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May court send drug-using thief to jail for violating no-drugs probation condition?

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An interesting question now pending before the Massachusetts high court in *Commonwealth v. Eldred* (see, e.g., this article in the Boston Globe [Maria Cramer]); Sally Satel, who has guest-blogged here before, co-wrote a brief in the case and was kind enough to pass along a longish op-ed version (co-written with Gene M. Heyman, Scott O. Lilienfeld and Stephen J. Morse), which I reproduced below:

Julie Eldred, 29, admitted stealing jewelry last year to support her opioid habit. She was placed on probation with the condition that she refrain from using drugs and submit to random drug testing. She agreed to these terms, but 11 days later tested positive for fentanyl. The judge ordered her to prison until an inpatient treatment bed was available to treat her addiction.

Ms. Eldred now claims that the abstinence condition and imprisonment for failing it were unconstitutional cruel and unusual punishment because she is a drug addict. According to her, drug addicts cannot say no to drugs: They cannot help themselves. The Massachusetts Supreme Judicial Court heard argument in this case in early October and will soon decide the issue.

A decision in favor of Ms. Eldred would pose serious problems. It would advance the erroneous idea that addicts are involuntary drug users who cannot be held responsible for their drug use. As outlined below, well-replicated scientific data concerning drug use by addicts contradict this view. Such a holding would also affect the future of successful treatment programs that are based on the verified principle that addicts can and often do say no to drugs.

Similarly, it would hobble successful judicial interventions that help addicts stay out of jail by making probation and parole contingent on testing clean for drugs. Accepting the scientifically discredited claim that addicts "can't help themselves" would have profound consequences for criminal responsibility and the fair and efficient administration of criminal justice.

Central to Ms. Eldred's argument is the oft repeated but unsupported notion that addiction is a "chronic and relapsing brain disease." The National Institute on Drug Abuse, NIDA, makes this same claim. As NIDA director, Nora Volkow explains, the addict's "brain is no longer able to produce something that is needed for our functioning … free will." The precise meaning of this statement is obscure, but the central message is clear: addicts are not responsible for the actions

of persistently seeking and using drugs despite negative consequences, which are the primary criteria for addiction.

The brain disease claim is a key component of NIDA's public relations campaign to secure support from Congress and the public for more funding. This claim may be largely well-intended, but the inference that addicted people are rendered helpless by their brain physiology is a form of simplistic neuro-reductionism that is refuted by solid research.

Federal health agency funded research demonstrates that many of those who meet the conventional criteria for addiction (based upon the American Psychiatric Association's definitions in its Diagnostic and Statistical Manual of Mental Disorders) not only learn to say "no" to drugs, but recover at high rates. They typically remit on their own, without professional interventions. This is not to say that interventions are pointless. Treatments based on the idea that addicts retain the ability to regulate their drug use have been found to be highly successful.

The data regarding the natural history of addiction are well established but not well known. Consider the following findings. Three major epidemiological surveys in the US have tracked "substance dependence" (the former technical term for addiction that has been renamed, "substance use disorder") and its demographic and psychiatric correlates. Among those who ever met the criteria for addiction to controlled substances, 76% to 83% were at the time of the surveys ex-addicts. They no longer used drugs at levels that met the criteria for substance dependence. As the average age of the participants was about 42, most of those addicted to illegal drugs quit by age 30 and did so without professional assistance.

That most addicts remit without the benefit of professional interventions strongly suggests that everyday economic, familial, and legal pressures played at least some role in reducing their drug use. Field research, biographies, and memoirs support this inference and make the additional point that values such as wanting to be a positive, contributing member of society, e.g., a good parent, also played an important role in turning over a new leaf. Despite what NIDA's rhetoric implies, addicts are not drug zombies at the mercy of dysfunctional brains. Craving for drugs can indeed be intense, but virtually all recovered individuals have, at some point, found — or chosen — a better alternative to using drugs.

Why, then, do NIDA and so many others continue to call addiction a brain disease? The stated rationale is that drugs change the brain. But all experience changes the brain, including reading this article. If brain changes were the hallmark of a pathological state, all behavior would qualify.

Asking if drugs change the brain is not the proper question to determine if addiction is a disease and whether drug use is voluntary. The proper question is whether drugs change the brain in such a way that drug use is no longer voluntary, no longer subject to self-control. The answer to this question must be ascertained on a case by case basis, largely on the basis of behavioral evidence. Brain changes alone are not a valid marker of lack of self-control.

Addicts remain capable of changing and very often do so. To frame the issue in terms of whether or not drugs change the brain is to perform a simplistic, intellectual sleight-of-hand that has been misleading the public, policymakers, and even many mental health professionals for decades.

Clinicians and the courts have discovered that they can help addicts quit drugs by attaching explicit costs to drug use and explicit benefits to sobriety. Furthermore, addicts, acting on their own, have discovered that they can control their drug use if they have a good enough reason to do so and are sufficiently motivated to change.

