

Legal Education and Alcohol

By: Don Carroll

Our law schools teach the evolution of our legal jurisprudence from many perspectives: the impact of natural law in the eighteenth century, the history of slavery in the nineteenth, the struggle for civil rights by African Americans in the mid-twentieth century, and the impact of modern economic theory on law in the late twentieth century. All of these perspectives are valid and have become infused in courses taught in law schools. What is remarkable is not what has been included, but what has been left out. Law school curricula today are distinguished not so much for including many of the contexts out of which the history of our jurisprudence arises, but for totally failing to understand the overriding significance of how drug abuse and alcoholism has defined that history.

Lawyers and legal scholars become alert when the point is made that study of a major tributary for our jurisprudence has been omitted. Curiously the attention span collapses when discussion starts about alcoholism. Because we are a part of a culture that thrives on alcohol, because we are almost all in some way affected personally by alcoholism and other drug addictions, approaching this subject in a serious objective manner is hard for most people. It takes the stretch of being able to think outside of the box, to be able to look at what has been considered a normal reality and realize something very significant and relevant to legal education has not been seen. It is akin to looking at the dining room table and realizing that after all these years what I thought was a table is really an elephant.

We have had an alcoholically dependent culture for a long time. It is estimated that in the first fifty years of the development of American jurisprudence, following the adoption of the Constitution, that on average every American male drank half a pint of hard liquor a day. The impact of this on our legal system is not discussed or hardly even imagined. A nineteenth century historian referring to a drunken nephew of Chief Justice Marshall wrote of Thomas Marshall, "In spite of his great weakness -- a weakness which often made him disagreeable and unwelcome . . ." Chronic alcoholism is referred to euphemistically as a weakness. If what is really going on cannot even be identified clearly its implications cannot be developed or understood.

George Washington, a whiskey distiller himself, thought that distilled spirits were "the ruin of half the workmen in this Country . . ." Washington had the chance to observe the impact directly of alcoholic use on the court system. In early Virginia the law allowed only one tavern per county and this tavern was most often adjoining the courthouse. It was common for defendants, attorneys, judges and jurymen to gather at the tavern to drink before and during trials. Sometimes when a controversial case attracted a crowd, it was necessary to hold the trial in the tavern, which was often the only public building roomy enough to accommodate spectators. In the 1700's the rum trade made liquor cheap and available to all. Later whiskey distilled from corn became the efficient way to market our country's most abundant crop. Taverns were "nurseries" of the revolution and liberty from the Crown was often equated with the right to down a few

glasses of rum. Accounts suggest that American troops fought the British largely in a state of inebriation.

Alexander Hamilton's early attempts to raise funds to operate the government by a tax on whiskey failed disastrously, resulting in civil insurrection in western Pennsylvania and widespread evasion of the taxing effort. Fundamentally the rejection of the whiskey tax was because of the patriot's belief in their right to drink unfettered and the importance of whiskey as a cash crop. Popular access to cheap liquor and the right to consume it was viewed by the end of the eighteenth century as a right.

Gradually in the 1830's and 1840's a reaction to the besotted nature of the country began to occur and found expression in the temperance movement. The temperance movement became, in part, entwined with the anti-slavery cause. The momentum of the temperance movement was halted by the Civil War. War brought widespread use of alcohol among soldiers, lawlessness in the South in which alcohol often played a role, and the widespread introduction of opium based narcotic medicines. The boom in patent medicines after the war became a way for many to advocate the cause of abstinence and still practice their chemical addiction. A huge post-war incidence of chemical addiction again provided fodder for the temperance movement which ultimately resulted in the first drug prescription laws being passed and in passage of a constitutional amendment mandating prohibition.

