DETERMINISM AND THE DRUG ADDICTION DEFENSE TO CRIMINAL PROSECUTION

I
INTRODUCTION

A drug addiction defense has been receiving increasing recognition as an excusing condition[1] in the criminal law for almost two decades. In 1962, the Supreme Court first acknowledged a version of the defense in *Robinson v. California*.[2] In *Robinson* the defendant had been charged not with an act but with addiction itself. The Supreme Court struck down the California statute criminalizing drug addiction, holding that to punish a mere status or involuntary act violated the eighth amendment cruel and unusual punishment clause.[3] In the line of cases following *Robinson*,[4] some courts expanded the *Robinson* holding into a broad drug addiction defense, and others strictly limited it. The post-*Robinson* decisions considered the question of addiction as a defense to certain addiction-related actions by the defendant, including possession and use of narcotics, trafficking in narcotics, and appearing in public while intoxicated.

Each decision in the *Robinson* line, however, was flawed by one or both of two false assumptions: (1) that moral responsibility requires an in-dwelling agent called the will, acting freely; and (2) that moral responsibility is compatible with a wholly causal explanation of human behavior, an assumption labeled by theorists, "soft determinism." The two assumptions lie on a philosophical spectrum running from the in-dwelling agent or "free will" theory through soft determinism to "hard" determinism (or "determinism"). As one moves along the spectrum from the in-dwelling agent theory to hard determinism, the role of free choice in human action diminishes while the role of causal control increases.

Determinism holds that for every human action there exists a complete causal explanation, or a list of the events which caused or "determined" the action. In other words, according to the theory, neither "free will" nor moral responsibility exists, because both the most enlightened and the most depraved

---

1. The excusing conditions recognized by a legal system express in negative form the mental conditions required by the system for criminal responsibility. H.L.A. HART, *Legal Responsibility and Excuses*, in PUNISHMENT AND RESPONSIBILITY 28 (1968).

2. 370 U.S. 660 (1962). Isolated earlier cases considering such a defense exist, however. *E.g.*, People v. Lim Dum Dong, 26 Cal. App.2d 135, 78 P.2d 1026 (1938); Prather v. Commonwealth, 215 Ky. 714, 287 S.W. 559 (1926).

3. *See* text accompanying notes 13-18 *infra*.

4. *See* text accompanying notes 44-96 *infra*.

human actions are determined by chains of causation stretching back to the beginning of time and beyond the actor's control. To excuse illegal behavior when certain causal conditions such as incapacity, involuntariness, or unconsciousness exist becomes absurd; *all* human actions have causal antecedents which completely explain their occurrence.

H.L.A. Hart has described the challenge of determinism to law and ethics:

> [The determinist] makes two claims. The first claim is that it may be true—though we cannot yet show and may never be able to show that it is true—that human conduct (including in that expression not only actions involving the movements of the human body but its psychological elements or components such as decisions, choices, experiences of desire, effort, etc.) is subject to certain types of law, where law is to be understood in the sense of a scientific law. The second claim is that, if human conduct so understood is in fact subject to such laws (though at the present time we do not know it to be so), the distinction we draw between one who acts under excusing conditions and one who acts when none are present becomes unimportant, if not absurd.[5]

By contrast, says Hart, existing law holds an individual who breaks the law legally responsible when no recognized excusing condition is present, because he or she purportedly acts of his or her own "free will."[6]

The determinism inherent in a drug addiction defense, which would excuse behavior on the basis of a particular causal antecedent, drug addiction, poses a threat to accepted concepts of moral and legal responsibility, because all behavior has some causal antecedents, if only antecedents such as the consciousness and the motor ability of the actor. Against the threat, *Robinson* and its progeny seek to preserve moral and legal responsibility by falling back on the in-dwelling agent and soft determinist assumptions. The courts have either refused to accept the drug addiction defense because the in-dwelling agent, called the will, is not "overborne" by the addiction, or have allowed the defense because the addict's actions are not morally responsible in soft determinist terms.

Courts have failed to consider another theory which would preserve the concepts of human freedom and moral responsibility while requiring the acceptance of a drug addiction defense in many situations. The theory, a version of libertarianism, falls midway between the in-dwelling agent and soft determinism theories on the philosophical spectrum; it finds human action free and morally responsible only when the actor performs it for "reasons" rather than "causes." The actor is responsible when his or her action is completely explained by the logical, aesthetic, or moral imperatives of the situation in which he or she acts, or the necessity lying in the subject matter, and not by antecedent causes such as genes, glands, and environment.[7]

The courts have made either of the two false assumptions primarily because the judiciary is susceptible to a third assumption: that if defendants are

5. H.L.A. HART, *supra* note 1, at 28-29.
6. *Id.* at 28.
7. *See* text accompanying notes 97-100 *infra*.

not morally responsible for their acts they cannot be legally responsible. In other words, courts have assumed that moral responsibility is a necessary condition of legal responsibility. Strict adherence to such a notion, however, is simply bad policy. The law might justifiably hold an addict legally responsible for an action for which he or she was morally blameless.[8] For example, the law appropriately might hold an addict criminally responsible for death or injury caused after the addict blacked out while driving under the influence of drugs. The addict could well be morally blameless for acts committed while unconscious, but that fact need not preclude legal liability. No necessary connection ties legal and moral responsibility. Other policy reasons besides punishing moral guilt exist for punishing violations of the law,[9] and the defendant's mental state might be relevant to determining legal liability in the context of these other policy reasons. For example, if it were found that incarceration effectively cures the addiction and antisocial behavior of some addicts, but not of others, policies of rehabilitation and deterrence might warrant inquiry into the mental states of all addicts, including a determination of whether their acts were free or determined. If a given addict's behavior were determined, it then could be altered by incarceration, promoting deterrence. H.L.A. Hart suggests other policy reasons for inquiring into "inner facts." Punishment, for example, is an extreme form of social control. It is tempered in Anglo-American law by respect for individual autonomy, and is legitimately applied only for acts freely chosen by the actor. Only thus can individuals plan their lives with certainty about the consequences of their deliberate actions.[10]

The concurring opinion of Judge Leventhal of the District of Columbia Circuit in *United States v. Moore*[11] addresses the question of how policy goals of punishment should be reconciled with a defendant's mental state and with possible criminal defenses.

