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Who is the Addict-Offender? A Historical Ontology

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Abstract
The relationship between addiction and crime, and the political preoccupation with the addict-offender, has been the source of some academic commentary. However, most of this research assumes that the concept of ‘addiction’ — however determined — is a relatively stable and uniform one, focusing for example on the links between an addict’s capacity and their liability for offending prior to sentencing. In this article, a novel approach, rooted in the turn to ontology in social theory, is brought to bear on addiction as a criminal concern. It involves a historical study of reported sentencing decisions in which judges attempt to stabilise the notion of the addict-offender. The findings point to both continuity and change in criminal framings of addiction over time, exposing differences in approaches to alcohol compared with other drugs. They also suggest that the dominance of questions about capacity when it comes to apportioning responsibility to the addict-offender neglects the importance of concerns about character and risk to decision-making practices.

Keywords
Addiction, crime, ontology, sentencing, drugs, alcohol

Introduction
Scholarship on how criminal courts address addiction in England and Wales has been limited to two, discreet aspects of criminalisation. First, some legal scholarship and philosophical literature has considered whether addicts should be less liable for an offence,
focusing on issues of capacity and volition, amid broader questions about whether addiction constitutes a disease (Baggini, 2015; Bogg and Herring, 2012; Morse, 2009). Second, a branch of mainly criminological research has considered the use of drug treatment orders as sentencing options for acquisitive offences, and particularly the effectiveness, ethics and politics of such orders (e.g., Seddon et al., 2008; Stevens, 2012). This article represents a departure from these approaches in two ways: first, instead of assuming that the concept of addiction is settled, I explore how it is understood and ‘made’ in criminal law judgements using critical perspectives rooted in Science and Technology Studies. Second, I consider the implications of this analysis, particularly for the relationship between addiction and culpability (rather than liability), or blameworthiness, when it comes to determining punishment.

The discussion is based on data drawn from reported court case transcripts in England and Wales from the late 19th century to the present day, where addiction has been discussed as a relevant consideration in decisions about sentencing (n = 103). The reason for undertaking this historical sweep is that the late 19th and early 20th century marked something of a turning point in attitudes and regulatory approaches towards drugs (Seddon, 2011). Some substances were to become criminalised whereas others, notably alcohol, would remain largely beyond the scope of this prohibitory regime. I was interested in whether it was possible to discern a consequent shift in the framing of addiction within criminal discourses as alcohol and other drugs (AOD) were problematised in new and distinctive ways. Whereas a body of work has addressed the question of addiction through history (see, e.g., Berridge, 2013; Courtwright, 2001; Mold, 2007; Seddon, 2011), focusing particularly on policy and health discourses, the exploration of criminal judgements offers a novel perspective. Using theoretical work on ‘ontological politics’ (Mol, 1999), my aim was to focus on the relationship between the ‘addict’ concept and assessments of culpability in order to develop a richer understanding of contemporary approaches to the ‘addict-offender’.

The analysis reveals both change and continuity in the evolution of the addict as an object of criminal concern. From the category of the ‘habitual drunkard’ in the late 19th century to the growing salience of the concept of ‘addiction’, questions of volition, capacity and morality were integral. The idea that addiction was a disease, sufficient to impair capacity, gained traction in the mid-20th century, although it was not sufficient to diminish responsibility or culpability for offending behaviour. At the same time, addiction to drugs such as heroin and amphetamines was increasingly viewed as inextricably bound up with criminality, and deceit was stabilised as a key constituent of the ‘addict’ personality. Leniency could be shown to people diagnosed with ‘alcohol dependency syndrome’, a concept that was more likely to be understood in epidemiological terms, but not illicit ‘drug addicts’.

I draw a number of conclusions from these findings. First, we should be more attentive to the ways in which criminal courts are not simply involved in responding to the challenges posed by the addict-offender to principles of liberal justice, involving objective assessments about capacity, but are active in producing meaning about addiction and truths about addicts, with important consequences. Relatedly, I suggest that there should be greater focus on culpability, and not just liability, when attempting to understand the relationship between addiction, criminalisation and responsibility. I also draw
attention to the importance of character, in addition to questions about capacity or risk, in understanding how addict-offenders are determined to be responsible. In this vein, I theorise that characterising addicts as inherently dishonest, as courts have done in recent history, is useful for resolving the tensions between criminal conceptions of the addict as both irrational yet responsible, thus attributing agency (and stigma) to an otherwise ‘unreasonable’ or even incapable offender. Although the research was undertaken on English and Welsh caselaw, the focus on the constitution of the addict-offender should have resonance in international jurisdictions and contexts, and prompt reflection on processes of stigma and blame formation within systems of criminalisation.

