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Criminal Law - Capacity to Commit and Responsibility for Crime - The Common Law Defense of Lack of Mens Rea; A Heroin Addict's Defense to Possession of Heroin

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CRIMINAL LAW—CAPACITY TO COMMIT AND RESPONSIBILITY FOR CRIME—THE COMMON LAW DEFENSE OF LACK OF MENS REA; A HEROIN ADDICT'S DEFENSE TO POSSESSION OF HEROIN.

Lavern Gorham was charged with the unlawful possession of heroin[1] and the unlawful possession of heroin paraphernalia.[2] Gorham attempted to raise as an affirmative defense[3] the common law defense of lack of criminal responsibility—*mens rea*[4]—due to heroin addiction[5] for her possession of heroin and heroin paraphernalia for personal use.[6] The trial court did not allow Gorham to develop evidence in support of the defense because the defense was not brought

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1. D.C. CODE ANN. § 33-402(a) (1973). This statute prohibits the possession of narcotic drugs.

The statute is not a strict liability statute; rather, it requires knowing possession of a narcotic drug. United States v. Weaver, 458 F.2d 825 (D.C. Cir. 1972).

The United States Congress is the law maker for the District of Columbia. U.S. CONST. art. I, § 8.

2. D.C. CODE ANN. § 22-3601 (1973). This statute prohibits the possession of implements of crime.

This statute is also not a strict liability statute; proof of criminal intent is needed. Benton v. United States, 232 F.2d 341 (D.C. Cir. 1956).

3. The appellant did not raise as a defense the eighth amendment's prohibition of cruel and unusual punishment. The court considered this issue disposed of in Wheeler v. United States, 276 A.2d 722 (D.C. Ct. App. 1971). Gorham v. United States, 339 A.2d 401, 403 & n.8 (D.C. Ct. App. 1975).

4. *Mens rea* is defined as: "A guilty mind; a guilty or wrongful purpose; a criminal intent." BLACKS LAW DICTIONARY 1137 (4th ed. 1968). *See generally* notes 14-22 and accompanying text *infra*.

5. Congress has statutorily defined a "drug addict" as:

> [A]ny individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, *or who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction.*

21 U.S.C. § 802(1) (1970) (emphasis added).

This is also the same definition the District of Columbia uses for "drug user." D.C CODE ANN. § 24-602(a) (1973). Perhaps the most cited definition of a drug addict is that of the World Health Organization, which lists the following as characteristic of heroin addiction:

> (1) an overpowering desire or need to continue taking the drug and to obtain it by any means; the need can be satisfied by the drug taken initially or by another with morphine-like properties;
> (2) a tendency to increase the dose owing to the development of tolerance;
> (3) a psychic dependence on the effects of the drug related to a subjective and individual appreciation of those effects; and
> (4) a physical dependence on the effects of the drug requiring its presence for maintenance of homeostasis and resulting in a definite, characteristic, and self-limited abstinance syndrome when the drug is withdrawn.

WORLD HEALTH ORGANIZATION EXPERT COMMITTEE ON ADDICTION-PRODUCING DRUGS 13 (World Health Organization Tech. Rep. Ser. No. 273 at 13, 1964), *as cited in* United States v. Moore, 486 F.2d 1139, 1229-30 (D.C. Cir. 1973) (Wright, Bazelon, Tamm, and Robinson, JJ., dissenting), *cert. denied*, 414 U.S. 980 (1973).

6. The basic issue dealt with by the court was whether a non-trafficking addict charged with possession of heroin and heroin paraphernalia has the requisite *mens rea* to be convicted of a crime that requires a mental element to be present. Gorham v. United States, 339 A.2d 401, 403, 432 (D.C. Ct. App. 1975).

> [T]he affirmative defense, if recognized, would be available to the addict who is guilty of the type of illegal activity which is inherent in the disease of heroin addiction—purchase, possession, use of heroin, and the paraphernalia to prepare and inject it. The defendant woud have to convince the trier of fact of the existence of the lack of capacity and the causal relation between the lack of capacity and the action in question.