No one has argued for, let alone established, similar approaches for a conventional brain disease like Alzheimer's. Addiction is self-destructive drug use, and those who are destroying their lives with drugs deserve our help and sympathy, but they are not helpless victims.

Consider the 1966 case of Mr. Leroy Powell of Austin, Texas, a diagnosed alcoholic who was arrested for public drunkenness over 100 times and fined for that offense. Public intoxication was a compulsion symptomatic of his disease, Mr. Powell maintained, and once he started drinking, he allegedly could not stop.

But on the day of the trial, his lawyer gave Mr. Powell a drink, presumably to stave off early morning tremors. Mr. Powell was not intoxicated at the trial, however, and conceded on cross-examination that the reason he did not keep drinking was that he knew he had to be in court.

Mr. Powell appealed to the Supreme Court of the United States (*Powell v Texas*, 1968), claiming that fining him for public drunkenness constituted cruel and unusual punishment because such behavior was allegedly not of his volition.

Mr. Powell's brain had been affected by his addiction to alcohol. Yet he made a reasoned choice on the day of his trial. His behavior is precisely what the research on addiction shows: addicts can change their behavior and incentives help them do so.

Contingencies are the lifeblood of criminal justice diversion-from-jail programs. The nation's roughly 3,000 drug courts mandate treatment while employing graduated sanctions for continued drug use. Compared with those adjudicated as usual, drug court participants have significantly lower rates of recidivism.

Ms. Eldred was not imprisoned for the status of being an addict, which would have been unconstitutional cruel and unusual punishment according to the United States Supreme Court case, *Robinson v. California* (1962). She was incarcerated for an action: using drugs. Whether or not her imprisonment was wise is debatable, and the four of us share considerable personal sympathy for Ms. Eldred's plight. But that is not the question at hand. The Supreme Judicial Court must decide whether she was constitutionally entitled to an "involuntariness" or compulsion defense.

If the Court decides that Ms. Eldred is entitled to this defense, the legal consequences will be profound and negative for addicts. Although it is a state case, it is a test case that could have great influence elsewhere. The defense bar and supportive organizations will surely bring test cases in other states.

The importance of this test case has been recognized by the major national addiction organizations. All have submitted or signed a friend-of-the-court (amicus) brief. These

documents repeat NIDA's scientifically misleading claim that addicts do not respond to incentives because drugs change the brain.

The only organization not supporting Ms. Eldred is the National Association of Drug Court Professionals. Why? They know on the basis of having worked with charged addicts like Ms. Eldred that drug-induced brain changes do not prevent addicts from changing in response to incentives. The commonsense question posed by the Drug Court Professionals is whether incentives help addicts to become ex-addicts. This is what the Massachusetts high court should also ask.

If Ms. Eldred's claim is granted, similar claims about addiction and loss of self-control will almost surely inundate the courts. Such claims will be easy to make and hard to disprove because there is no widely accepted valid behavioral or biological measure of self-control capacity.

Imposing a constitutional defense of compulsion or involuntariness based solely on the claim that drugs change the brain will also lead to negative consequences for addicts. If diversion programs, such as drug courts, that use abstinence as a condition are eviscerated or unavailable, trial judges may be more inclined to sentence addicted defendants to incarceration rather than probation. It will strike a blow to the therapeutic potential of the criminal justice system just as the nation is reeling from an opioid crisis.

At the very least, most addicts would have a complete defense to the crime of possession of controlled substances, which is an important legal tool in the attempt to control drug use and addiction Moreover Ms. Eldred's argument could in principle be used for crimes other than drug possession. Suppose Ms. Eldred continues to steal to support her habit and continues to use drugs. Perhaps in some cases larceny, too, is a compulsion symptomatic of the disease of addictions, just as Powell claimed that public intoxication was a compulsion symptomatic of his disease.

If courts fail to take into consideration that addicts can respond to incentives and instead focus on the undifferentiating criterion that drugs change the brain and indicate compulsion, then larceny too might be excused. This would be a victory in the ongoing struggle by many to excuse large numbers of people who commit crimes on the grounds that they are not responsible. There is no clear limiting principle.

Many think a decision in Ms. Eldred's favor would advance the cause of decriminalization. The legislature is the appropriate institution to do this, however. A sweeping judicial decision will tie the legislature's hands if it continues to desire to use criminal prohibition to address the problems of addiction and drug use.

In 1968, the Supreme Court rejected Powell's argument that alcohol had turned him into a compulsive drinker, noting that his argument "goes much too far on the basis of too little knowledge." Fifty years later, we can add that not only did Powell presume too much, but he drew the wrong conclusion. Controlled clinical research, extensive clinical experience, and judicial practice concur: addicts remain susceptible to the influence of nondrug incentives.

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