**Approach: Responsibility and the Ontological Politics of Addiction**

The focus on ontology arises from a branch of critical scholarship that has questioned the dominance of neuroscientific or epidemiological explanations for addiction in which the experience is understood as a stable disorder or disease of the mind. Rooted in the ‘turn’ to ontology within social theory, the term ‘ontological politics’ means exploring how ‘the “real” and the “political” [are] deemed to be directly implicated in one another’ (Mol, 1999; Pellizzoni, 2015: 7). The acceptance that the real is a political creation involves examining the ways in which the concept of addiction is made and remade in different discourses and contexts (Flacks, 2019, 2021; Fraser et al., 2014; Law, 2004; Mol, 2002; Seear, 2019). It requires a recognition that understandings of addiction are contingent, rather than stable or uniform, and assumes that the conditions of possibility – what belongs to ‘the real’ – are not given, and that ‘reality does not precede the mundane practices in which we interact with it, but is rather shaped within these practices’ (Mol, 1999: 75). Realities are therefore multiple and in a process of continual flux. This approach is also informed by, although departs from, work undertaken on historical ontology by, among others, the philosopher Ian Hacking (2002, 2006; Seddon, 2011). In the tradition of Foucault’s archaeologies, Hacking charts how disciplines such as psychiatry are responsible for ‘making up people’ through the production of concepts and classifications (2002: 99).

Much of the work interrogating drugs/addiction as the product of knowledge-making practices has been focused on scientific research and drug policymaking (Flacks, 2019; Fraser et al., 2014), enabling an understanding of how we are governed through problematisations (Bacchi, 2009; Bacchi and Goodwin, 2016). As I have argued elsewhere, legal discourses are also ripe for engagement through the lens of ontological politics (Flacks, 2019; see also Seear, 2019). Instead of understanding judgements, for example, as attempts to respond and resolve to pre-existing problems of crime, disorder and punishment, we must also ask what is being done within and by such discourses. Importantly, this is not a purely relativist position in which problems related to the use of AOD are said to be imagined or a function of language. The argument is not that there are no issues of concern in need of addressing (Bacchi, 2009). Rather, the aim is to unsettle the ways in which concepts such as addiction are asserted in court as if stabilised legal objects rather than choices made by judges and other legal actors between
different versions of reality and (responsible) subjectivity, and to think how things might be otherwise. When judges therefore articulate questions relating to, for example, reasonableness and capacity, they are active in constituting and transforming these objects and subjects by connecting apparently taken-for-granted ‘truths’ about AOD, or the addicted subject (Seear, 2019: 46).

It is well established that the concept of addiction, at least as many understand it today, is a relatively modern one (Berridge, 2013). It was a product – along with our late modern criminal law framework – of a particularly active period in the transformation of socioeconomic relations following the industrial revolution when the values of self-control, etiquette and responsible citizenship – intrinsic to the addiction concept – came to be venerated as primary constituents of a civil society (Sedgwick, 1993). A pervasive understanding, which I return to later in the article, is that addiction is characterised by dishonesty – an association resulting not only from the individual’s relationship with a given substance, but with the inauthenticity of the relationship with their addicted self (Keane, 2002). An addict is deceitful not necessarily because of their behaviour, but because of the refusal to comply with the exigencies of advanced liberal subjectivity, including moderation, responsibility and freedom. This characterisation of addiction is one that appears routinely in the knowledge-making practices of the sciences and social sciences. In the field of clinical psychology, for example, Ryan Kemp (2009: 361) has argued that ‘relations between addicts and others are dominated by untruth’ and moreover that ‘addiction is itself a form of untruth’ since it ‘wishes … to tell a false tale of affect’. For the psychiatrist Abraham Twerski (2009: 10), ‘addictive thinking’ is never ‘rational’, whereas bioethicist Hanna Pickard (2016) suggests that there is insufficient recognition of the role of denial (rather than compulsion) in addiction (see also Levy, 2003; Martínez-González et al., 2016; Walker, 2010). In parliamentary debates, ‘drug abuse’ has been described as inherently ‘deceitful’, and ‘lying’ has been identified as one of the ‘main symptoms’ of addiction (HC Deb, 23 June 1999; HC Deb, 16 December 2010).

The meaning of addiction is especially important for decisions about responsibility. Another understanding of addiction – the ‘disease model’ – determines that the addict is lacking at least some agency and volition as a result of their compulsive drug use (Fraser et al., 2014). This model is sometimes preferred because it is supposedly less stigmatising than ‘moral’ interpretations, although Fraser et al. (2017) doubt whether it affords such benefits rather than opening up new avenues for stigma formation. This interpretation is important for the question of responsibility since if addiction can be named and delineated as a cause of human action, attributing responsibility or culpability for an offence becomes an especially salient question where there is a relationship between the purported addiction and offending behaviour. Other scholars have persuasively argued that addicts should be understood as only partially responsible for harmful behaviours such as criminal activity as a result of ‘disordered’ choice making (Baggini, 2015; Bogg and Herring, 2012; Heather and Segal, 2016; Heyman, 2009; Morse, 2009).