The noble experiment gave rise to organized crime and the engendering of a selective anti-law attitude that manifested itself in the idea that certain laws did not have to be obeyed, or in milder form that the law was not always to be respected. Because of the institutions of slavery and prohibition, no popular coherent moral philosophy to underpin our jurisprudence ever developed in the United States. There were crusades and religious upsurgings, but these were more related to the excesses they responded to than to the growth of the kind of moral philosophy which ultimately is the fertile field supporting the rule of law. But while it is interesting to conjecture about what might have happened if prohibition had not occurred, more important is to understand the social context of widespread alcoholism and alcohol abuse and its import on the development of our jurisprudence. There are two aspects to this impact. First what types of legal doctrines the reality of widespread drug addiction has given rise to; and second, the impact on our legal system of our ignoring the reality of addiction. The legal doctrines that addiction has given rise to are indeed confusing. In many states where one, while intoxicated, engages in certain criminal conduct, our laws have found intoxication to be a defense in mitigation (especially where a specific mens rea is involved); but in the same states in other circumstances, our laws have found intoxication to be an aggravating factor. This inconsistency reflects society's own ambivalent views about alcoholism and other drug addictions. But more than anything, our legal system has given us a legacy of domestic violence, revolving door offenders, and burgeoning prison population by focusing for the most part only on the criminal behavior and not its cause. This will continue until our legal system begins to tackle the hard issue of separating the alcoholics and addicts who by virtue of their disease happen to engage in criminal acts from the criminals who also happen to be addicts and alcoholics.

Obtaining the super-majority in Congress and consent of three fourths of the state legislatures to amend our Constitution is not easy. Yet in trying to deal with the problem of addiction the American people have done that twice, first to enact Prohibition and then

to repeal it. What would it have meant if all this energy that went into constitutional legislating had been instead directed to understanding the nature of addiction and how it has affected our legal fabric? If the law treated chemical addiction as it has been defined for over forty years, as a disease, how does the law distinguish between the fact someone may be blameless for catching the disease but must bear responsibility for managing a chronic illness that unmanaged has unacceptable behavioral consequences and grave social implications? By ignoring the issue of chemical addiction our jurisprudence has avoided dealing with the problem of how to treat what appears at first blush to be a matter of personal choice in the use of legal drugs like alcohol, but has far reaching social implications in terms of breakdown of the family, child and marital abuse and violent crime.

Beyond the question of the problems produced by legal drugs is that of illegal ones. The crisis of crime today and the boom in prison building is not driven by poverty stricken people stealing to live. To the contrary, the standard of living has never been higher; instead the crime wave of today is almost totally driven by the economic crimes of distributing supermarket size amounts of drugs across the country on a daily basis and the addict's driven need for them.

Ultimately the law is contoured to reflect who we think we are as human beings. In the economic arena our laws tend to say that man should be a person of moderate greed, that is a certain amount of greed is good, but not too much. What do our laws say about who we are when we are sick? What should our laws say about our societal responsibility to look after each other, when some of us are sick? What should our law say about people who are sick, but refuse to accept treatment? We have laws about limiting the handling of poisonous snakes and about school children being required to get shots that have been litigated to square with our notions of religious freedom. Much more center stage than handling snakes in our culture is alcoholism and other drug addictions. The legal system is the precise place an understanding needs to be worked out to lessen the impact of this disease on our social fabric. Many alcoholics are unconscious Kerkvorian advocates of their right to die. Our legal system has not begun to articulate the issues presented by a disease that drives patients to take their own lives.

The social history of alcoholism in America is one of moving from excess to abstinence; finding that neither is workable and moving back into denial. This social history has created much of the raw material for our court system, and the additional problems brought on the legal system by the swings in public mood and changes in constitutional mandate. Our legal history is one of avoiding direct treatment of this subject. Our legal thinking has limped along without the development of a jurisprudence that might help us ameliorate the affects of this disease on the body politic. The social setting as exemplified now by talk shows is probably not a good place to start to develop such a jurisprudence, but perhaps our law schools are. Or, we can, as our fathers and forefathers did, continue to avoid the issue all together and simply see the sins of the fathers, and the unsuccessful way our legal system handles them, passed on to the next generation, and the next and the next.

Law and Addiction Teaching Outline

Objective: Goal of the course is to lay the foundation for a paradigm shift in how students think about the impact of addiction on law.