> [Criminal defenses at common law] are not defenses of lack of the "free will" or mens rea that is an ethical and moral requisite of criminality, but are affirmative defenses of justification and excuse that are based on policy assessment of the needs and limits of social control . . . that must be potentially capable of reaching the vast bulk of the population.[12]

Policy goals of punishment, such as the imperative that standards be "capable of reaching the vast bulk of the population," should fix standards of legal responsibility. It may or may not be a sufficient reason for imposing legal responsibility that an action is free and morally responsible, but the initial determination of the autonomy of the actor remains crucial in settling the question of a defendant's legal responsibility. Only an adequate moral theory, however, can provide criteria for determining free action. This Note proposes such a theory for drug addiction cases.

---

8. H.L.A. HART, *supra* note 1, at 31-32.

9. *Id.* at 38.

10. *Id.* at 44.

11. 486 F.2d 1139, 1159 (D.C. Cir.) (Leventhal, J., concurring), *cert. denied*, 414 U.S. 980 (1973).

12. *Id.* at 1179-80 (Leventhal, J., concurring); *see also* United States v. Freeman, 357 F.2d 606, 615 (2d Cir. 1966).

II
Robinson v. California

The defendant in *Robinson* was convicted under a California statute providing, "No person shall use, or be under the influence of, or be addicted to the use of narcotics. . . ."[13] The trial judge instructed the jury that being addicted is "a condition or status" and that "[i]t is a continuing offense and differs from most other offenses in the fact that [it] is chronic rather than acute; that it continues after it is complete and subjects the offender to arrest at any time before he reforms."[14] The Supreme Court viewed this reading of the statute, implicitly affirmed on appeal, as the authoritative determination of California law.[15]

The Supreme Court held that the statute violated the cruel and unusual punishment clause of the eighth amendment to the Constitution, as applied to the states through the fourteenth amendment.[16] First, California's law punished an individual for a "status" without any showing of antisocial acts within the state.[17] Second, the Court analogized punishing drug addiction to punishing mental illness, leprosy, or venereal disease, and implied that even aside from the status-act problem an illness cannot be punished, because it is involuntary.

> In this Court counsel for the State recognized that narcotic addiction is an illness. Indeed, it is apparently an illness which may be contracted innocently or involuntarily. We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment.[18]

This language, according to subsequent judicial interpretation expanding it, contained two interrelated rationales. First, it reiterated that it is unconstitutional to punish a status rather than an act.[19] The Court here drew upon a fundamental requirement of criminal responsibility that there be not only *mens rea*, but also an *actus reus*, or guilty act, that is, a willed movement accompanied by certain surrounding circumstances and consequences, and proscribed by law.[20] To punish a defendant for the status of "being an addict"

---

13. CAL. HEALTH & SAFETY CODE § 11721 (West 1939), 1957 Cal. Stat. ch. 1064 § 1 (amended 1963, repealed 1972).
14. 370 U.S. at 662-63.
15. *Id.* at 666.
16. *Id.* at 667.
17. *Id.* at 666.
18. *Id.* at 667 (footnotes omitted).
19. *Id.* at 667; *accord*, People v. Davis, 27 Ill. 2d 57, 188 N.E.2d 225 (1963); State v. Bridges, 360 S.W.2d 648 (Mo. 1962); *see also, e.g.*, United States v. Bishop, 469 F.2d 1337 (1st Cir. 1972); Hutcherson v. United States, 345 F.2d 964 (D.C. Cir.) (Bazelon, C.J., concurring in part and dissenting in part), *cert. denied*, 382 U.S. 894 (1965); People v. Davis, 33 N.Y.2d 221, 306 N.E.2d 787, 351 N.Y.S.2d 663 (1973), *cert. denied*, 416 U.S. 973 (1974).
20. G. WILLIAMS, CRIMINAL LAW 16-17 (2d ed. 1961). *See also* text accompanying note 23 *infra*.

perhaps punishes circumstances and consequences, but the circumstances and consequences surround no act. The Court recognized this distinction in proscribing punishment of a mere status.

Narrowly viewed, the status-act problem is remote from the questions addressed in this Note, but decisions expanding the first *Robinson* rationale to reach addiction-related acts, such as narcotics possession, extract from the language of *Robinson* a second holding, that punishment of involuntary acts caused by defendant's illness, drug addiction, is unconstitutional. The *Robinson* opinion itself does not go so far; it proscribes punishing the *status* of illness rather than acts *caused by* illness.[21] But the decisions expanding on *Robinson* reason that because addiction is not action, neither is behavior necessarily accompanying the addiction. The behavior, because it is constrained by addiction, is not free; therefore the actor is not responsible.[22]

III
THE IN-DWELLING AGENT THEORY

Whether courts allow or deny a drug addiction defense, they generally adhere to either an in-dwelling agent or a soft determinist theory of moral responsibility. If they employ the in-dwelling agent theory they may find the addict not morally responsible because he or she lacks free will. Under this theory the will is seen as a faculty or entity inhabiting the actor, controlling all actions. A strict dichotomy exists between the will, a part of the mental realm, and the body, a part of the physical realm; yet somehow this mental entity causes physical events such as bodily movements. Only those bodily movements controlled by the will, rather than by organic or mechanical causes, are true actions, because the will's determinations are uncaused and spontaneous and therefore considered free. The will's freely choosing to perform an illegal act is the paradigm of what the common law defines as *mens rea*, the culpable mental state required as one of the elements of any crime.[23]

The main weakness of the in-dwelling agent theory is that it does not explain what the will is but only what it is not. It is not a physical entity, but rather a sort of ephemeral "substance" permeating the body; one commentator calls it "the ghost in the machine."[24] The will's determinations are not caused,

---

21. *See* text accompanying note 18 *supra*.

22. Justice Douglas, concurring, relied heavily on the disease argument. He also used an in-dwelling agent theory; addicts are "under compulsions" and have "lost their power of self control." Robinson v. California, 370 U.S. 660, 668-70 (1962) (concurring opinion). Justice Clark, in his dissent, also relied on the in-dwelling agent theory when he drew distinctions between "volitional" and "non-volitional" addicts. 370 U.S. at 679-85 (dissenting opinion).

23. A precise definition of *mens rea* is "the mental element necessary for the particular crime . . . either *intention* to do the immediate act or bring about the consequence or (in some crimes) *recklessness* as to such act or consequence . . . . [*M*]*ens rea* means intention or recklessness as to the elements constituting the *actus reus*." G. WILLIAMS, CRIMINAL LAW 31 & n.3 (2d ed. 1961) (emphasis in original).