However, the question of responsibility goes beyond issues of liability or capacity. Lacey (2017) has identified four potentially overlapping ‘patterns’ of responsibility that have affected decisions in criminal courts since the Industrial Age; ‘character’,
‘outcomes’, ‘risk’, and ‘capacity’. Capacity responsibility, the dominant approach to criminal law decision-making today, is rooted in notions of personal autonomy, agency and opportunity, and particularly whether defendants had a fair opportunity to act otherwise yet failed to do so. Outcome responsibility, which does not concern us here, is based on accountability for our actions even if they were accidental. The risk pattern of responsibility has in recent years gained influence. Also known as the ‘preventative turn’, the rise in ‘risk thinking’ marks a move towards responsibilising individuals on the basis of future predicted behaviour, rather than simply past deeds. An example arguably includes the introduction of drug treatment orders as sentencing options in the late 1990s, today enacted under the Sentencing Act 2020 (s.19), aimed at breaking the link between addiction and future offending (Seddon et al., 2008). Character responsibility is, I suggest, somewhat neglected in assessing criminalisation practices in respect of addiction. At its most extreme, this pattern suggests that criminality is based in whole or in part on an assessment of the quality of the defendant’s disposition rather than his or her conduct. Whereas moral assessments based on ‘bad’ character were central to early modern English criminal trials (Lacey, 2017), they mainly feature now at the sentencing stage. This is particularly relevant in respect of mitigating factors, which, along with aggravating factors, exert a ‘powerful influence’ over sentencing outcomes, despite having attracted limited theoretical or doctrinal reflection or even discussion by judges (Hutton, 2006; Manson, 2011; Roberts, 2011; Tata, 2020). The preoccupation with capacity responsibility, I suggest, may elide the ways in which realities about addiction, and how the addict is constituted as a particular kind of governable subject, are multiple and not tied to the singular question of volition. In particular, an overriding concern with capacity may fail to acknowledge the importance of character and risk to decision making, and the intersection between these discreet yet overlapping patterns of responsibility.

Method

The research informing the discussion below was conducted between February 2020 and August 2022, and involved the extraction of criminal judgements from the Westlaw legal database. Just over 1100 judgements were sourced using a variety of search terms relating to addiction, inebriation, sentencing and mitigation (also including, e.g., ‘dependence’, ‘alcoholism’ and ‘responsibility’). A significant number of cases (n = 103) mentioned addiction as a factor in sentencing. These transcripts were downloaded and coded thematically. I explored both how judges explained addiction when considering how an addict’s sentence might differ from that of a non-addict, as well the kinds of sentences they saw fit to impose. The research was limited by its focus on reported caselaw and the criminal law more generally. Only a fraction of court cases are reported because they deal with a significant aspect of the law. A more lengthy, comprehensive ontology of the ‘addict-offender’ might include how the concept has been ‘made up’ or constituted in other public spheres or disciplines, such as the natural sciences and/or political discourses. However, the focus on criminal law judgements provides an important insight into criminalisation practices specifically.
The role played by addiction when it came to complex decisions about sentencing was not always clear. It could sometimes be inferred that a sentence was adjusted as a result of addiction, even if this was not expressly stated. The question of sentencing and addiction was further complicated by the relationship between alcohol/drug problems and mental health generally. Courts were much more willing to consider mitigation if a mental health problem preceding the use of alcohol/drugs could be identified (see, e.g., R v Griffiths (2021)). A significant proportion of the transcripts (n = 31) directly addressed whether addiction might constitute a ‘mitigating’ factor. None considered addiction to be an ‘aggravating’ factor, at least formally, although, as shall become clear, offenders were on occasion handed longer prison sentences because of their addiction.

In what follows, I begin by discussing how inebriation was discussed in court during the late Industrial Age, when a new ‘problem framework’ came into view. Within this developing approach to criminalisation, the inebriate-offender and later addict-offender began to attract specific sentences that reflected growing anxiety about the individual and social costs of excessive or compulsive drug taking. The capacity and character of the inebriate were, at the outset, important considerations for the court.

Approaches to Sentencing in the Industrial Era: From Inebriation to Addiction

The words or phrases used to describe excessive or compulsive consumption of AOD (addiction, dependence, problem use and so on) are important for shaping the control and governance of those concerned (Seddon, 2011). Such terms can today be used interchangeably, but it was the concept of ‘inebriation’ that held sway up until the early to mid-20th century. It was mainly applied to users of alcohol but also – to a much lesser extent – other drugs. ‘Addiction’ was a marginal concept prior to that era, although it was referenced in a non-criminal court as early as 1809 in relation to alcohol in the case of R v Cook (1809) in the Court of Chancery. The judge considered whether someone had been ‘using artifices to induce a person under their influence to make a will, such person being habitually addicted to, and disordered by, intemperate drinking’, and went on to argue that:

whenever a person’s habitual addiction to intoxication renders him extremely subject to imposition, such habits, though not carried to an excess constituting absolute incapacity, lay a ground for strict examination …