Brief for Appellants Gorham and Williams at 38, Gorham v. United States, 339 A.2d 401 (D.C. Ct. App. 1975).

within the format required for an insanity defense.[7] Gorham was convicted of possession of heroin and heroin paraphernalia and appealed.[8] The District of Columbia Court of Appeals *held* that the intent of Congress, indicated by the lack of a specific exemption of addicts from the possession laws,[9] and a statutory provision for treatment of addicts,[10] placed recognition of the defense beyond the court's authority. The court also ruled that even if it possessed such authority, it would not be disposed to recognize the defense because of the injury to society that is caused by addicts,[11] and because of the existence of provisions for discretionary probation and treatment[12] which render the existing method of handling addicts con-

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7. Gorham v. United States, 339 A.2d 401, 404, 427 (D.C. Ct. App. 1975). The insanity defense available in the District of Columbia is defined in United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972):

> The first component of our rule . . . defines mental disease or defect as an abnormal condition of the mind, and a condition which substantially (a) affects mental or emotional processes and (b) impairs behavioral controls. The second component, derived from the Model Penal Code, tells which defendant with a mental disease lacks criminal responsibility for particular conduct: it is the defendant who, as a result of this mental condition, at the time of such conduct, either (i) lacks substantial capacity to appreciate that his conduct is wrongful, or (ii) lacks substantial capacity to conform his conduct to the law.

Id. at 991.

8. Gorham v. United States, 339 A.2d 401, 403-04 (D.C. Ct. App. 1975).

Gorham's case was consolidated with the cases of other defendants at trial and on appeal. Chester Williams was the only other defendant to note an appeal from the trial conviction. Gorham v. United States, 339 A.2d 401, 403 (D.C. Ct. App. 1975).

A panel of the District of Columbia Court of Appeals issued a decision in Franklin v. United States, No. 5960 (D.C. Ct. App. 1973). The court sitting en banc vacated that decision sua sponte, and consolidated the appeals of Gorham and Williams with Franklin's for reargument before the court sitting en banc. Franklin v. United States, 339 A.2d 398, 401, 403 (D.C. Ct. App. 1975).

9. D.C. CODE ANN. § 33-402(a) (1973): "It shall be unlawful for any person to . . . possess . . . any narcotic drug. . . ."

But see Gorham v. United States, 339 A.2d 401, 433 & n.26 (D.C. Ct. App. 1975), wherein Justices Fickling and Kern noted in dissent that "Congress has not specifically provided that addiction shall not be an affirmative defense to a charge of possessing illicit narcotics or any other offense."

10. The purpose of sections 24-601 to 24-611 is to protect the health and safety of the people of the District of Columbia from the menace of drug addiction and to afford an opportunity to the drug user for rehabilitation. The Congress intends that Federal Criminal laws shall be enforced *against drug users* as well as other persons, and [the Act] *shall not be used to substitute treatment for punishment in cases of crime committed by drug users.*

D.C. CODE ANN. § 24-601 (1973), *as cited in* Gorham v. United States, 339 A.2d 401, 407-08 (D.C. Ct. App. 1975) (emphasis by the court).

But see Gorham, supra, at 435 where Justices Fickling and Kern noted in dissent that the words "shall be enforced" as used in this statute denote the intent of Congress to arrest and prosecute drug addicts which is "not synonymous with conviction." This would be consistent with the appellant's attempt to raise *mens rea* as an affirmative defense.

If the defense were recognized, addicts would still be criminally punished for their crimes, other than those which are inherent in addiction, *see* Brief for Appellants Gorham and Williams, quoted in part in note 6 *supra*.

11. The community provides the addict with the income he needs to support his addiction. This income is provided for the addict in two ways:

> 1) directly through street crime, or, 2) by the sale of small amounts of drugs to other addicts. . . . Thus the addict who cannot support his habit through legal means contributes to the misery of the community in two distinct ways: through the commission of crime against person or property or through perpetration, if not enlargement, of the addict population.

Gorham v. United States, 339 A.2d 401, 410-11 (D.C. Ct. App. 1975).

12. The "Narcotics Diversion Project" (1974) of the Superior Court of the District of Columbia makes such provisions. *Id.* at 412 & n.42.

sistent with concepts of elemental justice. *Gorham v. United States*, 339 A.2d 401 (D.C. Ct. App. 1975).

> Historically, our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong.[13]

Mens rea,[14] the mental factor necessary for criminality,[15] has been derived entirely from the case law.[16] *Mens rea* has varied with changes in the concepts and objectives which underlie criminal justice.[17] "[T]he constant reexamination and readjustment of the concept of *mens rea* and its application to specific cases is one of the basic duties of a judge."[18] A judge, it has been noted, uses *mens rea* to fill in "the open spaces in the law."[19] American courts have used the *mens rea* concept to modify broad and general statutes by the recognition of the *mens rea* defense in such instances as: mental disease or defect,[20] compulsion-duress,[21] alcohol dependence,[22] and kleptomania.[23]

The defense of lack of *mens rea* for a heroin addict's personal possession of heroin was first considered in depth in *Castle v. United States*.[24] The defendant in that case asserted that he was compelled

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13. Pound, *Introduction* to SAYRE, CASES ON CRIMINAL LAW (1927), *as quoted in* Morissette v. United States, 342 U.S. 246, 250 n.4 (1952).