24. G. RYLE, THE CONCEPT OF MIND 11-24 (1949). *See generally* R. DESCARTES, *Meditations on First Philosophy* in PHILOSOPHICAL WRITINGS 176 (N. Smith ed. 1958). According to the in-

but neither are they random. Despite this inadequacy of definition, a free will is absolutely necessary for moral responsibility, according to the in-dwelling agent theory. Without it, bodily movements are events and not actions, because they result from physical causes rather than the will's free choices. An actor cannot be held responsible for an event caused by glandular secretions or by his or her genetic makeup.

The in-dwelling agent theory underlies the common law *mens rea* doctrine and most unreflective everyday notions about moral responsibility. Through its strict separation of mental and physical entities and its conception of the freedom of the mental entity called the will to produce spontaneous, uncaused actions, the theory exerts a strong influence in opinions considering a drug addiction defense.

IV
BEHAVIORIST CRITIQUE OF THE IN-DWELLING AGENT THEORY

Proponents of behaviorism, a rigidly deterministic theory of psychology, have vigorously attacked the in-dwelling agent theory. The dean of behaviorists, Professor B. F. Skinner, dismisses in-dwelling agents, and such other mental entities as intentions, aims, purposes, and goals as cloaks for ignorance of the causes of behavior.[25] He believes that such ignorance can be dispelled by "explain[ing] how the behavior of a person as a physical system is related to the conditions under which the human species evolved and the conditions under which the individual lives."[26] Behaviorism, in other words, attributes the functions performed by mental entities in the in-dwelling agent theory to two forms of control by the environment: the triggering of behavior through antecedent conditions, and the selection of behavior through positive or negative consequences. "Behavior is shaped and maintained by its consequences."[27] For example, in a behaviorist's account of criminal intent, "when a lawyer states that the defendant who stole a watch intended to steal the watch, he means that the stimulus controlling the response (stealing) was a watch."[28] As science's explanation of human behavior becomes increasingly powerful, according to the behaviorists, the traditional view of humanity as the exception to

---

dwelling agent doctrine every human being has a body and a mind. Human bodies are in space, observable, and subject to mechanical laws, but minds are mysterious and unfathomable. Their workings are often described merely by negations of specific descriptions given to bodies: they are not in space, they are not modifications of matter, they are not accessible to public observation. A person's thinking, feeling, and doing cannot be described solely in the idioms of physics, chemistry, and physiology, but they must be described in counterpart idioms. In the same way, just as the human body is a complex organized unit, the human mind must be another complex organized unit, but it must be somehow different from the body. The in-dwelling agent theory cannot define what mental entities are, beyond specifying that they are different from physical entities. G. RYLE, *supra* at 11, 18, 20.

25. B.F. SKINNER, BEYOND FREEDOM AND DIGNITY 9 (1971). *See also* C.R. JEFFERY, CRIMINAL RESPONSIBILITY AND MENTAL DISEASE 273-78 (1967) (especially directed at insanity defense).

26. B.F. SKINNER, *supra* note 25, at 14.

27. *Id.* at 18.

28. C.R. JEFFERY, *supra* note 25, at 273.

causal determinism becomes untenable, as does the doctrine of moral responsibility.[29] The behaviorist criticism of the in-dwelling agent doctrine, then, ultimately rests on the conclusion that human behavior is entirely determined by environmental influences.[30]

V
SOFT DETERMINISM

Behaviorist theory is reflected, though not in strict form, in some drug addiction opinions which rest more on explicit or implicit soft determinist theories than on the in-dwelling agent theory.[31] These opinions find the defendant not morally responsible when he or she "could not have done otherwise" or "could not help" what he or she was doing. According to the doctrine of soft determinism[32] reflected in these cases, although acts are determined, human beings are sometimes free agents, and therefore morally responsible as well.[33] A special definition of freedom eliminates the apparent contradiction between asserting that human actions are causally determined and maintaining that human beings are morally responsible for their actions. According to soft deter-

---

29. B.F. SKINNER, *supra* note 25, at 21.

30. Recognition of the weakness of in-dwelling agent theory, however, need not grow from determinism. *See generally* G. RYLE, *supra* note 24, at 16, 19, 20,23.

31. *E.g.*, United States v. Lindsey, 324 F. Supp. 55, 60 (D.D.C. 1971), *aff'd in part, vacated in part*, 486 F.2d 1317 (D.C. Cir. 1973) (defense denied because "it has not been demonstrated that defendant was utterly unable to control his actions"). *See* text accompanying notes 58-96, *infra*.

32. William James coined the term "soft determinism" in his essay *The Dilemma of Determinism*. Edwards, *Hard and Soft Determinism*, in DETERMINISM AND FREEDOM 104 (1st ed. S. Hook ed. 1958) (citing JAMES, *The Dilemma of Determinism* in ESSAYS IN PRAGMATISM 37, 40 (1948)). The concept of soft determinism descends from section VIII of David Hume's *An Enquiry Concerning Human Understanding*. *See* Matson, *On the Irrelevance of Free-Will to Moral Responsibility, and the Vacuity of the Latter*, 65 MIND 489, 492 (New Series 1956). After showing that human conduct is regular, consistent, and in accord with natural laws just like events in the physical world, Hume wrote:

> For what is meant by liberty, when applied to voluntary actions? We cannot surely mean that actions have so little connexion [*sic*] with motives, inclinations, and circumstances, that one does not follow with a certain degree of uniformity from the other, and that one affords no inference by which we can conclude the existence of the other . . . By liberty, then, we can only mean *a power of acting or not acting, according to the determinations of the will*; that is, if we choose to remain at rest we may; if we choose to move, we also may. Now this hypothetical liberty is universally allowed to belong to everyone who is not a prisoner and in chains.

D. HUME, *An Enquiry Concerning Human Understanding*, in ENQUIRES CONCERNING THE HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS 95 (2d ed. L.A. Selby-Bigge ed. 1902) (emphasis in original). From this language soft determinists draw their characterization of free acts as those for which the actor "could have done otherwise." As Matson has pointed out, however, the issue of "liberty" or "human freedom" is not whether a person is subject to physical constraint, but whether his or her conduct is causally determined. Hume argued at length that there is causal necessity in human behavior and then disposed of the problem of freedom by observing that all we mean by freedom is absence of constraint and opportunity to choose among alternatives. Hume's solution begged the question. Matson, *supra*, at 493.

