AFTER THE OPIOID EPIDEMIC: A PROPOSED RETURN TO A MODEL PENAL CODE DEFENSE IN FEDERAL CASES INVOLVING ADDICTION

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INTRODUCTION

In the early 1980s, defendant Robert Lyons told a story to the Fifth Circuit Court of Appeals that would resonate with far too many twenty-first century Americans—the story of opioid addiction. Lyons, the former sheriff of Washington Parish, Louisiana, became addicted to opioid medications prescribed by doctors after a series of hospitalizations.[1] He was aided in his pursuit of more opioid drugs by one unscrupulous doctor in particular.[2] Lyons proffered evidence of his addiction in an attempt to muster an insanity defense, but the district court excluded it.[3] In 1981, he waived his right to a jury trial and was convicted on twelve counts of intentionally securing controlled narcotics.[4]

A Fifth Circuit panel reluctantly reversed in *United States v. Lyons*, holding that Lyons was entitled to submit his defense to a jury in light of the Model Penal Code-inspired insanity standard previously adopted by the Fifth Circuit.[5] Lyons's victory on appeal did not last long, however; the following year, the Fifth Circuit reheard the case en banc and abandoned the Model Penal Code insanity standard, declaring that "evidence of mere narcotics addiction . . . raises no issue of such a mental defect or disease as can serve as a basis for the insanity defense."[6] Just six months after the en banc ruling, Congress imposed the Fifth Circuit's rejection of the Model Penal Code standard on all of the federal courts by passing the Insanity Defense Reform Act of 1984.[7]

It is easy to imagine a modern audience looking more favorably upon a defendant like Lyons. The opioid epidemic, fueled in part by doctors' overprescribing of opioids, has ravaged the United States, resulting in

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1. *See* United States v. Lyons (*Lyons I*), 704 F.2d 743, 744–47 (5th Cir. 1983).
2. *Id.*
3. *Id.* at 744.
4. *Id.* at 743.
5. *See id.* at 747 & n.2, 748; *see also* United States v. Lyons (*Lyons II*), 731 F.2d 243, 246 (5th Cir. 1984) (en banc) (describing the *Lyons I* panel as having "acted with obvious reluctance").
6. *Lyons II*, 731 F.2d at 245, 248.
7. *See* Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, ch. IV, § 402(a), 98 Stat. 1837 (codified at 18 U.S.C. § 17).

nearly 450,000 overdose deaths between 1999 and 2019.[8] It has led to criminal and civil liability for American companies like Purdue Pharma, which pleaded guilty in 2020 to charges that it misled the federal government about OxyContin sales and agreed to pay $8.3 billion in a settlement with the U.S. Department of Justice.[9] The opioid epidemic has also coincided with, and perhaps helped cause, an apparent shift in Americans' attitudes about addiction: in the 1980s, addicts were often characterized as moral failures, but evidence suggests that they are more likely today (than they were thirty years ago, at least) to be viewed as suffering from a disease.[10]

This Comment argues that a return to the Model Penal Code's insanity standard in federal cases would treat involuntarily addicted defendants in a way that better comports with modern conceptions of addiction and the normative aims of criminal law. Part I traces the evolution of and justifications for the insanity defense in common law countries. Part II analyzes the *Lyons* case, illustrating how competing insanity standards are implicated in addiction cases. Part III situates the tension between the different insanity standards within the context of the opioid epidemic and argues for a return to the Model Penal Code standard in cases where the defendant became addicted involuntarily. Part III also argues that Congress should consider clarifying that addiction is a mental disease sufficient to mount an insanity defense.

Before proceeding, however, a brief note about terminology is warranted. Whether the word "insanity" is actually an appropriate term to use as a label for defendants who struggle with addiction is outside the scope of this Comment. The Model Penal Code's "insanity" standard does not even use that term; it is instead titled "Mental Disease or Defect Excluding Responsibility" and, at the time it was published, reflected the desire of the Code's authors to expand the traditional insanity rule and allow more defendants to raise the defense.[11] This Comment will nevertheless use the

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8. *See Opioid Data Analysis and Resources*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 25, 2021), https://www.cdc.gov/drugoverdose/data/analysis.html.