14. The original maxim was: "*actus non facit reum, nisi mens sit rea*" (an act does not make [the doer of it] guilty, unless the mind be guilty). COKE, THIRD INSTITUTE* 6, *56, *107, *as cited in* Gorham v. United States, 339 A.2d 401, 430 (D.C. Ct. App. 1975) (Fickling, Kern, JJ., dissenting) (court's translation).

15. The case of Gorham v. United States, 339 A.2d 401 (D.C. Ct. App. 1975) concerns only crimes that are not strict liability crimes—*i.e.*, crimes that require as a necessary element a certain state of mind, not crimes which impose liability without fault. *See* cases cited in notes 1 and 2 *supra*.

16. United States v. Gorham, 339 A.2d 401, 431 (D.C. Ct. App. 1975) (Fickling, Kern, JJ., dissenting).

17. *Id.*

> The doctrine of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man.

Powell v. Texas, 392 U.S. 514, 536 (1968).

18. United States v. Gorham, 339 A.2d 401, 436 (D.C. Ct. App. 1975) (Fickling, Kern, JJ., dissenting).

19. *Id.*, *quoting* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112-13 (Yale paperback ed., 1921).

20. United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972).

21. Gillars v. United States, 182 F.2d 962 (D.C. Cir. 1950); Martin v. State, 31 Ala App. 334, 17 So. 2d 427 (1944).

22. Easter v. Dist. of Columbia, 361 F.2d 50 (D.C. Cir. 1966); State v. Fearon, 283 Minn. 90, 166 N.W.2d 720 (1969).

23. State v. McCullough, 114 Iowa 532, 87 N.W. 503 (1901). *See also* Allen v. United States, 150 U.S. 551 (1893) (infancy); Heilman v. Commonwealth, 84 Ky. 457, 1 S.W. 731 (1886) (infancy); People v. Freeman, 61 Cal. App. 2d 110, 142 P.2d 435 (1943) (epilepsy and unconsciousness); Carter v. State, 376 P.2d 351 (Okla. Crim. App. 1962) (epilepsy and unconsciousness); Pribble v. People, 49 Colo. 210, 112 P. 220 (1910) (the effect of medication); Fain v. Commonwealth, 78 Ky. 183, 39 Am. R. 213 (1879) (sleepwalking); State v. Rippy, 104 N.C. 752, 10 S.E. 259 (1889) (involuntary intoxication).

24. 347 F.2d 492 (D.C. Cir. 1964), *cert. denied*, 381 U.S. 929, 953 (1965), *cert. denied*, 388 U.S. 915 (1967).

to use and possess heroin to prevent the major withdrawal symptoms that accompany a heroin addict's termination of heroin use.[25] The defense was called "pharmacological duress," and was based on the postulate that "[a]n act committed under compulsion, such as apprehension of serious and immediate bodily harm is involuntary and, therefore, not criminal. . . ."[26] The court recognized the plausibility of the defense[27] but did not reach it on its merits because the jury instructions originally submitted by defendant's counsel at trial were not in the correct form, and no supplemental jury instruction requests were made after the original instructions were rejected, nor was there any objection made to the charge as given to the jury.[28]

In *Watson v. United States*,[29] the possibility of the lack of *mens rea* defense was recognized in the prosecution of an addict for possession of heroin.[30] Here again, the court did not reach the merits of the defense, due to an insufficiency in the trial record.[31] In *Watson* a distinction was made between a trafficking addict and a non-trafficking addict.[32] A trafficking addict, the court noted, is an addict who engages in such acts as the trading, importation and distribution of heroin, while a non-trafficking addict is an addict who possesses heroin for personal use.[33] If the defense were recognized, the court suggested, it would be available only to the non-trafficking addict, and not the trafficking addict.[34] The court also suggested a procedure for defendants to utilize in raising the defense in future cases.[35]

In *United States v. Ashton*[36] the court, relying on *Watson*,[37] dismissed an indictment against an addict because there was insufficient proof to show the defendant was a trafficking addict.[38] The

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The *mens rea* defense was dismissed without discussion by the majority in Lloyd v. United States, 343 F.2d 242 (D.C. Cir. 1964), *cert. denied*, 381 U.S. 952 (1965).