This question of capacity was also the overriding concern for judges when framing the concept of inebriation under criminal legislation enacted towards the end of the 19th century. A small number of reported cases involved judicial efforts to interpret The Habitual Drunkards Act 1879, which allowed for the establishment of inebriate treatment centres, paid for by the inmate, and the 1898 Inebriate Act, which gave courts the power to commit offenders to state-funded inebriate reformatories. As today, legislators were seeking to prevent future offending by breaking the links between habitual drug use (in this case drunkenness) and criminal behaviour. According to the 1879 Act (s. 2(1)),
for example, any person who committed an offence listed in the Act, and had been convicted of the same offence at least three times within the preceding 12 months, and who was also ‘a habitual drunkard’, could be detained in an inebriate reformatory. A ‘Habitual Drunkard’ was defined as someone not subject to laws on lunacy, but who was nevertheless ‘dangerous to himself or herself or to others, or incapable of managing himself or herself, and his or her affairs’ because of drinking (s.3(b)). The legislation was rooted in the penal-welfarist logic of normalisation, based on the expectation that the ‘damaged will’ of inebriates could be repaired through coercive measures aimed, ultimately, at abstinence. These were, at the same time, status offences – effectively amounting to a criminalisation of drunkenness – that meant inebriates were held responsible for a deficiency in character beyond any offending behaviour. Confinement was longer than a prison sentence (1–3 years rather than 1–3 months) in order to effect change (Hunt et al., 1989).

In the few cases referring to the 1879 or 1898 Acts, such as Bridget Warrillow (1910), judges lamented the lack of availability of reformatory places or alternative sentencing options while also emphasising the rehabilitative nature of the sentences. In R v Briggs (1909), for example, the Court refuse to commit a habitual drunkard, convicted under the Inebriates Act 1898, to imprisonment with hard labour while awaiting a place in a reformatory. As discussed further in the next section, this departed from more retributive criminalisation practices during the mid-20th century when illegal drug (but not alcohol) addicts could be sentenced to longer terms in prison to ‘cure’ them of their condition.

At the same time, the meaning of ‘habitual drunkard’, as stabilised in these cases, differed from some later judicial interpretations of ‘addiction’ in criminal courts, including alcoholism, which decoupled intoxication from the disease of addiction and suggested that the illness itself was sufficient to impair capacity. In Eaton v Best (1909), therefore, the court considered whether the requirements of incapacity and dangerousness under the 1879 (s.3) and 1898 (s. 2, sub-s. 1) Acts were more or less permanent states. It was argued by the defence that the respondent did not qualify because he was, although like a ‘lunatic’ when drunk, ‘capable of managing his own affairs’ when sober (ibid at 633). Lord Alverstone disagreed, arguing that someone could still be a habitual drunkard despite being capable when sober (ibid at 635). It was therefore not necessary for the lack of volition to be permanent nor a direct consequence of, say, the condition or disease of inebriation/alcoholism. As I suggest further below, this troubles the suggestion that framing addiction as a brain disease, rather than say a moral deficit, necessarily leads to less punitive sentencing practices. It also points to the ways in which law-making practices serve to articulate inebriation (and later addiction) as a specifically legal concern by framing it according to the established juridical principles of capacity, responsibility and ‘lunacy’.

From the dawn of the 20th century the language of addiction appeared more often in reported court cases, but only in respect of civil matters and particularly divorce cases involving allegations of cruelty (see, e.g., Graham v Green (Inspector of Taxes) (1925)). Significantly, the inebriate acts were superseded by the Mental Deficiency Act 1913, under which inebriates could be classified as ‘mental defectives’ and detained in mental institutions. Again, while the conditions in such institutions were akin to punishment, the aim was to incapacitate and rehabilitate. The case of R v Rourke (1956),
concerning a doctor accused of aiding and abetting the unlawful possession of drugs, was the first reported criminal case to refer to the question of ‘drug addiction’. As I discuss below, the addict concept was subsequently constituted in court in ways that departed from previous iterations of drunkenness or inebriation, suggesting a stronger link between addiction, criminality and punishment, and a permanent, rather than episodic, loss of rationality, reason and, in some cases, capacity.

The Criminal(ised) Addict

By the 1960s, patterns of substances use had changed considerably. There was increased availability of illicit drugs, and associated concern about their use (Mold, 2007: 289). Attitudes to heroin, in particular, had noticeably shifted. Whereas treatment for inebriety in the late 19th century initially took the form of effecting a ‘cure’, by the latter half of the 1920s, a medical model – often known as the British system and lasting for the next 40 years – had been established which saw the distribution of minimum doses to heroin addicts, who were mainly middle class, so that they may go about their daily lives in a reasonably functional way (Shiner, 2009). For poorer and working-class addicts, abrupt withdrawal remained the norm. By the 1960s, however, heroin addiction, which was still very rare, had come to be framed as a ‘socially infectious condition’ demanding ‘epidemiological assessment and control’ (Berridge, 1979). It was also increasingly understood as contiguous with criminality, perhaps even requiring detention to enforce abstinence. This perception was reflected in parliamentary debates on mental health legislation, in which it was argued that addicts had a ‘bird-like mind and attitude of vagrancy’ and should be subject to ‘anti-drug’ sentences of ‘semi-penal detention’ since ‘[nothing] else works’ (HL Deb, 26 March 1969, paras 1327–1330).