- Move from an all or nothing mind set, reflected in the legal systems event based orientation, guilt or innocence
- To a disease model based, not on an event, but a condition which requires an ongoing process

A paradigm shift is not grasped intellectually but a change in emotional understanding which occurs over time as a new prospective is assimilated.

Capsule One – Addiction Is A Disease

Alcoholism Prototypical Addictive Disease

What is alcoholism?

- A long-term chronic progressive and, unless treated, fatal illness
- Primarily a brain disease
- Affects the patient's ability to understand the nature of his disease
- Midbrain, reptilian brain
- Governing site instinctual needs
- Dopamine system

Recognizing Alcoholism (Reward Deficiency Syndrome)

1. Genetic predisposition to alcoholism (four to eight times)
2. Cultural predisposition to the disease (distance away from Mediterranean based culture)
3. Triggering event or events
 - a. Stress
 - b. Pattern of Abuse
4. Tolerance
5. Once drinking starts, inability to know how much one will drink
6. Progression
7. Initially drink to feel good, eventually drink to feel normal (brain ceases to make normal feel good neuro transmitters)
8. Black-outs, gray-outs
9. Mental obsession – if not drinking, planning when to drink
10. Starting at early age (addiction four times more likely)
11. Objective medical results – hematology, live function test, psychological and aptitude testing show reduced mental function
12. Behavior – lying, missing deadlines, failing to keep appointments, frequent days off, withdrawal, overreaction and anger outbursts, weight changes, difficulty sleeping

Recognition As Disease

- AMA, since 1950's
- DSM IV
- Federal Disability Law

Capsule Two – Addiction As A Jurisprudential Perspective

Addiction is one of the four main perspectives for understanding the development of law in the United States. These may be understood as stemming from Jefferson's concepts of life, liberty, property and pursuit of happiness.

1. Natural Law – basis in religion and rational thought, age of enlightenment
2. Civil Rights – slavery, reconstruction, segregation
 - 13th and 14th amendments
3. Free market economics – history and development of capitalism and market economics
4. Addiction – colonial and post colonial intemperance, pre civil war temperance movement, civil war, post-war patent medicines, second temperance movement, prohibition, organized crime, repeal prohibition, war on drugs

Capsule Three – Impact Of Addiction On The Profession

- Nature of Self-Governing Profession; Challenges to Self-Government
- Fifty to seventy percent of the major and most severe disciplinary matters leading to disbarment result from addiction (1970's N.C. Survey); other states similar

Capsule Four – Therapeutic Jurisprudence

- Law as a healing force not a dividing force
- Legal issues not as events but processes
- How to not punish someone for their disease but make them responsible for it
- Moving law from just dealing with the problem created by the behavior to the cause of the behavior
- Earlier model would be emergence of English equity courts
- Development of Drug Courts
- DUI Courts, Family Courts, Mental Health Courts

Capsule Five – Addiction In Criminal Law And Sentencing

- Addiction as a factor in mitigation
- Addiction as a factor in aggravation
- Alternative models
 - a. Treat all behavior the same regardless of cause
 - b. Treat based on cause of the behavior
 - c. Treat all behavior in part the same regardless of cause and in part based on cause
- Don't punish the disease itself but state may limit liberties because of disease (e.g. treatment of tuberculosis)

Capsule Six – Addictive Disease As A Legal Cause

Review cases cited in the Discussion Topic in which addiction was treated as a way to

- Void a contract
- Terminate paternal rights
- Void a parent's right to inherit

In each of these cases the focus was on whether or not addictive disease existed

What would have been the results if the inquiry had moved beyond that to

1. was it diagnosed?
2. was there a chance for treatment?
3. was there opportunity for the afflicted person to become responsible?
4. had recovery occurred?
5. had recovery been sustained?