33. Edwards, *supra* note 32, at 106.

minists, a free action is not "uncaused," but simply one which is not compelled or constrained by physical necessity or human coercion, and which fulfills the actor's desires.[34] The soft determinist, like the hard determinist, envisions a chain of causes leading to every human action. Unlike the hard determinist, however, the soft determinist singles out for special treatment a subclass of those causes, desires unimpeded by compulsion or constraint. As long as the causes of an action include unimpeded desires, according to soft determinism, the action is free, even though those desires might in turn be caused by the actor's glandular secretions or genetic makeup.[35]

Assuming that some determined actions nevertheless can be free, as they can be under soft determinism, it follows that those actions can be morally responsible as well. Human beings, under soft determinism, are simply responsible for all unconstrained and therefore free acts, even though all acts are causally determined. According to one commentator, "[T]he world is after all wonderful: we can be determinists and yet go on punishing our enemies and our children, and we can go on blaming ourselves, all without a bad intellectual conscience."[36]

Another version of soft determinism involves establishing the "real meaning" of the word freedom. Free acts, according to this approach, are those for which the actor could have chosen alternatives, or "could have done otherwise."[37] This approach is another version of the soft determinist doctrine that human beings are responsible for unconstrained or uncompelled acts, or acts for which alternative courses of action exist.

Both versions of the soft determinist doctrine evade the issue of whether human actions are ever free. The only difference between soft determinism and hard determinism is that soft determinism arbitrarily delimits *a special class of causes*, unimpeded desires, in the inquiry into whether an action is determined or free. If the act springs from unimpeded desires, it is free.[38] Underlying the

34. *Id.*

35. On the soft determinist's view, hard determinism holds that apparently free acts are unfree; soft determinism holds that "apparently free" is all that is meant by a free act. *See* MacIntyre, *Determinism*, 66 MIND 28, 30-32 (1957).

36. Edwards, *supra* note 32, at 106.

37. For example, according to Antony Flew, two young people choosing to marry decide freely when, if they had chosen otherwise, they could have done so, given their ages, IQs, and temperaments, Flew, *Divine Omnipotence and Human Freedom*, in NEW ESSAYS IN PHILOSOPHICAL THEOLOGY 144, 149 (1955).

C.A. Campbell describes and criticizes a similar thesis of P.H. Nowell-Smith. According to Nowell-Smith, "A could have acted otherwise, if he did not happen to be what in fact he was or if he were placed in circumstances other than those in which he was in fact placed." Campbell, *Is 'Free-Will' a Pseudo-Problem?*, 60 MIND 441, 453 (1951) (citing Nowell-Smith, *Freewill and Moral Responsibility*, 57 MIND 45, 49 (1948) (emphasis omitted)), Nowell-Smith implies that it is irrelevant to a "could have done otherwise" statement whether or not the action was causally determined, since all we "really mean" by freedom is "could have done x, if I had chosen to," or "could have acted otherwise, if . . . he were placed in other circumstances." This analytical solution, Campbell says, has no bearing on A's moral responsibility; what someone other than A would have done is irrelevant. Campbell, *supra* at 453.

38. *See* Edwards, *supra* note 32, at 106.

soft determinist emphasis on unimpeded desires is a concern with the possibility of changing behavior; actions springing from unimpeded desires are generally deterrable. Labelling as "free" those actions caused by unimpeded desires only disguises the soft determinist's alliance with the less palatable hard determinist position. Analyzing the "real meaning" of freedom as "could have done otherwise" also fails to distinguish soft determinism from hard determinism. The fact that taking one course of action often excludes alternatives open to the actor is irrelevant to the question whether human beings ever act freely.[39] The question is how to account for the choice of one alternative rather than another. Moreover, examining the question of freedom in terms of what people "really mean" by the word does violence to ordinary language.[40] When a person says that a given choice was "free," he or she does not "really mean" only that it was not physically compelled or coerced by other people, but that it was more than the mechanical outcome of all its causal antecedents.

The characterization of soft determinism as arbitrary hard determinism is borne out by the way behaviorism, a deterministic scientific theory, handles the problem of freedom. Behaviorists often use soft determinist language, particularly when expounding their theory to the public, and in doing so they reveal the close relationship between hard and soft determinism. For example, one behaviorist writes, "By free will we mean choice, the ability to behave in alternative ways in order to produce different results."[41] If this ability exists, an actor is morally responsible.[42] Similarly, when behaviorist B.F. Skinner refers to freedom from "aversive features," he means, in soft determinist terms, unconstrained behavior:

> Man's struggle for freedom is not due to a will to be free, but to certain behavioral processes characteristic of the human organism, the chief effect of which is the avoidance of or escape from so-called "aversive" features of the environment. . . . [T]he struggle for freedom is concerned with stimuli intentionally arranged by other people.[43]

Ultimately, any reliance by courts on soft determinism to preserve the common law presumption of free will reduces to hard determinism, because the soft determinist criteria of free action, unimpeded desires, may in turn be caused by factors such as glands and genes. Nevertheless, some of the drug addiction opinions discussed below embrace soft determinism in their use of phrases like "unimpeded desires," "unconstrained" or "uncoerced" behavior, "could have done otherwise" or "choice among alternatives." They thus manifest inchoate hard determinism.

---

39. *Id.*
40. *See* MacIntyre, *supra* note 35, at 32.
41. *See* JEFFERY, *supra* note 25, at 279.
42. *Id.*
43. *See* SKINNER, *supra* note 25, at 42.

VI
ROBINSON'S OFFSPRING

The major drug addiction opinions reveal explicit and implicit reliance on in-dwelling agent and soft determinist theories, irrespective of whether they grant, deny, expand, or contract the drug addiction defense. Some[44] follow language in *Robinson* indicating the unconstitutionality of punishing an illness. Other cases involve attempts to assimilate a drug addiction defense to the well-established insanity[45] or involuntary intoxication[46] defenses. All those decisions, whether hostile or sympathetic to the addiction defense, reflect soft determinism, for they single out only those causal determinants of behavior which amount to constraint as negating criminal responsibility. In other cases courts have used in-dwelling agent terminology such as "irresistible impulse" and "compulsion." When they have done so they have generally purported to rely on the common law doctrine of *mens rea*.[47]

Close reading of the major cases in the *Robinson* line reveals one or both of these theories in every case. Explicitly or implicitly, courts have relied on the in-dwelling agent or soft determinist theories or, in the majority of cases, combinations of both.

In *Easter v. District of Columbia*,[48] the defendant was convicted under a public drunkenness statute, but the case is part of the *Robinson* line because the decision rests on the same considerations as do the drug defense cases.[49] The *Easter* court employed a wide range of deterministic and free-will arguments. First, in construing the public drunkenness statute, the court turned for guidance to the District of Columbia Code's definition of "chronic alcoholic": one who "chronically and habitually uses alcoholic beverages to the extent that he has lost the power of self-control with respect to the use of such beverages, or while under the influence of alcohol endangers the public morals, health, safety, or welfare."[50] From a philosophical standpoint this is in large part a very good definition, avoiding soft determinism and in-dwelling agent theory

---

44. *See* text accompanying notes 44-96 *infra*.