In court, in contrast to habitual drunkenness, heroin addiction was thought to mean a state of continuous subjugation – both to the substance itself and the unscrupulous supplier. This was evident in R v Fraser (1967), in which the judge argued that:

Heroin is … a killer, and it must be remembered that those who take heroin put themselves body and soul into the hands of the supplier. They have no moral resistance to any pressures that may be brought to bear upon them. (para 472)

The heroin user was thus not only (permanently) disempowered physically, but also morally and spiritually. Unlike for habitual drunkards under inebriate or mental health legislation, there was also a more explicit blurring of boundaries between technologies of treatment and punishment, and the addict was characterised as more obviously dangerous or threatening. Judges began issuing longer prison sentences in order to ‘cure’ offenders of their use of such substances, an illiberal practice that – while short lived – continued the practice of criminalising habitual substance use. However, whereas concerns about the inebriate resulted in measures aimed at detention and moral reconditioning, those aimed at illegal drug addicts were more explicitly punitive. In R v Glasse (1968), a sentence of 5 years’ imprisonment for possessing dangerous drugs was upheld. Lord Parker, noting that the appellant had previously failed to attend treatment clinics, rejected any psychiatric orders that might restrict liberty. He said:
Where a drug addict will not co-operate with treatment in open conditions a comparatively long custodial sentence is appropriate since it provides the best hope of a cure … it is clear that the only possibilities of a cure are either that with increasing age and greater maturity he may cease to have the craving … or that he will get somehow in prison the psychiatric treatment over the years which will gradually relieve him of this craving. (para 123)

Addiction is framed here in both epidemiological and penal terms, requiring treatment over a number of years in order to effect a cure unless the offender grows out of his involuntary craving (see also R v Molyneaux (1968); McCreadie v HM Advocate (1961)). Similarly in R v Bond (1968), the judge found that, where a drug addict supplies drugs in order to fund his own use, and refuses treatment, the sentence may be punitive as well as treatment based. He said:

Since taking drugs his personality has changed. He has become aggressive, he is anti-authoritarian and his only hope is co-operation in treatment not only to get him off the drugs but to get rid of the craving for the drugs. (para 110)

The drug-induced ‘anti-authoritarianism’ of the offender justified retribution; the option of Borstal training (for young offenders) instead of prison, providing a ‘more intensive psychiatric regime’, was rejected, and the judge insisted that ‘we are not considering solely the question of cure but of punishment’ (ibid). Again, addiction was framed here as a threatening (rather than ‘weak’) condition requiring penal correction. It was not until 1980 that the practice of detaining an offender because of their addiction was deemed unlawful, although it nevertheless continued for a while longer (R v Huskinson, (1992); R. v Bassett (1985)). The decision in R v Roote (1980) departed from the cases described above by explaining the imposition of a longer sentence at the lower court as purely in the interests of the defendant, rather than as means of punishment as well as treatment. According to the judge:

She had not the strength of mind to give up drugs of her own free will and it is clear to this Court that what the [lower court] judge was in fact doing was passing a longer sentence than he would otherwise have considered appropriate, the additional term of imprisonment being passed for the benefit of this appellant and not in any way by way of punishment. (para 369)

However, it is perhaps significant that this was the only case found in which the defendant was a female addict described by the judge as a morphine user who ‘had not the strength of mind to give up drugs of her own free will’ and had a ‘tenuous hold on life’ (ibid). The reasoning perhaps signalled the paternalistic attitude of the court rather than any shift in approaches to sentencing, and points to how findings of incapacity can nevertheless lead to coercive interventions (Spivakovsky et al., 2018). As courts were faced with an evolving drug predicament, therefore, addiction continued to be stabilised in the judgements as a disorder requiring moral reconditioning in order for individuals to be granted full citizenship. However, substances such as heroin were framed differently from alcohol, although both were understood to have addictive qualities. Users of opiates, in particular, were believed to be in a state of more or less
continuous enslavement. Moreover, their sentences were more explicitly penal in nature, and the association between addiction and criminality was more evident. Addict-offenders could also be described as ‘diseased’ or incapable without necessarily receiving less punitive, and more rehabilitative, sanctions. While it did eventually die out, the notion that abstention from drugs is necessary and a legitimate function of criminal sentencing, and that addicts may not be capable of doing so, or trusted do so, without restrictions on their liberty, remain important principles of guidelines and decision making.