9. Katie Benner, *Purdue Pharma Pleads Guilty to Role in Opioid Crisis as Part of Deal with Justice Dept.*, N.Y. TIMES (Dec. 17, 2020), https://www.nytimes.com/2020/11/24/us/politics/purdue-pharma-opioids-guilty-settlement.html.

10. *See* Kristina Peterson & Stephanie Armour, *Opioid vs. Crack: Congress Reconsiders Its Approach to Drug Epidemic*, WALL ST. J. (May 5, 2018, 7:00 AM), https://www.wsj.com/articles/opioid-v-crack-congress-reconsiders-its-approach-to-drug-epidemic-1525518000. As the crack epidemic of the 1980s (which disproportionately affected the Black community) gave way to the opioid epidemic of the twenty-first century (which has predominately affected whites), race almost certainly played a role in causing the shift in attitudes. *See id.*; Hernandez D. Stroud, *Our Opioid Crisis Reveals Deep Racial Bias in Addiction Treatment*, TIME (July 15, 2016, 10:24 AM), https://time.com/4385588/crack-babies-heroin-crisis/ ("[O]ur national attitude towards [white opioid addicts] is markedly different than it was towards black crack addicts in the 1980s . . . .").

11. *See infra* notes 19–22 and accompanying text. It is worth noting, however, that many recovering addicts in twelve-step groups refer to themselves as having been "powerless

term "insanity" to reduce confusion and to acknowledge the reality that the Model Penal Code standard was understood when it was published as a defense that would replace and encompass the traditional insanity defense.

I. THE EVOLUTION OF THE INSANITY DEFENSE FROM THE *M'NAGHTEN* RULE TO THE MODEL PENAL CODE

The current federal insanity rule can trace its ancestry to nineteenth-century England. *M'Naghten's Case*[12] involved an 1843 attempt to assassinate British Prime Minister Robert Peel, who survived because the assassin mistook Peel's secretary for Peel himself.[13] Charged with murdering the secretary by fatal gunshot wound, the defendant presented evidence that he was suffering from "morbid delusions" at the time of the shooting.[14] The standard that arose from the case before the House of Lords was that to establish a defense of insanity, a defendant must prove that he "was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong."[15] A justification for the *M'Naghten* rule and an explanation of how it serves the purposes of the criminal law came from Justice Dixon of the High Court of Australia nearly a century later in *The King v. Porter*[16] as he explained the rule to the jury:

> The purpose of the law in punishing people is . . . to deter people from committing offences. . . . Now, it is perfectly useless for the law to attempt, by threatening punishment, to deter people from committing crimes if their mental condition is such that they cannot be in the least influenced by the possibility or probability of subsequent punishment . . . . [T]he law, in laying down a standard of mental disorder sufficient to justify a jury in finding a prisoner not guilty on the ground of insanity at the moment of the offence, . . . is attempting to define what are the classes of people who should not be punished although they have done actual things which in others would amount to crime.[17]

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over . . . addiction" and in need of a "restor[ation] . . . to *sanity*." *Who, What, How, and Why*, NARCOTICS ANONYMOUS (emphasis added), https://www.na.org/admin/include/spaw2/uploads/pdf/litfiles/us_english/IP/EN3101.pdf (last visited Feb. 20, 2021).

12. M'Naghten's Case (1843) 8 Eng. Rep. 718, 10 Cl. & Fin. 200.

13. *See Sir Alexander James Edmund Cockburn, 10th Baronet: British Chief Justice*, ENCYC. BRITANNICA (Dec. 20, 2020), https://www.britannica.com/biography/Sir-Alexander-James-Edmund-Cockburn-10th-Baronet.