45. *E.g.*, Martin v. United States, 327 F. Supp. 126 (W.D. Pa. 1971); Fisher v. State, 54 Del. 542, 182 A.2d 333 (1962); McLaughlin v. State, 236 Ga. 577, 224 S.E.2d 412 (1976); Faught v. State, 155 Ind. App. 520, 293 N.E.2d 506 (1973), *aff'd*, 162 Ind. App. 436, 319 N.E.2d 843 (1974); State v. Flores, 82 N.M. 480, 483 P.2d. 1320 (Ct. App. 1971); State v. Matthews, 20 Or. App. 466, 532 P.2d 250 (1975). For a discussion of insanity and determinism, *see* United States v. Brawner, 471 F.2d 969, 995 (D.C. Cir. 1972).

46. *E.g.*, McLaughlin v. State, 236 Ga. 577, 224 S.E.2d 412 (1976); State v. Crayton, 354 S.W.2d 834 (Mo. 1962).

47. *E.g.*, United States v. Bishop, 469 F.2d 1337, 1347 (1st Cir. 1972); United States v. Lindsey, 324 F. Supp. 55, 59-60 (D.D.C. 1971), *aff'd in part, vacated in part*, 486 F.2d 1317 (1973); McLaughlin v. State, 236 Ga. 577, 579-80, 224 S.E.2d 412, 413-14 (1976); State v. Crayton, 354 S.W.2d 834, 837 (Mo. 1962); State v. Flores, 82 N.M. 480, 481, 483 P.2d 1320, 1321 (1971). *See* note 23 *supra* and accompanying text.

48. 361 F.2d 50 (D.C. Cir. 1966).

49. Two other cases in the *Robinson* line are drunkenness cases. Powell v. Texas, 392 U.S. 514 (1968); Driver v. Hinant, 356 F.2d 761 (4th Cir. 1966). The public drunkenness statutes in those cases closely resemble the *Robinson* narcotics statute. *See also* text accompanying notes 48-63 *infra*.

50. D.C. CODE ANN. § 24-502 (1961) (current version at D.C. CODE ANN. § 24-522 (1973)).

both in the objective phrase, "chronically and habitually uses alcoholic beverages," and in the second clause, which describes the alcoholic's antisocial behavior. These phrases mention no soft determinist unconstrained desires nor in-dwelling agents, but simply describe observed behavior. The significant words for the court, however, were "power of self-control." This phrase evoked an in-dwelling agent called a "power," which the court believed inhabits the alcoholic. In interpreting the definition of alcoholism, the court relied on soft determinism, stating that an essential element of criminal responsibility is "an ability to avoid the conduct specified."[51] In other words, because the alcoholic "could not have done otherwise," he failed to meet the soft determinist criterion of moral responsibility.

Having found the defendant not guilty under the words of the statute,[52] the court reached an alternative holding. Chronic alcoholics are incapable of the necessary *mens rea* for public drunkenness, because "a chronic alcoholic is in fact a sick person who has lost self-control over his use of alcoholic beverages."[53] This alternative holding has both in-dwelling agent and soft determinist elements. It draws on the notion in the Code definition of a "power" of self-control, a thing which can be lost and which presumably inhabits an actor as an in-dwelling agent. In the case of the defendant alcoholic, the agent, "power of self-control," was no longer in-dwelling; it had vacated the man's body. The defendant could not be morally responsible after its departure. At the same time, the court held, an alcoholic is a sick person. The court quoted the language in *Robinson* comparing drug addiction to leprosy or venereal disease, and implied that the alcoholic is not responsible for acts caused by his or her illness, because such acts amount to what soft determinists would consider compelled or constrained behavior. In other words, the actor could have been held responsible had he merely been fulfilling desires or been "voluntarily intoxicated," but his drunkenness was compelled behavior, a symptom of his disease.[54] For these reasons, the *Easter* court held that under *Robinson* the District of Columbia public drunkenness statute cannot constitutionally apply to chronic alcoholics.[55] By quoting the *Robinson* "disease" language, the court read into the statute the soft determinist "second holding" of *Robinson*, that punishing involuntary acts caused by disease is unconstitutional because those acts are compelled or constrained, and do not arise from unimpeded desires.

In *Driver v. Hinant*,[56] the Fourth Circuit used the "disease" approach of *Robinson* as the starting point for a variety of in-dwelling agent and soft determinist arguments. The defendant, a chronic alcoholic, was convicted under a public drunkenness statute. The court began its analysis by quoting defendant's appeal argument, which described alcoholism as a disease; unlike the *Easter* court, however, the *Driver* court drew on the disease characterization from an

51. Easter v. District of Columbia, 361 F.2d 50, 52 (D.C. Cir. 1966).
52. *Id.* at 55.
53. *Id.* at 53.
54. *Id.* at 53-54.
55. *Id.* at 54-55.
56. 356 F.2d 761 (4th Cir. 1966).

in-dwelling agent rather than a soft determinist standpoint. The court quoted with approval the defendant's own description of his disease as an agent which "destroyed the power of his will," and the defendant's public appearance as a "compulsion," not a "volition."[57] Its description evokes two agents, the will and the disease, battling for ascendency within the body of the actor. Since the disease has driven the will out of the body, moral responsibility becomes impossible.

The court proceeded to recite definitions of alcoholism from the National Council on Alcoholism, the American Medical Association, and the World Health Organization. All the definitions were confined for the most part to describing behavior patterns objectively without appealing to mental entities,[58] but the court altered one definition to make it consistent with its in-dwelling agent approach. It expanded the World Health Organization characterization, "a chronic illness that manifests itself as a disorder of behavior," to a "disorder of behavior" which may manifest itself in "appearances in public . . . unwilled and ungovernable by the victim."[59] The last phrase turns the definition inside out: alcoholism becomes an illness "manifesting" inself as an interior mental entity, an ungovernable compulsion. In other words, the court converted the objective World Health Organization definition into an instance of an in-dwelling compulsion. The court proceeded to fit the defendant's illness into the same in-dwelling agent pattern it had imposed on the definition. While defendant's act "objectively comprises the physical elements of a crime, nevertheless no crime has been perpetrated because the conduct was neither actuated by an evil intent nor accompanied with [*sic*] a consciousness of wrongdoing, indispensable ingredients of a crime."[60] Like "compulsions" or "volitions," the evil intent inhabits the defendant. In contrast, the *Easter* court had used the District of Columbia Code definition in a soft determinist approach by finding the defendant not responsible for his acts because they were compelled as symptoms of his disease.