‘Alcohol Dependency Syndrome’ and ‘Drug Addiction’

Towards the end of the 20th century, courts were becoming more willing to consider whether addiction might count in mitigation in respect of certain acquisitive (theft-related) and supply offences, although the position on sentencing/mitigation formally reflected that on liability; drug addiction is not a mitigating factor in sentencing because it is ‘self-induced’ (R V Masllin (2014); R v. Mellor (2017)). Although it tended to be acknowledged that addicts were vulnerable and different from other offenders, judges sought to establish culpability and refute mitigation based on two broad justifications: (1) **illegal** drug addiction is set apart from other mental health conditions due to the character/morality (and particularly the inherently deceitful nature) of the offender; (2) Drug users are already culpable because of their decision to use drugs (prior fault). An addict could only therefore avoid responsibility entirely if there was some other reason, aside from their addiction alone, to suggest that their behaviour was involuntary. An influential text by Sir Gordon (1979) explains this position:

The addict is by definition unable to control his craving, and so might be said not to be responsible for anything he does as a result of the craving, or of the effects of any drug for which he craves. Nor will punishment cure his addiction … His addiction was at one stage a habit, and it may be said that persons are responsible for their habits.

For Gordon, the addict is incapable yet responsible, and the voluntary, albeit reckless, decision to continue consuming is enough to render them fully culpable for future acts. It allows the law to reassert the principle that self-control, albeit in an anterior expression, remains the foundational constituent of liberal, legal subjectivity. This is consistent with the question of voluntary intoxication, which provides no defence to crimes of basic intent even where it is demonstrated that it prevented the defendant from forming the required mens rea (R v Majewski (1977)). In respect of the offence of manslaughter on the grounds of diminished responsibility, where the question of whether addiction can impair an offender’s ability to form a rational judgement and/or exercise self-control, the issue is somewhat less settled (R v Dietschmann (2003); R v Wood (2008)).

The ‘brain disease’ and other models of addiction tend to suggest limited difference between the problematic use of AOD (Volkow et al., 2016). Yet ‘alcohol dependency syndrome’ has been recognised more unambiguously as a mitigating factor in various recent court judgements. In R v Tully (2006), the Court of Appeal appeared to acknowledge that, although the appellant’s alcohol use was not sufficient to diminish his
responsibility for murder, it lowered his degree of culpability when it came to mitigation (see also R v James Steele (2020). In R v Bourke (2017), the defendant’s alcohol dependency syndrome was itself held to be a ‘mental condition’ (and not merely the cause of one) that also mitigated the sentence, although there was no mention of the condition falling within mental health legislation. This can be contrasted with the earlier case of R v Williams (2008), in which it was held that, although the applicant was diagnosed in a psychiatric report with alcohol dependency syndrome, and used other substances, ‘there was … no evidence of any mental illness leading up to the offences’ and ‘he did not suffer from any illness within the meaning of the Mental Health Act 1983, or any psychopathic illness or mental impairment’ (para 12) (see also R V Dunstan (2016)). In R v Stewart (2009), the Lord Chief Justice, referring to international systems of disease classification, concluded that ‘whether or not brain damage is discernible, alcohol dependency syndrome is a disease … or disorder of the mind …’ (para 26).

This variation in enactments of alcohol addiction as a mental disorder, or disease, reflects the instability of the addiction concept in other discourses and wider society. Its privileged status also draws attention to the importance of morality and character – not simply objective determinations of risk or capacity – within criminalisation practices relating to addict-offenders.

Addiction, Reasonableness, and Deceit

Ambivalence about the addiction concept was also apparent in the ways in which judges considered whether addicts can ever be ‘reasonable’. R v Morhall (1995) concerned a habitual glue sniffer who argued that he had been provoked into killing a friend because of persistent comments about his addiction. Provocation may be a question for a jury, in respect of liability for an offence, or for the judge as a potential mitigating factor when sentencing (Sentencing Council, 2019). The key concern was whether what was said in provocation should have been enough to make the reasonable person do as the accused did. When considering who the reasonable person in this situation might be, the Court of Appeal ruled that an addiction could not be relevant to that determination:

Not only would a defendant, who habitually abuses himself by sniffing glue to the point of addiction, be entitled to have that characteristic taken into account in his favour by the jury; logic would demand similar indulgence towards an alcoholic, or a defendant who had illegally abused heroin, cocaine, or crack to the point of addiction. Similarly, a paedophile, upbraided for molesting children, would be entitled to have his characteristic weighed in his favour on the issue of provocation. Yet none of these addictions or propensities could sensibly be regarded as consistent with the reasonable man.

The House of Lords demurred, holding that a characteristic was not irrelevant to the reasonable person simply because it was discreditable or ‘shameful’. The reasoning reflects tensions between different, but dominant, ‘realities’ about addiction; an addict is reprehensible and irrational, while at the same time reasonable and responsible. It is also points to the ways in which judges discuss questions of reasonableness and addiction.
as if settled and coherent, reaching a ‘sensible’ conclusion that involved the making of some creative connections between glue-sniffing, paedophilia and the ‘illegal abuse’ of other substances.