14. 8 Eng. Rep. at 719, 10 Cl. & Fin. at 200–02.

15. *Id.*at 722, 10 Cl. & Fin. at 210.

16. The King v. Porter (1933) 55 CLR 182.

17. 55 CLR at 186–87.

The *M'Naghten* rule survives to this day; indeed, it serves as the basis for the congressionally mandated insanity standard that is used in federal courts.[18] But the Model Penal Code, adopted by the American Law Institute in 1962, questioned whether the rule "goes far enough."[19] As the 1985 Commentaries to the Code later explained, "A . . . pervasive difficulty with the [*M'Naghten*] standard appears in cases in which the defendant's [mental] disorder . . . destroys or overrides the defendant's power of self-control."[20] In the *M'Naghten* rule, the Code's authors perceived an "inadequacy in connection with claims that emphasize a defendant's *volitional* incapacity rather than his *inability to understand*."[21]

The Code's alternative to the *M'Naghten* rule, which dispensed with the label "insanity" for the more expansive "Mental Disease or Defect Excluding Responsibility," thus excuses from criminal conduct a defendant who can show that "at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct *or to conform his conduct to the requirements of law*."[22] For addicts who *know* their behavior is wrongful but *engage in the behavior anyway due to their dependence on drugs*, the distinction between *M'Naghten* and the Model Penal Code is crucial.

The Model Penal Code standard quickly proved influential in the federal courts, including in the Fifth Circuit. That court became the sixth federal appellate court[23] to adopt the Code's formulation of the insanity rule when it decided *Blake v. United States* in 1969.[24] In *Blake*, the Fifth Circuit justified its adoption of the Model Penal Code rule by calling it "a definition of insanity which will serve as a vehicle to enable the court and jury to give effect to the defense . . . in terms of what is now known about diseases of the mind."[25]

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18. *See* 18 U.S.C. § 17(a) ("It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature or quality or the wrongfulness of his acts."); *see also* Clark v. Arizona, 548 U.S. 735, 750 & n.12 (2006) (recognizing that the federal standard derives from *M'Naghten*).

19. MODEL PENAL CODE AND COMMENTARIES 166 (AM. L. INST. 1985) (discussing the Code as adopted in 1962).

20. *Id.* at 166–67.

21. *Id.* at 167 (emphasis added).

22. *Id.* at 163 (brackets in original) (emphasis added).

23. If one adds the two circuits that adopted similar standards prior to the Code's publication, the Fifth Circuit was actually the eighth circuit to adopt such a rule. Blake v. United States, 407 F.2d 908, 914–16 (5th Cir. 1969) (adopting the Model Penal Code standard after noting that seven other circuit courts had adopted the same or a similar rule).

24. *Id.* By 1984, the Model Penal Code standard was firmly entrenched across the federal judiciary. *See* United States v. Lyons (*Lyons II*), 731 F.2d 243, 253 & n.3 (1984) (Rubin & Williams, JJ., concurring in part and dissenting in part).

25. *Blake*, 407 F.2d at 915.

II. THE RETURN TO *M'NAGHTEN* IN *LYONS* AND IN CONGRESS

The more expansive vision of the insanity defense, however, was short-lived, and the *M'Naghten* rule returned in the wake of yet another assassination attempt. Debate over the insanity defense reignited in the 1980s, after a jury found John Hinckley Jr.—who tried to assassinate President Ronald Reagan in 1981—not guilty by reason of insanity in 1982.[26] It was in that high-strung context that Robert Lyons appealed his case to the Fifth Circuit. This Part describes Lyons's battle with addiction in greater depth. It then explains how the Fifth Circuit reacted to Lyons's insanity defense in a way that, in hindsight, was out of step with our modern understandings of drug dependency.

