

Debating intoxication: response to commentaries

Article (Published Version)

Crombag, Hans S, Child, John J and Sullivan, George R (2020) Debating intoxication: response to commentaries. *Addiction*. pp. 1-2. ISSN 0965-2140

This version is available from Sussex Research Online: <http://sro.sussex.ac.uk/id/eprint/94254/>

This document is made available in accordance with publisher policies and may differ from the published version or from the version of record. If you wish to cite this item you are advised to consult the publisher's version. Please see the URL above for details on accessing the published version.

Copyright and reuse:

Sussex Research Online is a digital repository of the research output of the University.

Copyright and all moral rights to the version of the paper presented here belong to the individual author(s) and/or other copyright owners. To the extent reasonable and practicable, the material made available in SRO has been checked for eligibility before being made available.

Copies of full text items generally can be reproduced, displayed or performed and given to third parties in any format or medium for personal research or study, educational, or not-for-profit purposes without prior permission or charge, provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

Debating intoxication: Response to commentaries

The lack of scientific or clinical clarity faced by courts dealing with cases involving intoxicated criminal defendants is unavoidable, but introducing further legal ambiguity to meet policy goals introduces ever greater risk of problematic (including unjust) legal outcomes.

We thank Robert MacCoun [1] and Johann Koehler [2] for their insightful commentaries on our Addiction Opinion and Debate article [3], in which we discuss *R v Taj* [4], a recent judgement from the Court of Appeal (CA) of England and Wales (E&W). Their expert commentaries highlight and discuss a number of important points, including how scientific and legal reasoning more often collide, differences and complexities around causal reasoning in science and law, and what relation we might conceive between holding a person responsible and blaming (or praising) them. Word restrictions prevent us addressing all these important points, so we limit ourselves to the following.

First, Koehler is certainly correct that the criminal law is prone to cling to simplistic concepts (proxies) that may fail to adequately engage with the complexities of scientific and/or clinical understanding. We see this in different areas (as usefully described by Koehler), including in the context of intoxication and the legal distinctions between insanity and automatism. A useful, and lamentable, example of this is the internal/external cause divide used to legally separate potential cases of insanity and automatism. When applied to those causing harms while suffering a diabetic coma, defendant 1, with hypoglycaemia as a result of injecting insulin and a lack of eating (an external cause), might avail herself of automatism and an unqualified acquittal; while defendant 2, with hyperglycaemia brought on by lack of insulin (an internal cause), would have to plead insanity. The scientific and moral distinctions here are minimal, but the legal outcome for our defendants is very different.

However, the CA's decision in *Taj* (setting precedent going forward) was not simply a rejection of scientific/clinical complexity (i.e. holding to a simplistic legal definition of intoxication), but a rejection of long-established legal doctrine as well (i.e. a change from the simple 'drug-on-board' assumption; e.g. [5]). As we discuss in our article, what appears to be driving the reasoning is not scientific or legal oversimplification, but what appears to be an expression of normative outcome logic: the court decided that *Taj* was bad, not mad. MacCoun's reference to motivated cognition may well offer a psychological explanation for such logic.

There is some basis for this normative conclusion, usefully illustrated by MacCoun, although it involves complex analysis of *Taj*'s prior-fault over months/years of substance

abuse. We see prior-fault logic of this kind applied to insanity cases in other (civil-law) jurisdictions, and also regularly mooted in common-law ones. However, there is currently (in E&W) no legal device for applying a prior-fault rule to insanity cases; nothing from legislative or jurisprudential sources. On that basis, the court in *Taj* were wrong to find him liable, and wrong to dress their *ad-hoc* outcome logic in a veneer of scientific legitimacy; indeed, we see enough of that from politicians lately!

We appreciate MacCoun's clarifications about causal reasoning in the law and agree that the type of multiple-step, trace analysis illustrated in his Fig. 1 [1] offers a valid model of the sort of more complex causal reasoning we (implicitly or explicitly) adopt when deciding moral responsibility and blameworthiness. Specific to *Taj*, of course he had multiple past occasions when he might have decided to restrain from drink and/or drug taking (especially when on at least one of these occasions he also subsequently experienced delusions), so some responsibility and blame seems appropriate. Whether this should prevent him from raising a defence altogether and a resulting sentence of 19 years for attempted manslaughter is a complex question which we discuss in further detail elsewhere [6]. However, the issue is less about whether the court was wrong in *Taj* specifically and more whether the wider and fuzzier definition of intoxication going forward increases the odds of problematic, undirected decisions. We, and both commentators, think it will.

Finally, a few brief words in relation to addiction which, although not directly at play in *Taj*, raises interesting legal and moral question, and around which there is a significant literature (e.g. [7–9]), including some recent empirical work of our own [10]. Models such as proposed by Pickard, and endorsed by MacCoun, are indeed a more promising and interesting means to break the moralistic 'War on Drugs' deadlock. Perhaps the development of so-called Drug Courts in the United States, United Kingdom and other places are a cautious expression of this sort of more progressive, forward-looking and constructive way of thinking and, as mentioned, holding addicts responsible (at least for their addiction) while not looking to blame has important therapeutic benefits (e.g. [11]). The 'rate-limiting step', however, is again political will.

Declaration of interests

None.

Acknowledgement

Supported by funding from the British Academy 'Knowledge Frontiers 2019' Project KF3/100111.

Keywords Alcohol and drugs, criminal law, mens rea, mental disorders, psychosis, self-defence.

HANS S. CROMBAG¹ , JOHN J. CHILD²  &
GEORGE R. SULLIVAN³

School of Psychology and Sussex Neuroscience, The University of Sussex, Brighton, UK,¹ Birmingham Law School, The University of Birmingham, Edgbaston, Birmingham, UK² and Faculty of Laws, University College London (UCL), Bentham House, London, UK³
E-mail: h.crombag@sussex.ac.uk

Submitted 24 August 2020; final version accepted 3 September 2020

References

1. MacCoun R. J. Balancing compassion, accountability, and causal clarity. *Addiction* 2020. doi: <https://doi.org/10.1111/add.15164>
2. Koehler J. Legal concept-creep and scientific imprecision. *Addiction* 2020. 10.1111/add.15141.
3. Crombag H. S., Child J. J., Sullivan G. R. Drunk, dangerous and delusional: how legal concept-creep risks overcriminalization. *Addiction* 2020; <https://doi.org/10.1111/add.15024>
4. R v Taj EWCA Crim 1743. 2018.
5. R v Beard AC 479. 1920.
6. Child J. J., Crombag H. S., Sullivan G. R. Defending the delusional, the irrational, and the dangerous. *Crim Law Rev* 2020; 4: 306–324.
7. Husak D. N. Addiction and criminal liability. *Law Philos* 1999; 18: 655–84.
8. Yaffe G. Lowering the bar for addicts. In: *Addiction and Responsibility*. Cambridge, MA/London: MIT Press; 2011, pp. 113–38.
9. Morse S. A good enough reason: addiction, agency and criminal responsibility. *Inquiry* 2013; 56: 490–518.
10. Sinclair-House N., Child J. J., Crombag H. S. Addiction is a brain disease, and it doesn't matter: prior choice in drug use blocks leniency in criminal punishment. *Psychol Publ Pol Law* 2019; 2: 36–53.
11. Lewis M. Addiction and the brain: development, not disease. *Neuroethics* 2017; 10: 7–18.