The tension between different, and often antagonistic, versions of addiction was reflected in other judgements. Courts have been reluctant to accept that drug addiction could reduce culpability, even where they might be sympathetic towards the offender, because of reservations about condoning an immoral act (see, e.g., R. v Ravenhill (1974)). In R. v Gee (1984) the appellant was deemed to have sold drugs ‘on a modest scale’ and property to ‘sustain his addiction.’ A plea of mitigation, in part on the basis of his ‘dependence on drugs’, and the appellant was ‘weak’ and ‘pathetic’ rather than ‘malevolent’ was rejected (para 89). Culpability could be reduced, however, in circumstances where the offender had either taken steps to ‘free’ themselves from addiction or could prove that they were already abstinent (see e.g., R. v Mackey and Shaw (1992); R. v Macdonald (1983); R. v Gould (1983)). Although it tended to be acknowledged that addicts were vulnerable, judges sought to establish culpability and refute mitigation based either on the harms caused by drugs to wider society, particularly the contagion of drug use and supply, as well as the inherently defective – and particularly deceitful – nature of the addict.

The case of Majewski (1977), for example, concerning a pub brawl ‘fuelled’ by drugs, has largely been analysed through the lens of intoxication and the law on criminal responsibility. The court found that intoxication provides no defence to crimes of basic intent even when it can be shown to have prevented the defendant from forming the necessary mens rea. Responsibility was not, therefore, simply a question of intent or rational decision making – the key ingredients of criminal subjectivity – but of dangerousness. However, in determining punishment the case was also instructive for its consideration of addiction as a potential mitigating factor in sentencing. Lord Edmund-Davies said:

Such a plea [of mitigation due to addiction] is becoming much more common, and those acting judicially or who have otherwise acquired any knowledge of addiction are familiar with such parlance of the drug scene as ‘going on a trip’ or ‘blowing the mind,’ the avowed intention of the taker of hallucinatory drugs being to lose contact with reality. Irrationality is in truth the very essence of drug-induced fantasies. (para 495)

Drug use was not just infantile and irrational, but also inauthentic. Note too the slippage between drug use and addiction, effacing problem use, specifically, as worthy of greater sympathy or mitigation.

The key question in R v Crampton (1991) concerned the use of evidence rather than assessments of culpability. The appellant was a heroin addict who claimed that his confession to the offence of conspiracy to supply heroin should have been excluded on the basis that he was withdrawing from the substance at the time. According to the medical opinion of a doctor who examined the appellant,

A patient suffering from withdrawal symptoms can be manipulative and tell lies; he can do anything to get more drugs or to get rid of the symptoms. At the same time, he can be
perfectly lucid … the addict’s intelligence is working normally during the withdrawal – they know that they are telling lies. (para 373)

The judges concluded that the question of whether a drug addict is ‘fit to be interviewed, in the sense that his answers can be relied upon as being truthful, is a matter for judgment of those present at the time’ (ibid).

Recently, in *R v Brumby* (2002), when addressing the addict-appellant, the judge said: ‘Honesty from drug users and takers is in short supply, but only you will know that’. The question has not only been one of the dishonest behaviour towards others but the tendency of addicts to deceive or delude themselves. In *R v Larcher* (1979), concerning an addict who was sentenced to five years for stealing drugs from a chemist and committing a number of other acquisitive offences, the judge remarked that there is a ‘great deal of false optimism about an otherwise totally hopeless way of life’. In *R v Martinez* (1984), which extended the guidelines to cocaine and other class A drugs, the judge stated that taking cocaine could lead to ‘the feeling of persecution’ and that wealthy users were responsible ‘for perpetuating the false elitism which accompanies its use’.

As noted above, the idea that addicts cannot, as a general rule, be trusted has important effects. In *Attorney General’s Reference* (No.101 of 2009) Lord Justice Hughes said that:

> Courts need to be aware that many defendants, and perhaps particularly drug abusers, find it easy to make promises when they are otherwise confronted with the prospect of a long sentence of imprisonment. Simple optimism is not enough. (para 17) [my emphasis]

An early guilty plea or demonstration of remorse – both indications of character – is potential mitigating factors for any offence (Sentencing Council, 2012: 14). For the addict, however, the threshold is higher; since they are deemed untrustworthy by nature (finding it particularly ‘easy to make promises’), they potentially must go to extra lengths to demonstrate compliance with treatment and/or a commitment to abstinence. Moreover, the question of whether an offender is, or is not, genuinely committed to treatment is presumably a subjective and discretionary one for a judge, depending perhaps on the ability of a particular offender to perform contrition and resolve.