Before suffering from addiction, Lyons was "generally in good health except that he suffered from occasional severe stomach pain, nausea, and vomiting."[27] He was hospitalized twice, was diagnosed with a probable ulcer, underwent surgery for internal hemorrhoids, and was administered Percodan and Demerol,[28] both of which are addictive opioids.[29] He left the hospital with a prescription for Percodan.[30] His symptoms continued, however, and he was hospitalized three more times in late 1978 to deal with the symptoms, a minor gunshot wound he suffered while he was cleaning a pistol under the influence of the Percodan, and an appendectomy.[31] Each time, Lyons received opioids while at the hospital and left with a prescription for Percodan.[32] Soon thereafter, Lyons's doctor "was concerned about the possibility of addiction" and "determined not to give [Lyons] any more Percodan."[33] But Lyons, still suffering from pain, switched doctors, and the new doctor "continued to prescribe Percodan for Lyons in constantly increasing amounts during the year 1979."[34]

At the end of 1979, Lyons was elected sheriff of Washington Parish, Louisiana.[35] By late 1980, Lyons's family "had discovered that [Lyons] had a serious drug problem."[36] But Lyons's doctor was helping him use "devious means of securing the drugs," including by placing "a fake cast on

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26. Natalie Jacewicz, *After Hinckley, States Tightened Use of the Insanity Plea*, NPR (July 28, 2016, 10:20 AM), https://www.npr.org/sections/health-shots/2016/07/28/486607183/after-hinckley-states-tightened-use-of-the-insanity-plea (noting that the 1982 verdict "sparked fierce argument over use of the insanity defense").

27. United States v. Lyons (*Lyons I*), 704 F.2d 743, 744 (5th Cir. 1983).

28. *Id.*

29. *Percodan®*, U.S. FOOD & DRUG ADMIN. (Dec. 2016), https://www.accessdata.fda.gov/drugsatfda_docs/label/2016/007337s049lbl.pdf; *Demerol® (meperidine hydrochloride, USP)*, U.S. FOOD & DRUG ADMIN. (Sept. 2010), https://www.accessdata.fda.gov/drugsatfda_docs/label/2011/005010s050lbl.pdf.

30. *Lyons I*, 704 F.2d at 744.

31. *Id.* at 744–45.

32. *Id.*

33. *Id.* at 745.

34. *Id.*

35. *Id.*

36. *Id.*

Lyons'[s] leg so that his family and the public would believe he had a broken leg, and therefore a legitimate reason for taking the drugs which [the doctor] was supplying."[37] The doctor even told Lyons that "because he was the sheriff, it would be possible for him to get local doctors to write prescriptions for drugs ostensibly to be used in law enforcement undercover narcotics cases."[38]

Lyons "had a tremendous need for drugs, and on the occasions when he could not get them, he suffered great physiological and psychological pain to the extent that he felt a complete inability to refrain from using them."[39] He struggled to eat food, lost over forty pounds, and suffered from drastic malnutrition.[40] News of his addiction eventually became public, and he was indicted on twelve counts of knowingly and intentionally securing controlled narcotics by misrepresentation, fraud, deception, and subterfuge.[41]

The Fifth Circuit panel that heard Lyons's appeal held that Lyons should have, under the Model Penal Code standard adopted in *Blake*, been able to offer to the jury his argument that he lacked "substantial capacity to conform his conduct to the requirements of the law."[42] The panel acknowledged that Lyons's addiction was involuntary, but it nevertheless made its reluctance to permit his insanity defense plain, declaring that it was "[c]onstrained by the shackles of precedent."[43]

Upon rehearing en banc, the court demonstrated even less sympathy for Lyons's battle with addiction, abandoning the Model Penal Code standard and returning to a *M'Naghten*-like rule.[44] The court pointed to a law journal's statement that "there is no consensus in the medical profession that addiction is a mental disease," and the court itself suggested that addicts can simply choose to attend treatment programs rather than use drugs.[45] The court also cited Supreme Court precedent for the proposition that "mere alcoholism does not constitute a mental disease or defect warranting an