25. 347 F.2d 492, 493 (D.C. Cir. 1964).

26. *Id.* at 494, *quoting* Gillars v. United States, 182 F.2d 962, 976 & n.14 (D.C. Cir. 1950).

27. 347 F.2d 492, 494-95 (D.C. Cir. 1964) (dictum).

28. *Id.* at 495.

29. 439 F.2d 442 (D.C. Cir. 1970).

30. *Id.* at 452-54 (dictum).

31. At the trial the defendant brought his defense solely within the format of an insanity defense. On appeal the court felt that the evidence produced by this defendant in support of an insanity defense did not meet the heavy burden of proof required for the lack of *mens rea* defense. *Id.* at 451.

32. *Id.* at 452-53 & n.9. The only previous distinction drawn was between addicts and non-addicts. *Id.*

33. *Id.* at 453 n.9.

34. *Id.* at 454.

35. The court suggested that the primary attack be with a motion to dismiss the charges because the possession of heroin under such circumstances has not been made criminal, with an alternative claim that the statute violates the eighth amendment's prohibition of cruel and unusual punishment. *Id.* at 453-54.

36. 317 F. Supp. 860 (D.D.C. 1970).

37. 439 F.2d 442 (D.C. Cir. 1970) (dictum).

38. 317 F. Supp. 860, 862 (D.D.C. 1970). Both common law *mens rea* grounds and the eighth amendment's prohibition against cruel and unusual punishment were relied upon by the court in it's holding. *Id.*

court in *Ashton* recognized the need for clarification of the trafficking, non-trafficking addict distinction, because:

> It is a matter of common knowledge that most addicts sell narcotics from time to time to finance their habit, or trade heroin for the favor of food or lodging, or give drugs to friends facing withdrawal.[39]

In *United States v. Lindsey*,[40] the court ruled that although the common law defense of lack of *mens rea* was available to a non-trafficking addict charged with possession,[41] the defendant in that case failed to prove that he was an addict and therefore did not qualify for the defense.[42]

In the case of *United States v. Moore*,[43] a 5-4 circuit court decision,[44] a *mens rea* defense was rejected in a prosecution of an addict for possession of heroin.[45] The court in *Moore* believed there to be sufficient evidence in that case to show that the defendant was a trafficking addict, but went on to state that the conviction would be sustained even if he were a non-trafficking addict.[46] The majority introduced a mathematical concept of self-control to indicate when the loss of self-control or free will would be available to the defendant with a *mens rea* defense.[47] Under this concept, a loss of self-control occurs when the amount of physical craving for a substance such as heroin exceeds a person's strength of character or moral standards.[48] Applying this reasoning, the *Moore* majority concluded that a person who commits a more serious crime to feed his habit has less self-control than does the addict who confines his crime to personal possession of the drug.[49] The court, therefore, rejected the defense of a lack of *mens rea* for a heroin addict's possession of heroin because the concept of *mens rea* would apply to more serious crimes as well as the crime of possession.[50]

The court in *Moore* recognized two goals in dealing with heroin addicts.[51] The first was rehabilitation which, the court admitted,

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39. *Id.* at 862.
40. 324 F. Supp. 55 (D.D.C. 1971), *modified*, 486 F.2d 1317 (D.C. Cir. 1973).
41. *Id.* at 59-60.
42. *Id.* at 60. The court stated:
> The defendant on cross-examination indicated that on the 14th of August when he was arrested he had simply made up his mind to get high so that he could watch the Redskins football game.

43. 486 F.2d 1139 (D.C. Cir. 1973).
44. Three justices found the defense to be invalid, and two others voted to affirm the conviction without reaching the merits of the defense. Justices Wright, Tamm, Robinson and Chief Justice Bazelon voted in dissent to recognize the defense. *Id.* at 1140.
45. *Id.* at 1144.
46. *Id.*
47. *Id.* at 1145.
48. *Id.* Physical craving and moral standards or strength of character were not defined by the court.
49. *Id.* at 1146.
50. *Id.* at 1146-48.
51. *Id.* at 1157.

might be served by allowing the defense of lack of *mens rea* for a addict's possession of heroin for personal use.[52] The second goal was the complete elimination of the addictive substance from society, which, the court noted, is best served by non-recognition of the defense, thereby giving to the police prosecutorial discretion to enable them to enlist addicts to ferret out wholesalers.[53] The court also felt that the possible punishment for possession would persuade some addicts to undertake rehabilitation.[54]