The *Driver* court's next step, however, while still regarding alcoholism as a disease, betrayed reliance on soft determinism rather than in-dwelling agent theory. The court reasoned that defendant's acts were like an imbecile's or those of a delirious person;[61] presumably they were caused by his neurological makeup or physical condition. The acts therefore were compelled or constrained, and the defendant, having no alternatives by reason of the compulsion, "could not have done otherwise." Thus, the court at this stage used the disease conception as a vehicle for soft determinist theory.

The court concluded equivocally, with a position which adhered to either in-dwelling agent or soft determinist theory. It confined its exculpation of a defendant to those acts "which were compulsive as symptomatic of the

57. *Id.* at 763.
58. *Id.* at 763-64.
59. *Id.* at 764.
60. *Id.*
61. *Id.*

disease,"[62] interpreting *Robinson* to forbid punishment of a status "involuntarily assumed."[63] The court might have meant that the compulsion inhabits the defendant as an in-dwelling agent, or it might have meant that the disease constrained defendant's behavior, preventing fulfillment of unimpeded desires and making him unable to do otherwise. The court straddled the two theories without clearly favoring either. Either theory, in any event, would have been inadequate to the task of explaining why the defendant ought to be excused from criminal responsibility. The in-dwelling agent is an imaginary construct which cloaks ignorance of the causes of human behavior, while soft determinism does not explain why actions caused by unimpeded desires should be treated differently from actions caused by disease or addiction.

In *Powell v. Texas*,[64] the first major Supreme Court decision on the addiction defense question after *Robinson*, the Court rejected the expansion of its own "status" and "disease" arguments which had been advocated in decisions like *Easter* and *Driver*. Instead, it adhered to a very narrow reading of *Robinson*, upholding the public drunkenness statute in question because it punished action, whether voluntary or involuntary. Defendants and courts wishing to use the expanded "status" and "disease" arguments after *Powell* could do so only by distinguishing *Powell* on its facts. The decision, consequently, effectively halted further development of the "status" and "disease" theories.

The Supreme Court denied the defendant a *Robinson* defense to a public drunkenness charge because the record did not support a finding of chronic alcoholism according to certain of the criteria set out in an authoritative text on the subject:[65] (1) loss of control when drinking begins, (2) inability to abstain, and (3) withdrawal symptoms.[66] Moreover, the Court held that the defendant's conviction would stand unless he had been convicted for the status of being an alcoholic, thus bringing the case within the ambit of *Robinson*. Such a conviction was impossible in the *Powell* case for two reasons. First, the defendant was not an alcoholic within the definition used by the Court. Second, the statute in question purported to convict him not for a status but for an action, that is, being publicly drunk.[67] Whether the defendant's action had been free or determined, morally responsible or not, was irrelevant to the Court. If the statute punished an action rather than a status, it met the requirements of *Robinson* and satisfied the eighth amendment.

By employing a soft determinist argument that certain behavior compelled by the disease of alcoholism was not free or morally responsible, the Court might have found that *Robinson* prohibits punishment for acts caused by the status of being an alcoholic. The *Easter* and *Driver* courts had entertained such arguments, but the *Powell* Court refused to do so. Only Justice Fortas, in his dissent, reasoned that *Robinson* prohibits punishing a person "for being in a

62. *Id.*
63. *Id.* at 765.
64. 392 U.S. 514 (1968).
65. E. JELLINEK, THE DISEASE CONCEPT OF ALCOHOLISM 37 (1960).
66. Powell v. Texas, 392 U.S. 514, 524-25 (1968).
67. *Id.* at 532.

condition he is powerless to change." [68] If "powerless" means constrained behavior, caused by defendant's alcoholism and leaving him no alternatives, Fortas's dissent made a soft determinist argument.

The majority rejected the soft determinist expansion of *Robinson* because it admits of no principled limitation and opens the door to such defenses as "compulsions" to kill. The majority's concern hit upon the principal weakness inherent in soft determinism: its focus on only those causes of behavior involving constraint, coercion, or physical necessity in its exculpation of defendants.[70] Because there is no principled distinction between causes involving constraint and other causes of behavior, there is no bulwark within soft determinism against the expansion the majority feared. If a defendant's alcoholism were to excuse public drunkenness, then sadism might logically excuse murder. The majority erroneously assumed, however, that only by adhering to the indwelling agent theory inherent in the *mens rea* doctrine could the criminal law be saved from total collapse, and that no other account of human behavior could provide a defense for chronic alcoholics or drug addicts.[71]

In *Watson v. United States*,[72] the District of Columbia Circuit reasoned from a consistently soft determinist standpoint. The defendant, a heroin addict, had been convicted for possession of half the amount of heroin necessary to support his daily habit.[73] The court refused to resolve the case by expanding the *Robinson* status argument (which it perceived as a new test of criminal responsibility) to include possession. It reasoned that the Supreme Court in *Powell* had recoiled from opening avenues of escape from responsibility "by reason of the compulsions of such things as alcoholism and, presumably, drug addiction — conditions from which it is still widely assumed, rightly or wrongly, that the victim retains some capacity to liberate himself. In any event . . . *Powell* at the least contemplates a heavy burden of proof on one who claims to the contrary . . . ."[74] The implication was that as a matter of empirical fact the defendant's behavior did not fulfill the soft determinist criteria of criminal responsibility; "capacity to liberate himself" echoes "could have done otherwise" and "could have helped himself."[75]

The court also considered whether, as a matter of statutory construction, the laws prohibiting drug possession could constitutionally be applied to mere possessors as opposed to traffickers.[76] This concern seemed to arise from the empirical question of which actions commonly accompanying addiction are so

68. Fortas first explained that *Robinson* made it unconstitutional to punish for an illness, then continued, "Criminal penalties may not be inflicted . . . for . . . a condition [defendant] is powerless to change." Moreover, "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." *Id.* at 567, 569.

69. *Id.* at 533-34.

70. *See* text accompanying notes 38-40 *supra*.

71. *See* text accompanying notes 97-100 *infra*.

72. 439 F.2d 442 (D.C. Cir. 1970).

73. *Id.* at 444-45.

74. *Id.* at 451.

75. *See* text accompanying notes 37-40 *supra*.

