

**COMMENTARY ON CROMBAG *ET AL.* (2020): LEGAL CONCEPT-CREEP AND
SCIENTIFIC IMPRECISION**

Accepted for publication in [Addiction \(2020\)](#).

Crombag and colleagues contend that judicial reliance on neat legal categorizations of intoxication-induced psychosis expands criminal fault. Intoxication jurisprudence adds yet another frontier to law's search for conceptual neatness in determining criminal responsibility, even when scientific imprecision proves unavailing.

Lawyers often share Artemus Ward's fanciful tale of the "lamblike" fourteen-year-old who, upon conviction for the cold-blooded midnight murder of his parents with a meat-axe, unpersuasively begs for the court's mercy: "I hope yer Honor will show some consideration *for the feelings of a poor orphan!*" [1]

Like Ward's unperturbable judge, the law frowns upon offenders manipulating the conditions of their offence into grounds to mitigate the punishment that is their rightful due. 'Prior-fault' doctrine governs the analogous principle in intoxication law by neutralizing the defense that would otherwise exculpate criminal behavior committed by an unreasoning mind. Where the accused voluntarily brings about their intoxication, prior-fault doctrine holds, courts may 'impute fault' from that voluntary ingestion to the consequences of their intoxicated conduct.

Crombag and colleagues [2] worry that *R v. Taj* (2018) EWCA Crim 1743 widens the prior-fault doctrine's scope in England and Wales. Before *Taj*, prior-fault attached liability to criminal psychosis that manifested while a defendant was intoxicated, but not if the psychosis manifested after intoxication had already dissipated. Yet the trial court in *Taj* imputed fault even absent ongoing intoxication, because the defendant's criminal psychosis followed so shortly after withdrawal from psychosis-inducing substance ingestion. *Taj*'s conviction and 19-year sentence for attempted murder thus rested on an inculpatory exception for behavior committed during a period of *legal* intoxication when *Taj* was *clinically* not intoxicated.

The slippage between legal and clinical categories that Crombag and colleagues observe in prior-fault doctrine bedevils much else in criminal law, too. Just as *Taj* complicates determining whether a defendant is 'intoxicated,' law's demand for bright lines often finds science's messiness frustratingly unavailing [3]. For defendants, the consequences of that slippage are bleak.

Take, for example, the broader class of questions concerning whether a defendant commands the cognitive and volitional capacities that criminal responsibility requires. Any such abstraction from the jurisprudence of intoxication to criminal capacity more generally corroborates Crombag and colleagues' prediction: when clear legal thresholds rest on uncertain clinical criteria, the ensuing "concept-creep" risks over-criminalization.

American death penalty jurisprudence showcases the challenges that arise when courts circumscribe tidy legal categories around indeterminate scientific constructs. When the US Supreme Court set aside Florida's IQ threshold for deciding a capital defendant's intellectual (dis)ability in favor of a more clinically-informed standard, subsequent practice fell dispiritingly short of the protective restriction on the death penalty that the Supreme Court envisioned [4]. Rather than displaying caution in the face of scientific imprecision, lower courts in many States across the US instead reinterpreted the science so as to operationalize categories of disability neatly—and rarely so in defendants' favor.

The jurisprudence of juvenile status tells a similar story in the negative. There, law's search for clarity where science provided none contributed to the US Supreme Court's stepwise progress toward abolishing the death penalty for crimes committed as children. The Supreme Court

recognized that wading deeper into complicated developmental science to determine whether a child's inchoate cognitive capacities bore the trappings of criminal responsibility would have been a fool's errand [5]. It therefore concluded that outright abolition spared lower courts untold errors yet to come.

Taj thus fits into a longstanding doctrinal pattern of “concept-creep,” observable even in far-removed domains of law, that the collision of law and science introduces. The trial court in *Taj* imputed fault from the defendant's withdrawal from substance ingestion to his criminal psychosis the following day, and in so doing it trod on shaky toxicological ground. The precedent *Taj* sets promises conceptual neatness, but is likely to deliver little. As Crombag and colleagues forewarn, when science offers shaky insights, courts over-extend the law to defendants' detriment. And because reality is rarely as straightforward as stories like Artemus Ward's would have us entertain, perhaps the prudent course would instead point in precisely the reverse direction altogether.

DECLARATION OF INTERESTS

None.

KEYWORDS

prior-fault; legal responsibility; criminal capacity; scientific imprecision; over-criminalization.

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