37. *Id.*
38. *Id.*
39. *Id.* at 746.
40. *Id.*
41. *Id.* at 743, 746.
42. *Id.* at 748.
43. *Id.* at 744.
44. United States v. Lyons (*Lyons II*), 731 F.2d 243, 248–50 (5th Cir. 1984) (en banc).
45. *See id.* at 245 (quoting Herbert Fingarette, *Addiction and Criminal Responsibility*, 84 YALE L.J. 413, 424–25 (1975)).

insanity instruction"[46] but ignored alternative precedent in which a majority of the Supreme Court recognized that addiction to narcotics is an illness.[47]

The en banc decision was not unanimous. Five members of the Fifth Circuit joined an opinion criticizing the seven-judge majority and arguing that if addiction is not a mental disease or defect (a conclusion in which they concurred with the majority), there was no need to "redefine the scope of the insanity defense" because such a conclusion would mean Lyons could not raise an insanity defense regardless of whether a *M'Naghten*-like or Model Penal Code-like rule were in effect.[48] The majority's result was a "newly restricted insanity defense" formulated in a rule based on *M'Naghten*: A Fifth Circuit defendant accused of criminal conduct could be acquitted by reason of insanity, the court held, "only if at the time of that conduct, as a result of a mental disease or defect, he is unable to appreciate the wrongfulness of that conduct."[49]

For Lyons, the upshot was a much bleaker outlook after the court remanded for a new trial.[50] Later that year, Congress effectively codified the Fifth Circuit's holding, imposing on the entire federal judiciary a *M'Naghten*-like insanity standard that grants the defense only to defendants who can show that a mental disease or defect rendered them unable to "appreciate the nature or quality or the wrongfulness of [their] acts."[51]

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46. *Id.* at 245 n.3 (citing Powell v. Texas, 392 U.S. 514, 535 (1968) (plurality opinion)). The cited portion of *Powell* says only that the Court was "unable to conclude" that chronic alcoholics are unable to resist getting drunk in public. 392 U.S. at 535. Justice White, who cast the deciding fifth vote and concurred only in the result, wrote that homeless alcoholics "must drink" because of "their disease" and that "[f]or some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible." *Id.* at 551 (White, J., concurring). "As applied to them," Justice White continued, "this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk." *Id.* Justice White distinguished the appellant in the case before the Court, Leroy Powell, who "had a home" and "made no showing that he was unable to stay off the streets on the night in question." *Id.* at 553–54.

47. *See* Robinson v. California, 370 U.S. 660, 667 & n.8 (1962) (describing addiction to narcotics as "an illness" and noting that the appellee state government conceded that alcoholics and addicts suffer from physical and mental illness); *see also id.* at 674 (Douglas, J., concurring) ("If addicts can be punished for their addiction, then the insane can also be punished for their insanity. Each has a disease and each must be treated as a sick person.").

48. *See Lyons II*, 731 F.2d at 252 (Rubin & Williams, JJ., concurring in part and dissenting in part) ("This case simply does not require redefinition of the insanity defense.").

49. *See id.* at 248–50 (majority opinion).

50. *See id.* at 250 (remanding for a new trial).

51. *See* Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, ch. IV, § 402(a), 98 Stat. 1837 (codified at 18 U.S.C. § 17) ("It is an affirmative defense to a prosecution under any Federal statute that, at the time of the commission of the acts constituting the offense, the defendant, as a result of a severe mental disease or defect, was unable to appreciate the nature or quality or the wrongfulness of his acts."). Some states, including Wisconsin, retain the Model Penal Code standard. *See, e.g.*, WIS. STAT. ANN. § 971.15(1) (West, Westlaw through 2019 Act 186). There does not appear to be a reported Wisconsin case in which a defendant attempted to rely on drug addiction in raising the defense, but the