Alcohol, like heroin, is a drug which produces addiction in many of the people who use it.[55] Alcohol, unlike heroin, is legally possessable by adults, whereas the possession of heroin is generally illegal under all circumstances.[56]

A defense of lack of *mens rea*, similar to the one proposed in *Gorham*, has been recognized for a chronic alcoholic[57] convicted of public intoxication.[58]

In *Driver v. Hinnant*[59] the court relied exclusively on the eighth amendment's[60] prohibition against cruel and unusual punishment in holding that a chronic alcoholic could not be convicted and sentenced for being drunk in a public place.[61] The court in that case appeared to recognize the possibility of a common law *mens rea* defense in stating:

> Although his [the defendant's] misdoing 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 a consciousness of wrongdoing, indispensible ingredients of a crime.[62]

In *Easter v. District of Columbia*[63] a common law *mens rea* defense was specifically relied upon by the court in a prosecution of a chronic alcoholic for public intoxication.[64]

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52. *Id.*
53. *Id.*
54. *Id.*
55. Driver v. Hinnant, 356 F.2d 761, 764 (4th Cir. 1966).
56. Gorham v. United States, 339 A.2d 401, 409 (D.C. Ct. App. 1975).
57. A chronic alcoholic has been defined as "a person who is powerless to stop drinking and whose drinking seriously alters his normal living pattern." Driver v. Hinnant, 356 F.2d 761, 763 & n.1 (4th Cir. 1966), *quoting* PUBLIC HEALTH SERVICE, ALCOHOLISM (Public Health Service Pub. No. 730).
D.C. CODE ANN. § 24-522 (1973) provides:
> (1) The term "chronic alcoholic" means any person who chronically and habitually uses alcoholic beverages to the extent that (A) they injure his health or interfere with his social or economic functioning, or (B) *he has lost the power of self control with respect to the use of such beverages.*

Id. (emphasis added).
58. Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966).
59. 356 F.2d 761 (4th Cir. 1966).
60. U.S. CONST. amend. VIII.
61. 356 F.2d 761, 765 (4th Cir. 1966).
62. *Id.* at 764 (dictum), *citing* Morissette v. United States, 342 U.S. 246, 250-52 (1952).
63. 361 F.2d 50 (D.C. Cir. 1966).
64. *Id.* at 51-4.

> An essential element of criminal responsibility is the ability to avoid the conduct specified in the definition of the crime. . . . To be guilty of the crime a person must engage responsibly in the action. . . .[65]

The fact that alcoholism originally begins with an initially voluntary act or series of acts, the *Easter* court noted, does not make the later developed alcoholism criminal.[66] The court recognized the defense only for an alcohol addict—an involuntary drinker, and not for the voluntary drinker.[67] The court noted that the *mens rea* defense was based on the defendant's lack of criminal responsibility, which is separate and distinct from a defense based upon the defendant's affliction with any mental disease or defect.[68]

Although the appellant in *Gorham* relied upon the *Easter* rationale in asserting his *mens rea* defense,[69] the majority rejected such a defense by distinguishing between the two drugs at issue: alcohol and heroin. Alcohol, although regulated, is legal, while the possession of heroin is illegal.[70] Alcohol, the court noted, is less addicting and safer for the average individual to experiment with.[71] Finally, alcohol is simply used too widely to seriously consider prohibition, while heroin is still "exotic," and as such is easier to control.[72]

The majority's distinctions appear to center more on the nature of the drug rather than on the state of the person who is addicted to it. It has been noted that "[t]he law looks to the immediate, and not to the remote cause; to the actual state of the party, and not to the causes, which remotely produced it. . . ."[73] The majority seems therefore to have overlooked the most crucial factors involved in the problem of heroin addiction: the addict's physical and mental state.

The heroin addiction problem in North Dakota does not appear to be as severe as the problem of heroin addiction in the District of Columbia.[74] Nevertheless, North Dakota cannot completely ignore this rapidly increasing problem.