It is also possible to parse, in this historical analysis of sentencing decisions and remarks, the contours of current policy approaches to the sentencing of addicts and particularly the role of character in decisions about culpability. According to guidelines issued by the Sentencing Council (2012), a commitment to addressing addiction can reduce the seriousness or ‘reflect personal mitigation’ in relation to a range of offences. ‘Freeing’ oneself completely from addiction to drugs has been called a ‘powerful’ mitigating factor (*R v Leaver*, 1989; *R v Grigas*, 2017). To benefit from a Drug Rehabilitation Requirement (DRR), instead of a custodial sanction, primarily for supply and particularly acquisitive offences, an offender needs to demonstrate certain qualifying factors such as determination to overcome an addiction and evidence that they are capable of doing so (*Attorney General’s Reference No 66 of 2003*). A dim view is taken of any failure to respond to drug treatment, and/or subsequent re-offending (*R v Fountain* (2017)). Judges have emphasised that addicts
remain blameworthy and that DRRs are ‘rigorously enforced’ leading to a ‘heavy demand on offenders’ (*R v Woods and Collins* (2005), para 8).

**Concluding Discussion**

It is important to attend to the production and framing of the addiction concept within criminal law-making processes, both to situate the constitution of the ‘addict-offender’ within critical perspectives on drugs and addiction, and because of the impact on choices about punishment. This analysis of historic court judgements suggests that the characteristics of the habitual user of alcohol or other drugs continues to be stabilised in different ways, depending on the substance and the context, with varying consequences for sentencing. This echoes research undertaken in other fields whereby the concept of addiction has been found to be mutable and contingent, rather than settled or universal, as tends to be suggested in some scientific discourses and systems of disease classification (Fraser et al., 2014). Whereas concerns about character and agency dominated throughout the period surveyed, the 19th century ‘inebriate’ was understood to be periodically intoxicated/incapable, as well as weak-willed and deserving of compulsory or coerced treatment. For addict-offenders who habitually used substances such as heroin as well as alcohol, courts from the mid-20th century onwards tended to characterise them in more threatening and morally abject terms, as well as subject to states of continuous incapacity, and sentencing measures were more unambiguously punitive. There is an established principle that illicit drug users must not be considered worthy of mitigation. In contrast, judges have recently shown a willingness to consider ‘alcohol dependency syndrome’ in epidemiological terms as a mental disorder, in some cases allowing it to be used in mitigation. The point with this historical sweep is not to suggest that we have now arrived at a settled understanding of addiction – the brain disease model of addiction remains a hotly contested topic, including within legal scholarship – but to point to the instability of the concept and the need to remain attentive to how and why it is constituted in specific ways.

In addition to troubling the notion that the ‘addict’ is a neutral or given category in law, the findings cast doubt on whether decisions about punishment involve the straightforward application of a set of standardised rules relating to capacity and choice. Determinations of capacity were not independent from character-based judgements, but rather intersected with questions about the morality of individuals’ substance-using behaviours. Invoking a disease model of addiction did not necessarily result in a more forgiving approach by the courts, with judgements rendering addicts both diseased and immoral/culpable, complicating the ‘disease versus moral’ binary sometimes explicated in scientific literature on addiction (see also Sinclair-House et al., 2020). This raises questions about whether acknowledging the (disputed) epidemiological nature of addiction necessarily reduces stigma or mitigates punishment (Fraser et al., 2014).

The characterisation of the drug addict since the mid-20th century as dishonest and inauthentic also does some work in framing addicts as irrational yet responsible. The unreasonable addict may be living an irrational or even ‘fictional’ life, but since dishonesty requires agency, they remain capable and culpable. From a risk perspective, whereas earlier sentencing decisions seemed guided by a penal-welfarist approach to addiction,
including measures aimed at incapacitation, the association between addiction and deceit indicates a shift in criminal conceptions of dangerousness of the kind described by Henrique Carvalho (2017: 168). He argues that, whereas the early modern notion of dangerousness was based on pathology and the need to incapacitate incapable offenders, subjecting individuals to regulatory regimes, dangerousness has today been ‘reconfigured in criminal law from a pathological to a political character’ so that responsibility and dangerousness are intertwined. A focus on prevention and containment is thus premised on the notion that responsible subjects can endanger community security by virtue of their agency. Addict-offenders can demonstrate that they are no longer a threat by committing to treatment – thus exercising their agency and freedom in prescribed ways (Rose, 1999) – which courts may equate with abstinence. However, this individualisation of responsibility and agency divorces the problems associated with substance use from their social context, particularly the prevalence of social deficits such as homelessness and poverty among addict-offenders, as well as national variations in treatment availability. This suggests that the availability of a reduced sentence for addict-offenders should not be based simply on their willingness to abstain from alcohol or other drugs, but the extent to which their use of such substances has, along with their experiences of disadvantage, constrained their ability to abstain from offending.

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Notes
1. Drug Courts have also been of considerable interest to researchers in other jurisdictions (e.g., Vrecko, 2009; Murphy, 2012), but they have not gained a significant foothold in England and Wales, despite a number of pilot schemes (see Ward, 2019).

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