III. BACK TO THE MODEL PENAL CODE? CONCEPTIONS OF ADDICTION AND CULPABILITY AFTER THE OPIOID EPIDEMIC

Though the en banc Fifth Circuit did not consider addiction to constitute a disease at the time of Lyons's case, society's understanding of drug dependency has arguably changed. Over the past two decades, the opioid epidemic has shown that Lyons's story of legal trouble resulting from an addiction to prescription opioids is far from unique.[52] Similarly, the epidemic exposed overprescribing doctors who resemble the unscrupulous doctor in *Lyons*.[53] Doctors, in turn, have been paid to prescribe opioids in the form of bribes and kickbacks from the pharmaceutical industry.[54] The

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Wisconsin Court of Appeals in one case appeared to suggest that in theory, a sufficiently serious case of sexual addiction could meet the Code's standard. *See* State v. Krieger, 471 N.W.2d 599, 604 (Wis. Ct. App. 1991) (stating that the defendant "failed to obtain any diagnosis that his sexual addiction met the standards of sec. 971.15(1)"); *see also* Michael Davis, Note, *Addiction, Criminalization, and Character Evidence*, 96 TEX. L. REV. 619, 641 (2018) ("[N]o court applying the MPC insanity rule appears to have allowed addiction to suffice.").

52. *See, e.g.*, Riley Johnson, *Lincoln Doctor Arrested, Suspected of Drug Fraud to Feed Opioid Addiction*, LINCOLN J. STAR (Aug. 27, 2020), https://journalstar.com/news/local/crime-and-courts/lincoln-doctor-arrested-suspected-of-drug-fraud-to-feed-opioid-addiction/article_d6ec71f7-0791-515f-8a7c-b42feff678d4.html (reporting on Nebraska doctor accused of writing fraudulent prescriptions to a patient, then buying back hundreds of opioid painkillers to feed his addiction); Phil Fairbanks, *Former Kenmore Police Chief Gets Probation for Stealing Painkillers*, BUFF. NEWS (Apr. 10, 2019), https://buffalonews.com/news/local/crime-and-courts/former-kenmore-police-chief-gets-probation-for-stealing-painkillers/article_a20b78e3-da88-5c4b-804a-3d6e73a57106.html (reporting on man who admitted that he, while serving as police chief of New York village, stole opioid painkillers from community drop box for unwanted prescription medicine and, according to federal agents, admitted addiction to painkillers shortly after his arrest); Sam Howe Verhovek, *Limbaugh Deal Avoids Drug Prosecution, Defense Says*, L.A. TIMES (Apr. 29, 2006, 12:00 AM), https://www.latimes.com/archives/la-xpm-2006-apr-29-na-limbaugh29-story.html (reporting on radio host, accused of abusing OxyContin and fraudulently obtaining prescriptions, who agreed to continue treatment for addiction in return for prosecutors dropping criminal charge).

53. *See, e.g.*, Emerson Clarridge, *Doctors Among 49 People Who Funneled Opioids in Texas Pill Mill, Authorities Allege*, FORT WORTH STAR-TELEGRAM (Oct. 5, 2020, 7:47 AM), https://www.star-telegram.com/news/local/crime/article246158440.html (reporting on two doctors accused of writing prescriptions for opioids "knowing that the drugs would be diverted to the street for illicit use"); Terry DeMio, Kevin Grasha & Dan Horn, *Ohio, Kentucky Doctors Among 60 Charged in Pain Pill Bust Acted 'Like Drug Dealers'*, CIN. ENQUIRER (Apr. 18, 2019, 3:10 PM), https://www.cincinnati.com/story/news/2019/04/17/opioid-pain-pill-federal-prescription-bust/3482202002/ (reporting on sixty physicians and pharmacists who were accused of "illegally handing out opioid prescriptions"); Hayley Fowler, *Doctor Accused of Turning NC Practice into Pill Mill Gets Decades in Prison, Feds Say*, NEWS & OBSERVER (Raleigh, N.C.) (Sept. 9, 2020, 7:04 PM), https://www.newsobserver.com/news/state/north-carolina/article245608410.html (reporting on doctor who was found guilty of "turning his medical practice into a pill mill" and illegally distributing oxycodone).