The North Dakota statute[75] prohibiting the possession of heroin

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65. *Id.* at 52.
66. *Id.* at 53.
67. *Id.* at 54.
68. *Id.* at 55 n.8.
69. 339 A.2d 401, 408 (D.C. Ct. App. 1975).
70. *Id.* at 409.
71. *Id.*
72. *Id.*
73. United States v. Drew, 25 F. Cas. 913, 914 (No. 14,993) (C.C.D. Mass. 1828).
74. [W]ithin the Model Cities area of the District of Columbia, it is estimated that more than a third of all men between the ages of 20 and 24, and almost a quarter of those between 15 and 19, are addicted to heroin.
United States v. Moore, 486 F.2d 1139, 1227 & n.120 (D.C. Cir. 1973) (Wright, Bazelon, Tamm, and Robinson, JJ., dissenting).
75. N.D. CENT. CODE § 19-03.1-23(3) (Supp. 1975).

is not a strict liability statute which would impose liability regardless of the existence of "fault." The North Dakota statute[76] requires *willful* possession of heroin.[77] Since there appears to be no judicial precedent on point in North Dakota, North Dakota courts may, it appears, be able to recognize the common law defense of a lack of *mens rea* as it was proposed in *Gorham*.

A defense such as that proposed by the appellant in *Gorham* would not amount to a legalization of heroin.[78] Civil commitment would still be available for the courts to impose on non-trafficking addict possessors of the drug.[79] Such a defense would be available only for those acts of a non-trafficking addict which are inseparable from the disease itself and which inflict no direct harm on society.[80]

Heroin addiction has been labeled as the most intensive form of drug dependence, much more severe than alcohol addiction.[81] To punish a non-trafficking addict for possession of heroin would attribute to the addict an ability he may not have: the ability to choose to possess or not to possess heroin.[82]

> When disease [dipsomania] is the propelling, uncontrollable power, the man is as innocent as the weapon; the mental and moral elements are as guiltless as the material. If his mental, moral and bodily strength is subjugated and pressed to an involuntary service, it is immaterial whether it is done by his disease or by another man, or a brute, or any physical force of art or nature set in operation without any fault on his part. If a man knowing the difference between right and wrong, but deprived by either of those agencies of the power to choose between them, is punished, he is punished for his inability to make the choice—he is punished for incapacity; and that is the very thing for which the law says he shall not be punished. He might as well be punished for an incapacity to distinguish right from wrong, as for an incapacity to resist mental disease which forces upon him its choice of the wrong.[83]

During the last twenty years the use of abusable drugs has shown an increase of epidemic proportions, despite the vigorous pro-

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76. N.D. CENT. CODE § 12.1-02-02(2) (Supp. 1975).
77. *Id.*
78. *See* Brief for Appellants Gorham and Williams, quoted in part in note 6 *supra*.
79. Gorham v. United States, 339 A.2d 401, 439 (D.C. Ct. App. 1975). (Fickling, Kern, JJ., dissenting).
80. United States v. Moore, 486 F.2d 1139, 1257 (D.C. Cir. 1973) (Wright, Bazelon, Tamm, and Robinson, JJ., dissenting).
The defense would cover acts such as purchase, receipt, possession for personal use, and possession of paraphernalia for personal use. *Id.*
81. WORLD HEALTH ORGANIZATION EXPERT COMMITTEE ON ALCOHOL, FIRST REPORT, (World Health Organization Tech. Rep. Ser. No. 84 at 10-11, 1954), *cited in* Moore v. United States, 486 F.2d 1139, 1242 & n.192 (D.C. Cir. 1973) (Wright, Bazelon, Tamm, and Robinson, JJ., dissenting).
82. The same rationale would apply in punishing an addict for other crimes inseparable from heroin addiction, *supra* note 80.
83. State v. Pike, 49 N.H. 399, 6 Am. R. 533, 584-85 (1870) (J. Doe, dissenting).

secution of addicts.[84] The American Bar Association's committee on Crime Prevention and Control has found that:

> The demand [for heroin] is created not by economic considerations but by an insatiable physiological craving of the addicts, who must obtain large and frequent doses of heroin to maintain a semblance of physical normality. As a result, the addicts' incessant efforts to obtain heroin are undeterred by the threat of harsh punishment for illegal drug possession or by the black market's exorbitant prices.[85]

The majority in *Gorham* has not taken advantage of an opportunity to apply the *mens rea* concept to the problem of heroin addiction. Unfortunately, the *Gorham* decision has thus contributed little towards the solution of a growing heroin problem.

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84. Gorham v. United States, 339 A.2d 401, 437 & n.40 (D.C. Ct. App. 1975) (Fickling, Kern, JJ., dissenting).

85. A.B.A. SPECIAL COMMITTEE ON CRIME PREVENTION AND CONTROL, NEW PERSPECTIVES ON URBAN CRIME 26 (1972), *as cited in* Gorham v. United States, 339 A.2d 401, 437-38 & n.41 (D.C. Ct. App. 1975) (Fickling, Kern, JJ., dissenting).