76. Watson v. United States, 439 F.2d 442, 452 (D.C. Cir. 1970). *See* note 82 *infra*.

remote or peripheral as to fail to meet the soft determinist criteria for moral responsibility of constrained behavior. Arguably, possession is intimately related to addiction and should be excused as constrained behavior, but the court did not address this question directly. The court denied the defense to this defendant because of an insufficient record,[77] but nevertheless set forth the proper format for such a defense.

With a properly presented case it would be possible effectively to entreat the Supreme Court as final arbiter "to explain, more fully than it has done so far, how it is that California may not, consistently with the Federal Constitution, prosecute a person for being an addict, but the United States can criminally prosecute an addict for possession of narcotics for his personal use."[78] Again, the question appears to be whether "mere" possession, as opposed to trafficking, is such an integral part of addiction that possessing drugs is constrained behavior. If so, possession fails to meet the soft determinist criteria for moral responsibility.[79]

The opinion of Chief Judge Bazelon, concurring in part and dissenting in part, is notable for its call for the development of new doctrines of criminal responsibility apart from the *Robinson* eighth amendment approach.[80] According to the Chief Judge, the eighth amendment proscription is only a floor and not a ceiling for potential doctrines of criminal responsibility; the *Powell* Court's strict limitation of *Robinson* to prevention of punishment for status should act as an exhortation toward further development.[81] In any case, the eighth amendment approach has limited utility, since only by straining the status-act distinction can it reach the more important issue in a possible drug addiction defense, human freedom.[82]

In *United States v. Moore*[83] the District of Columbia Circuit took up the *Watson* court's concern with the distinction between possession and trafficking. Reasoning from a fundamentally in-dwelling agent position, the court denied the defendant a drug addiction defense. The appellant had been arrested under circumstances which made it unclear whether he was a "mere" possessor or a trafficker. He was found to have been a heroin addict for 25 years and was charged with unlawful possession.[84]

The majority began its consideration whether the appellant's addiction was relevant to his criminal responsibility by considering a scheme (based on appel-

77. *Id.* at 453-54.

78. *Id.* at 454.

79. Other cases turning on the trafficker-user distinction in applying *Robinson* are United States v. Sutton, 346 F. Supp. 464 (D.D.C. 1972), *rev'd*, 479 F.2d 922 (1973); United States v. Ashton, 317 F. Supp. 860 (D.D.C. 1970).

80. For a related discussion by Judge Bazelon of free will, justification, and excuse, *see* United States v. Barker, 514 F.2d 208, 227-32 (D.C. Cir.) (Bazelon, J., concurring), *cert. denied*, 421 U.S. 1013 (1975).

81. Watson v. United States, 439 F.2d 442, 459 (Bazelon, J., concurring).

82. *See* text accompanying notes 19-22 *supra*.

83. 486 F.2d 1139 (D.C. Cir.), *cert. denied*, 414 U.S. 980 (1973). The concurring opinion is discussed in the text accompanying notes 11-12 *supra*.

84. United States v. Moore, 486 F.2d 1139, 1141-43 (D.C. Cir.), *cert. denied*, 414 U.S. 980 (1973).

lant's arguments) which not only relied on an in-dwelling agent concept, but quantified it. The court suggested that two variables operate in drug addiction, physical craving and strength of character. If numerical values are assigned to each variable, an individual "loses self-control" and acts to obtain drugs when the numerical value of the physical craving exceeds the numerical value of the strength of character.[85] The physical craving, in other words, overrides the strength of character. "*But if it is absence of free will which excuses the mere possessor-acquirer, the more desperate bank robber for drug money has an even more demonstrable lack of free will and derived from precisely the same factors as appellant argues should excuse the mere possessor.*"[86] The court reasoned that commission of more severe crimes, such as bank robbery, indicates a lower value for strength of character than does commission of less severe crimes, such as possession. Strength of character and free will apparently were roughly equivalent in the court's analysis, and the bank robber has less free will than the possessor because the physical craving drives him to do the more heinous deed.

To the court, the appellant's argument was untenable, since its reconstruction of the argument for a drug addiction defense makes a better case for excusing more serious crimes. Yet the court neither supported nor articulated this assumption. Moreover, its reconstruction, which quantifies in-dwelling agents, was inadequate. "Strength of character" and "physical craving," like all in-dwelling agents, are ephemeral constructs which are poorly defined and which explain little about human behavior. Lying behind the *Moore* court's analysis is probably the same concern voiced by the *Powell* Court about the lack of principled limits to any defense implicitly based on soft determinism.[87]

The *Moore* majority also examined and rejected a direct *Robinson* approach. It reasoned that *Robinson* left the states free to punish activities such as possession or use, because the eighth amendment holding in *Robinson* did not invalidate punishment for "compulsion," but only for "status."[88] The court insisted, furthermore, that "the interpretation that *Robinson* held that it was not criminal to give in to the irresistible compulsions of a 'disease,' weaves in and out of the *Powell* opinions, but there is definitely no Supreme Court holding to this effect."[89] Finally, despite *Watson's* invitation to do so, the *Moore* Court refused to hold that *Robinson* represents a constitutional bar to conviction of the non-trafficking addict-possessor, because such a ruling should come from the Supreme Court.[90] The court simply refused to face the question of the adequacy of criminal responsibility doctrines.

The court in *Gorham v. United States*[91] also evaded assessment of criminal responsibility doctrines. It quoted the defendant's offer of proof, which be-

85. *Id.* at 1145.
86. *Id.* at 1146 (emphasis in original).
87. *See* text accompanying notes 69-71 and 34-42, *supra*.
88. United States v. Moore, 486 F.2d 1139, 1149 (D.C. Cir.), *cert. denied*, 414 U.S. 980 (1973).
89. *Id.* at 1150.
90. *Id.* at 1153.
91. 339 F.2d 401 (D.C. Cir. 1975).

trayed an in-dwelling agent viewpoint. The defendant offered to prove he was "unable to restrain from further use," that he had an "overpowering desire or need to continue taking," and an "overpowering and irresistible craving or compulsion to continue taking the drug [to which he was addicted] and to obtain it by any means."[92] The "overpowering desire," "craving," and "compulsion" inhabited the defendant as in-dwelling agents. The defendant's offer, reasoned the court, amounted to a request to establish a new rule of criminal responsibility in drug addiction cases, but such a rule could be avoided; congressional intent to prosecute mere drug users nullified any putative authority to create new common law doctrines.[93] *Easter* could be distinguished because (1) there was no such congressional preemption with regard to alcohol use, and (2) use of alcohol is legal, but use of drugs is illegal.[94]

Finally, because the statutory scheme set up by Congress, with mandatory sentences and pretrial diversion of drug users available, comported with "elemental justice," there was no need to consider whether such a defense, if established, could be kept within verifiable bounds. The court did indicate in dictum that the defense could not be practically limited; the defense would amount to legalization of possession.[95] In the court's view, as in that of the *Powell* Court, granting the defense would have been one step down the road toward excusing murder because of a compulsion to kill.[96] The *Gorham* court, as did the *Moore* court, avoided the question of criminal responsibility altogether in order to mask a hostility to the drug addiction defense. This hostility probably was based on an in-dwelling agent conception of human nature and was directed against the problem of principled limits in the soft determinist approach.