54. Benner, *supra* note 9; Hannah Kuchler, Shaunagh Connaire, Nick Verbitsky, Annie Wong, Rebecca Blandon & Tom Jennings, *Opioids, Bribery and Wall Street: The Inside*

retail industry has been implicated, as well: the U.S. Department of Justice recently accused Walmart of "contributing to the deadly opioid epidemic by filling thousands of invalid prescriptions and failing to report suspicious orders of opioids and other drugs placed by its pharmacies" in a civil complaint alleging "hundreds of thousands of violations" of the Controlled Substances Act.[55]

At the same time, there is evidence that as the opioid epidemic has spread, attitudes about drug addiction and addicts have changed.[56] While it would be premature to say the scientific community has reached a consensus about the causes of addiction, a study published in 2019 noted that even for those who subscribe to a "choice model" rather than a "brain disease model" of addiction, moral considerations have become increasingly irrelevant.[57] Indeed, a 2012 academic review of a book that advanced a view of addiction as choice commented favorably on the book but nonetheless acknowledged that the addiction-as-choice view was "controversial" in "the context of ever-growing popular support for a disease model of addiction."[58]

In the context of opioids specifically, neuroscience research has revealed that drugs such as hydrocodone, oxycodone, and heroin "impact the brain at its most fundamental levels."[59] And in 2016, the Secretary of the U.S. Department of Health and Human Services wrote that "decades of scientific research" demonstrates that "addiction is a chronic neurological disorder."[60] Recent election results also indicate a similar attitudinal shift among the general population. Not only has the number of states where recreational marijuana is legal grown to fifteen (and medical marijuana to thirty-five), but Oregon in 2020 decriminalized small amounts of other illegal drugs, including heroin.[61] Likewise, in the District of Columbia,

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Story of a Disgraced Drugmaker, PBS FRONTLINE (June 18, 2020), https://www.pbs.org/wgbh/frontline/article/opioid-drugmaker-insys-bribing-doctors-fentanyl-painkiller/.

55. Kevin Johnson, *Walmart Accused of Fueling Opioid Epidemic in Justice Department Lawsuit*, USA TODAY (Dec. 22, 2020, 8:26 PM), https://www.usatoday.com/story/news/politics/2020/12/22/justice-department-sues-walmart-over-opioid-prescriptions-ap-reports/4012910001/.

56. *See* Peterson & Armour, *supra* note 10.

57. *See* Jostein Rise & Torleif Halkjelsvik, *Conceptualizations of Addiction and Moral Responsibility*, 10 FRONTIERS PSYCH., art. 1483, June 2019, at 2 ("The choice model has been referred to as the successor of the moral model of addition [sic], where addiction was considered a moral failure and addicts could be perceived as people of bad character. However, moral considerations are not core features of modern choice theories of addiction." (citations omitted)).

58. Allison N. Kurti & Jesse Dallery, *Review of Heyman's Addiction: A Disorder of Choice*, 45 J. APPLIED BEHAV. ANALYSIS 229, 229 (2012).

59. Samuel Fresher, Case Note and Comment, *Opioid Addiction Litigation and the Wrongful Conduct Rule*, 89 U. COLO. L. REV. 1311, 1315 (2018).

60. U.S. DEP'T OF HEALTH & HUM. SERVS., FACING ADDICTION IN AMERICA: THE SURGEON GENERAL'S REPORT ON ALCOHOL, DRUGS, AND HEALTH, at i (2016).

