder. See Volkow & Li, *supra* note 79, at 969.

185. Morse, *supra* note 132, at 305.

186. Denno, *supra* note 12, at 360.

187. *But see* Transcript of Oral Argument at 21–22, *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (No 10-9646) ("Well, I thought that modern penology has abandoned that rehabilitation thing, and they—they no longer call prisons reformatories or whatever, and punishment is the—is the criterion now. Deserved punishment for crime.").

might last longer than a prison sentence would otherwise.¹⁸⁸ The most dangerous individuals would have to submit to more restrictions and surveillance. They would also be required to pay any restitution to victims.¹⁸⁹

This inquiry could be similar to the efforts of current drug courts.¹⁹⁰ While only a small-scale effort, these courts have shown some promise for reducing recidivism among defendants.¹⁹¹ This Comment aims for a similar kind of inquiry into the defendant's drug problem and the role drugs played in the commission of crimes. The work done in drug courts would be invaluable in fashioning a verdict broadly applicable to all criminal courts. Notably, one important difference from drug courts is that this proposed verdict would be limited on the basis of a defendant's drug addiction rather than on whether his alleged crime was violent or nonviolent.¹⁹²

V. POTENTIAL OBJECTIONS

The first major objection to this proposal is that it may expose society to the threat of the drug-addicted defendants who would be advancing this defense. Since many not guilty but responsible individuals would not serve the prison terms they otherwise would have received if they were found guilty, there is a risk that these individuals could harm society. These concerns can be answered in two ways: First, the treatment requirement for applications of not guilty but responsible would be directly tied to the level of danger the individual posed to the public. The most dangerous individuals might be kept in isolation until a probation of-

188. This might deter some drug addicts from raising this affirmative defense since they might prefer to serve out a shorter sentence for a minor drug infraction than seek the more involved treatment over a longer term.

189. Typically, poor drug addicts will be unable to make these payments. But they have a much better chance of making payments if they are not incarcerated and if treatment is effective since this would increase the likelihood of obtaining and holding a job.

190. However, while drug courts can inform the development of what to do with a defendant once he has been found not guilty but responsible, they do not challenge the underlying criminal doctrine as this Comment does. This Comment argues that the legal community should not only rethink how we sentence drug-addicted defendants but also question the concept of voluntariness that underlies a determination of criminal culpability.

191. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-219, ADULT DRUG COURTS: EVIDENCE INDICATES RECIDIVISM REDUCTIONS AND MIXED RESULTS FOR OTHER OUTCOMES 7 (2005), available at <http://www.gao.gov/new.items/d05219.pdf>.

192. Christine A. Saum et al., *Violent Offenders in Drug Court*, 31 J. DRUG ISSUES 107, 108 (2001) ("Many drug court programs are considered diversionary programs where first-time and less serious offenders are actually diverted away from the correctional system into treatment. These individuals are given what could be considered a second chance; if the conditions of the drug court program are met, their charges will be dropped. Violent offenders, on the other hand, are often treated differently because of the way in which they are perceived by the public, legislatures, and the criminal justice system.").

ficer empowered by the court found them no longer to be a threat to the community. These individuals would be isolated for treatment, and the treatment would typically last longer than for a less-dangerous individual. Second, by shortening the incarceration periods for non-dangerous defendants, this verdict will provide a benefit to society by allowing these individuals to transform into productive, law-abiding citizens.¹⁹³

Some will likely object that this proposal will endanger society by reducing general deterrence for drug use and criminal activity. Because some drug addicts would be able to avoid prison time for actions that outwardly appear to be criminal, others may lose respect for the law and may be less deterred from using drugs or committing other crimes. However, the high burden of proof will restrict this defense only to drug addicts rather than to frequent drug users, and therefore there will be enough individuals who are punished for drug usage and for other criminal behavior that it is not likely to change drastically the deterrent effect of the law. Additionally, the condition of the people who suffer from this drug addiction is likely to be so pitiable that it is not likely to change the deterrent effect of the law.

Another objection may be that the availability of this verdict would increase bogus claims of semi-voluntary acts, so individuals who frequently used drugs could escape punishment by feigning a drug addiction. Fortunately, given research on brain-scanning technology and objective markers of drug addiction, this would be exceedingly difficult to do. These claims could be dismissed at a motion in limine or independently verified by a court-appointed expert.

Finally, this proposal is vulnerable to criticism because it is likely to be costly if adopted now. Until courts become familiar with the mechanisms of a particular drug, a factual showing necessary for each of the elements of the not guilty but responsible verdict will be difficult to establish. It will likely require expert testimony and laboratory tests. Additionally, many drug-addicted defendants will be indigent and might not be able to afford to advance a partial defense that relies on costly information. This Comment merely provides a starting point, however, from which courts and legislators can fashion a fully workable doctrine; the focus of this proposal is to hew closely to a scientific understanding of drug addiction rather than cost cutting. It is my hope that scientific understanding of drug addiction will advance along with the actus reus doctrine to provide faster, cheaper, and easier methods to identify drug addicts and to understand the voluntariness associated with different types of addiction and intoxication.

193. See, e.g., HAWKEN & KLEIMAN, *supra* note 120.

CONCLUSION

Since this Comment proposes a partial affirmative defense potentially available to dangerous individuals, it is worth reexamining the Rudy Eugene case. This will demonstrate how the not guilty but responsible verdict would work for the kind of defendant that might cause the most fear. It is highly unlikely that Rudy Eugene would be able to advance this defense successfully, and even if he did, he would not pose a threat to society.

First, Eugene would have to prove that he was addicted to a drug. He would have to prove that he was more than just a frequent user of a drug. He could potentially do this by proffering a combination of clinical experts and brain scans showing severe damage to the regions of his brain responsible for impulse control. Genetic tests could strengthen an argument that he was predisposed to a drug addiction. Eugene could bolster his case by arguing that the drug that he was addicted to tended to cause severe addictions. This would establish the first element that he was a drug addict.

Second, Eugene would have to demonstrate that the drug he was addicted to had intoxicating properties and that he was susceptible to becoming intoxicated. Pharmacological research about the drug's effects, combined with testimony about how he behaved after using the drug would shed light on the nature of his intoxication. Family members and friends who observed him after he used drugs, police officers at the scene of the crime, and even Eugene himself could all supply valuable information about Eugene's level of cognition while using the drug.

Finally, Eugene would have to demonstrate that he committed the crime while intoxicated with the drug to which he was addicted. Toxicology tests and the findings of law enforcement specialists at the scene of the crime could prove this.

The prosecution could counter his claim that he was entitled to a not guilty but responsible verdict by proffering any evidence of a relevant voluntary act. One such example would be any evidence that Eugene was lucid while committing the crime. Even more damning would be evidence that Eugene had planned the crime while he was not intoxicated. The evidence of lucidity or the evidence of prior planning would indicate the presence of a voluntary act sufficient to find guilt under the tracing schema.

In the unlikely event that Eugene could prove each of these elements, he would be eligible for the verdict of not guilty but responsible. A court would require Eugene to receive drug treatment—likely in a supervised facility—until it could be verified that he was no longer a danger to society. Once Eugene completed this stage of his treatment, a representative of the state would closely moni-

tor Eugene for the rest of his life to make sure that he was no longer using drugs and would be encouraged to rejoin the workforce and pay restitution to his victim.

With this framework, even in the most extreme cases of drug addicts acting abhorrently, judges have the option both to protect the public and to avoid unfairly punishing semi-voluntary acts associated with drug addiction.