VII
Reasons and Causes

In place of the in-dwelling agent and soft determinist theories the courts must find an adequate account of moral responsibility and human freedom. Such an account would provide standards for determining a drug addict's legal responsibility for his actions.

Libertarianism—a general term for any theory that human beings act freely—need not posit ghosts or in-dwelling agents.[97] Instead, according to a rational libertarianism,[98] human beings act freely when they act for reasons

92. *Id.* at 404.
93. *Id. passim.*
94. *Id.* at 408-09.
95. *Id.* at 413.
96. *Id.*; *see* text accompanying notes 69-71, *supra*.
97. *See, e.g.*, MacIntyre, *supra* note 35, at 28. MacIntyre delineates a different kind of libertarianism than the in-dwelling agent theory. He describes determinism as the confidence that some excusing causal condition will always be present in any apparently free act. This does not mean, however, that the area of human freedom will necessarily shrink with each discovery of causes of behavior. "Behavior is rational [and hence free] . . . if and only if it can be influenced by the adducing of some logically relevant consideration," even if its causal antecedents can be specified.
98. *See, e.g.*, Campbell, *supra* note 37, at 464. According to Campbell's libertarianism, human

rather than from causes. Their free acts proceed from the logical constraints of a situation and seek to realize ideals such as consistency, simplicity, beauty, or goodness. Antecedent causes do not mechanically determine free acts; rather, the actor gives his or her behavior over to the demands of the ideal. Free behavior is "caused" in the sense that there exist conditions, such as life and breath, necessary for its occurrence, but it is "uncaused" in the sense that such necessary conditions are never sufficient conditions and that only the logical demands of the actor's ideals control a decision. Such behavior is predictable in that it involves reference to rational principles.[99] Under this form of libertarianism an addict is not morally responsible for his or her behavior to the extent that it is caused by the addiction rather than dictated by logical reasons.

Critics contend, however, that this version of libertarianism is a variant of soft determinism. For example, the disposition or capacity to be swayed by logical considerations rather than prejudice or desires may itself be determined.[100] Such criticism is aimed at a straw man. Capacity to act according to logical considerations, like life and breath, may well be a necessary condition of a free act. The agent's disposition or capacity to act in response to logical considerations, however, is not enough for his or her acts to be free; the logical considerations must in fact exist, and he or she must act in accordance with them.

A court dealing with a drug addiction defense, therefore, ought to consider first whether the addict's behavior constituted morally responsible action by deciding whether causes determined it or whether reasons dictated it. If the best explanation of the addict's behavior in the situation is his or her physical or psychological condition, then causes determined the behavior, and he or she is not morally responsible. Such a finding would provide one strong reason for not punishing. Nevertheless, the court should consider next whether the defendant should be punished despite his lack of moral responsibility, in view of the policy goals of punishment. Factors influencing the court's decision should include the severity of the crime for which the defendant seeks exculpation, and society's consequent need to isolate him or her, statutory provisions for rehabilitating drug addicts through civil rather than criminal channels, and empirical data about the deterrent effect of harsh treatment of drug addicts.

---

beings are free agents when they engage in creative activity, although a great deal of their behavior is predictable and follows causal law. In other words, the "self" is more than the sum of the causal conditions which mold it. *But see* P. NOWELL-SMITH, ETHICS 278-85 (1965).

Brand Blanshard, although a determinist, sketches a doctrine closely related to MacIntyre's and Campbell's theories. Blanshard's determinism operates on two levels. On the lower level, action is inexorably determined by causal antecedents such as genes, glands, and environment. The higher level, however, resembles MacIntyre's freedom; instead of being determined by causes that went before it, action on this level is controlled by the logical, ethical, and aesthetic constraints of an "immanent ideal." *See* note 97 *supra*. Action "keep[s] to lines appointed by the whole one is constructing . . . and becomes the instrument of a necessity lying in its own subject matter." Blanshard, *The Case for Determinism*, in S. Hook, *supra* note 32, at 13.

99. *See id.* at 34.

100. Matson, *supra* note 32, at 494. *See also* Hospers, *What Means This Freedom?* in S. Hook, *supra* note 32, at 123.

VIII
CONCLUSION

Instead of using implicit or explicit in-dwelling agent or soft determinist reasoning, courts faced with a drug addiction defense ought to consider whether the addict's behavior constituted morally responsible action, from a rational libertarian point of view, by deciding whether the behavior was controlled by causes or by reasons. Next, they should determine whether the defendant ought to be held legally responsible in view of the policy goals of punishment. Moral responsibility, if it exists, should be one factor in the decision. For example, the defendant in *Moore* had been an addict for 25 years. The circumstances under which he was arrested left unclear whether he was a trafficker or was purchasing narcotics for his own use. In such a context the forbidden behavior (purchasing drugs) might best be explained by a cause (the defendant's physiological dependence on drugs) rather than by reasons such as participation in a lifestyle which involved heavy drug use or the desire to turn a profit. In that event the court might well determine that the behavior was not morally responsible and pass on to the question whether it was legally responsible. Here the lack of responsibility, the duration of the defendant's addiction, and other circumstances might lead to the conclusion that punishing the defendant would have little deterrent or rehabilitative effect. Consideration of whether he or she was a user or a trafficker might nevertheless compel an opposite conclusion. Users harm no one but themselves, unless they support their habit by criminal means, but traffickers harm their customers. In view of the strong policy against trafficking the court might impose legal responsibility on the addict in order to isolate a dangerous person from society, even if the court previously had found that defendant was not morally responsible for the forbidden act.

As psychological and sociological understanding of drug addiction grows, the law ought to accommodate to new scientific knowledge. In order properly to incorporate increasing understanding into a drug addiction defense, however, the law must eradicate two prevalent but erroneous assumptions, the in-dwelling agent and soft determinist theories, and replace them with a rational libertarian theory. Only when free of these confusions can the law begin to carve out a drug addiction defense which accurately reflects scientific understanding of human action and rationally furthers the policies underlying criminal responsibility.

CLAUDIA R. SARRO