61. Jonah E. Bromwich, *This Election, a Divided America Stands United on One Topic*, N.Y. TIMES (Jan. 6, 2021), https://www.nytimes.com/2020/11/05/style/marijuana-

voters in 2020 approved a ballot initiative to decriminalize the use of "magic mushrooms" and other psychedelic substances.[62]

In light of these developments, Congress should consider clarifying that addiction is a mental disease sufficient to mount an insanity defense and allowing involuntarily addicted defendants to raise the defense under the Model Penal Code's "Mental Disease or Defect Excluding Responsibility" standard. Unlike the *M'Naghten* rule, which only excuses a defendant who can show her mental disease or defect resulted in her inability to understand the wrongfulness of her conduct, the Code's defense additionally would protect defendants like Lyons. In other words, the Code's defense would protect someone who, even though she understands her conduct is wrongful, engages in the wrongful conduct anyway because, due to her involuntarily acquired drug addiction, she lacks substantial capacity to conform her conduct to the requirements of the law. Since it goes further than the *M'Naghten* rule in guarding against the punishment of those who are not morally culpable or who cannot be deterred by a criminal prohibition, the Code's defense better serves the normative underpinnings of the criminal law.[63]

It is important to note that the Model Penal Code defense would not allow anyone with a drug or alcohol problem to avoid criminal liability. Each defendant who attempts to raise the defense would have to present enough evidence to convince a jury that his addiction was acquired involuntarily and was so advanced and all-consuming that he lacked the requisite capacity to control his behavior.

CONCLUSION

If Robert Lyons's story of an opioid addiction that resulted from an overprescribing doctor sounded atypical in the 1980s, his ordeal would have started to sound relatively commonplace a few decades later. Situated as he was in the era before the modern opioid epidemic, he found an unsympathetic audience of judges, whose decision to abandon the Model Penal Code's treatment of the insanity defense was echoed by Congress only months later. Lyons's case and the subsequent congressional action, taken in the charged environment resulting from the Hinckley acquittal, has had far-reaching consequences for criminal defendants that persist to the present day.

Congress should consider amending the federal insanity standard to allow defendants suffering from involuntary drug addiction to make a

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legalization-usa.html ("Decriminalization is popular, in part, because . . . Americans personally affected by the country's continuing opioid crisis have been persuaded to see drugs as a public health issue.").

62. Justin Wm. Moyer, *D.C. Voters Approve Ballot Question to Decriminalize Psychedelic Mushrooms*, WASH. POST (Nov. 3, 2020, 8:24 PM), https://www.washingtonpost.com/local/dc-politics/dc-magic-mushrooms-result/2020/11/03/bb929e86-1abc-11eb-bb35-2dcfdab0a345_story.html.

63. *See, e.g.*, *supra* notes 16–22 and accompanying text.

showing under the Model Penal Code rule, which would excuse those who, as a result of extreme addiction to drugs or alcohol, lack substantial capacity to conform their conduct to the requirements of the law. Such an amendment would reflect the way scientific and popular attitudes toward addiction have shifted in the wake of the devastating loss caused by the opioid epidemic[64] and better serve the normative aims of the criminal law.

64. For instance, one local Pennsylvania judge spoke during a drug dealer's 2017 sentencing hearing about how one of the dealer's customers, who died of an overdose, "didn't ask . . . to live in chronic pain." Dylan Segelbaum, *'They Didn't Let Her Killer Get Away': Heroin Takes a Life; a Drug Dealer Stands Trial.*, YORK DAILY REC. (Mar. 1, 2018, 8:35 AM), https://www.ydr.com/story/news/watchdog/2018/02/28/they-didnt-let-her-killer-get-away-heroin-takes-life-drug-dealer-stands-trial/351172002/. The judge said the "story was too familiar: Someone being prescribed opioids after medical treatment, only to become addicted to them." *Id.* Society, the judge said, "needed to become better educated about addiction," referring also to veterans who are prescribed opioids by the military and to the "multibillion-dollar" pharmaceutical industry. *Id.*