Capsule Seven – Addiction And Public Policy

- Drinking age, deterrence,
- Limitations on advertising
- Proposed marijuana legalization, medical marijuana
- Law enforcement versus education versus treatment
- Support of terrorism
- Third world development

Capsule Eight – The Recovery Process

- Physical
- Emotion
- Mental
- Spiritual
- Difficulty for lawyers, ability to be intellectually defended

Capsule Nine – History Of Addiction And The Law

- Colonial
 - Triangle trade, cheap rum
 - Trials in taverns
 - Sons of Liberty, toast everyone
- Independence
 - Corn as cash crop, bootlegging
 - Drinking as a political right
 - Whiskey rebellion
- Early 1800's
 - Development of first temperance movement
 - 1850's the Washingtonians
 - Civil War
 - Addiction from opiate treatment for war injuries and patent medicines for widow's depression
 - Patent Medicines
- Late 1800's – Development of second prohibition movement
- January 16th, 1919 ratification of the 18th amendment
- Development of Organized Crime
- Ratification on December 5th 1933 of the 21st amendment repealing the 18th amendment
- Development of the war on drugs
- Erosion of the 4th amendment

Overview

All

or

Nothing

One drink too many, more than one, never enough

Prohibition
Gutting 4th amendment

Repeal of prohibition
Culture that runs on
instantaneous
gratification

Not looking for reasons
for addiction driven criminal
behavior (not addressing
cause)

Proponents of drug
legalization

In between
Education
Treating Disease
Responsibility for Recovery
Drug Courts

Capsule Ten – Origins Of Recovery

- Occurred in the Great Depression, addiction causes depression
- Story of Bill and Bob
- Ebby Thatcher
- Roland Hazard, Dr. Jung
- Dr. Silkworth, Townes Hospital
- Physical Allergy and Mental Obsession

Research Topics

I

During most of history, law and medicine and religion have been combined. Why were they separated, what was lost in the separation and what was gained? In what ways if at all would you further separate or re-combine them and how? How would you propose in the 21st century to reconcile law as a dividing force and a healing force?

II

The most effective treatment long-term for alcoholism that has developed has been participation in Alcoholics Anonymous. Because of this many prison, probation, or other state related programs have referred and/or required participation in A.A. The underlying premise of A.A. is that alcoholism is a disease that affects one physically, emotionally and spiritually. The A.A. approach to treating the disease is to confront it on all levels: physical - abstinence; emotional -- group support, sponsorship; and spiritual -- finding a relationship with a Higher Power.

In "The Requisition of God by the State", 47 Duke L.J. 785 (Feb, 1998) the author reviews most of the recent cases that have dealt with A.A. and the Establishment Clause. All of these cases, without discussion, assume a deconstructed, rationalist view of man -- that he is a physical and emotional creature, but has no inherent spiritual nature. Because of this reductionist view of man, these courts equate the spiritual component in A.A. with religion, even though both in fact and theory A.A. is not a religion and promotes no religion.

Over the years there have been many responses to man's spiritual nature: animism, pantheism, atheism, agnosticism and a great varieties of religions, including Christianity, Islam, Buddhism, Hinduism and Judaism. A.A. has found that for recoveries to last the spiritual muscle must be strengthened. It tries to address this central aspect of being human. But studiously avoids prescribing any particular kind of response and indeed acknowledges the validity of most.

Develop an argument that the courts cited in the law review article above, and their progeny, are wrong in their reasoning because our jurisprudence does not support such a limited view of the nature of man, and because the Establishment Clause was not intended to define man as a non-spiritual creature but simply to prevent government from imposing a particular form of religion as a response to our needs as spiritual creatures.

III

Why did the English judicial system with existing courts of law come to develop courts of equity? What were the social issues that drove the emergence of equity courts? What were the benefits of this development? What were the benefits/losses of recombining law and equity into one court? How is what happened in the history of law/equity relevant to today's emergence of family courts and drug courts?

IV

Starting with Robinson v. California, 370 U.S. 660 (1962) to date, how have the courts developed an understanding of the difference between the status of having addictive disease and engaging in criminal conduct because of addictive disease? To what extent has this jurisprudence been aided by a medical understanding of addiction? What would you propose as a more appropriate jurisprudence?

V

Under what circumstances, where one engages in criminal conduct, has our law found intoxication to be defense in mitigation and under what circumstance is it an aggravation. Our courts have found alcoholism to be a factor that might negate a required state of mind such as in the North Carolina v. Daniel, 333 N.C. 756 (1993) and found alcoholism to be a factor that increases the nature of the crime such as in North Carolina v. Ballard, 127 N.C. App. 316 (1997). How, if at all, can these two approaches to addiction be reconciled? How does the idea of intent fit with the concept of a diseased mind?

VI

You graduate from law school, go to work for a large firm where your years of college and law school drinking finally blossoms into alcoholism. After another bad night and missing getting to work on time, you call the Lawyer Assistance Program. You meet with the director and, after an evaluation; he recommends you attend a treatment program for professionals. The standard time for the professional program is 90 days inpatient. Would your firm be required to allow you time away from work for this treatment under federal and/or state law? Would it matter if your addiction were to marijuana? After you get back from treatment, your treatment center suggests you be randomly drug screened and that you attend A.A. each day. May your law firm subject you random drug screens and may you require your firm to allow you to be gone an hour at lunch each day to attend Alcoholics Anonymous? Explain the operation of any applicable statutes to each aspect of this fact situation and governing case law.

VII

Critique the North Carolina Court of Appeals definition of alcoholism as a disability in McCullough v. BB & T, 136 N.C. App. 340 (2000). Does the definition suggested by the plaintiff or the defendant makes the most sense medically; or if neither does, what would you argue as the most appropriate definition. And further assuming the discovery of modern antibiotics (which as given rise to the belief that medical conditions are subject to quick cures) have made it more difficult for legislatures and courts to address legal problems caused by addiction, why would this be so and how would you construct a statutory scheme to make more sense medically?

VIII

How has the nature of addiction reinforced the impact of Descartes' mother dying on the day he was born (i.e. a rationalist view of life) on the way the legal system has dealt with affirmative action, abortion and addiction? What about the similarity of these social issues gives rise to the difficulty of their amenability to legal solution? What recommendations do you have for solving these difficulties? How do Ritter v. Department of Human Recourses, 118 N.C. App. 564 (1995) and North Carolina v. Ragland, 80 N.C. App. 496 (1986) illustrate this problem?

IX

How has addiction driven crime (including but not exclusively the law enforcement policy of using drug forfeiture statutes) changed the concept of due process and the protection of the Fourth Amendment?

X

Does the legal system avoid grappling with the problems of addiction because continued expansion of a free market economy is dependent on people being addicted? From the prospective of market economics how should the legal system deal with addiction? From the perspective of civil rights how should the legal system deal with addiction? From a natural law perspective how should the legal system deal with addiction? What other applicable perspective might you suggest and how would it work?

XI

Can a drug policy of harm reduction be squared with the spirit of the constitutional prohibition of slavery?

XII

Trace the development to date of Therapeutic Jurisprudence starting with the Notre Dame Law Review article (Vol. 74, Number 2) in your materials.

XIII

In a global market, are third world countries, that do not have first world technology, inevitably dependent upon underground drug economics to support their economic development?

XIV

The present administration advocates a policy of war on terrorist to include those who aid or harbor terrorist. Much of terrorism is financed by drug money. Our society generally condones the middle class use of marijuana, cocaine, ecstasy and other club drugs, though not lower class use of cocaine and heroin. Should middle class drug users be held responsible for aiding and abetting terrorism?

XV

What are the implications, for the legal system and society, of a policy for or against the legalization of marijuana? What is the role of the pro-medical marijuana users in this debate? What would you propose our national policy on drugs be? How would you use the legal system to support it?

Discussion Topic

In the following cases, alcoholism is the primary factor in giving rise to a legal issue.

In each case, consider how the Court analyzed alcoholism. Was it treated as a disease? Was it treated as an event or a process? Do you think the Court would have treated this case the same way if instead of alcoholism the disease were cancer, diabetes or dementia? Would a different analysis be better than the one used by the Court?

In Re: The Estate of Candice Leigh Lunsford, Deceased (2001)

Kayla Ann McLemore and Taylor Lynn McLemore, 139 N.C. App. 426 (2000)

Sharpe v. Worland, 137 N.C. App. 82 (2000)

Matthews v. James, 88 N.C. App. 32, (1987)

State of North Carolina v. Barts, 321 N.C. 170 (1987)

Chesson v. Pilot Life Insurance Co., 368 N.C. 98 (1966)

Rogers v. University Motor Inn, 103 N.C. App. 456 (1991)

West v. Georgia-Pacific Corp., 107 N.C. App. 600 (1992)

State of North Carolina v. Jones, 339 N.C. 115 (1994)

Alcohol Related Issues in Legal Education

1. Constitutional Law:

How has the policy of stopping drug trafficking affected the constitutional protections against search and seizures? How have constitutional protections been eroded by forfeiture and taxation statutes? The North Carolina Supreme Court upheld the taxation of drug sales but this was overturned by the Fourth Circuit. What are the implications of having this area of our law develop in the context of addiction? Are there other examples where the major contours of the law have developed out of how society approaches an illness?

2. Criminal Law:

In most serious crimes AOD (alcohol and/or other drugs) is involved in some way. What impact should the Court give the perpetrator's impairment by alcohol? Does it matter what kind of crime? Does it matter if intent is not a part of the crime? What impact should the Court give the victim's impairment by AOD? Can one be an accomplice to a crime if one is passed out in the get away car and has no knowledge that a crime has been committed? Should the law try to force people to get well? Should the law require people to be responsible for having a disease? How can the law do this? Can/should judges sentence convicted drunk drivers to attend AA meetings?

3. Criminal Procedure:

Is an intoxicated person capable of understanding his/her Miranda rights? Must a law enforcement officer treat an intoxicated person different from a sober one? Can a person under the influence of AOD waive his/her right to remain silent, to have an attorney present for questioning, to have a jury trial or other due process rights? Can an intoxicated person give a knowing consent to allow a search of a dwelling?

What is the impact on a client's post conviction relief petition of the fact that his lawyer was in active addiction at the time that the client was convicted?

4. Family Law:

What relationship does AOD have to domestic violence? How should courts deal with parents or spouses who are violent as a result of AOD use? Should lawyers encourage or resist for their clients mandatory counseling (what if the attorney thinks his client needs it but the clients doesn't want to participate)? Does an attorney have any duty to identify an AOD problem or is his/her role to help his client only with the immediate legal issue? Can/should periodic random drug screens be included in domestic orders where there is an issue of AOD abuse and violence? The cycle of family

breakdown caused by AOD is intergenerational. What role, if any, (and how) could the court system help break that cycle?

5. Employment Law: What are the effectiveness, usefulness and legality of random drug screens in the workplace. Do employers have any responsibility to assure that employees are not impaired on the job i.e. Alaska oil spill, bus drivers? If so to what extent may they legally go to carry out this responsibility and what are the most effective ways to do that.

6. Evidence: What are the evidence problems associated with AOD problems? How may intoxication be proved? How do you prove responsibility for a disease?

7. Professional Responsibility: Do you have any obligation to assist a colleague whom you believe has an AOD problem? In what ways can attorneys' AOD problems affect their performance? When do such performance issues arise to ethical violation?

8. Torts: Is there a different standard of care for an alcoholic or drug addict? Does the reasonable man standard vary? How much alcohol does a reasonable person drink? Does a reasonable person do drugs? Is there a different standard that applies depending upon whether a person is an alcoholic or not and intoxicated or not. E.g. what is the standard of care for the alcoholic who is sober, the alcoholic who is intoxicated, the non-alcoholic who is sober, the non-alcoholic who is intoxicated, the alcoholic who knows he has a disease and the alcoholic who is in denial about his condition?

