(Mis)treating Substance Use Disorder With Prison

Kaitlin Puccio*

Keywords: prison, bioethics, substance abuse, incarceration, rehabilitation, ethics

INTRODUCTION

It is largely unethical to sentence individuals who are addicted to drugs to prison. While substance use can be a crime, it must be treated differently from other crimes because addiction is a psychiatric disorder. Prisons are penal institutions. Legitimate goals of penal sanctions include retribution, deterrence, rehabilitation, and incapacitation.[1] Most of these goals do not speak to those with substance use disorder, and incarceration may be counterproductive given the wide availability of drugs and feeble rehabilitation efforts in prison. Further, it may be the case that substance use disorder impairs an addict's autonomy, calling into question his criminal culpability. Our understanding of substance use disorder has evolved and our prison sentencing practices must do the same.

This paper will first provide background on substance use disorder as a psychiatric disorder. Then, the need to focus on rehabilitating rather than punishing those with substance use disorder who commit crimes will be explored. Finally, this paper will address whether an individual with substance use disorder can be considered culpable for any crime—regardless of severity—and whether that individual's autonomy is impaired due to his addiction. I conclude that culpability should depend on whether the serious crime would have occurred in the absence of the drug addiction. In most cases, it is unethical to sentence an individual with substance use disorder to prison where other options such as home confinement are available.

II. Background

The fifth and most recent edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5)—published nearly twenty years after the previous edition was published in 1994—includes a section on substance use disorder.[2] In prior editions, substance abuse and substance dependence were listed as separate categories. Abuse was conceptualized as "mild or early phase" (dangerous substance use) and dependence as the "more serious manifestation" (regular substance use).[3] The recently combined category of substance use disorder is measured on a spectrum of severity, reflecting two decades of clinical research. This is a significant development, because it recognizes that what was once considered "substance abuse" is not simply a "mild" vice, but a serious disorder. This new understanding warrants changes to the existing penal system in the United States as applied to those who are addicted to drugs.

Kaitlin Puccio, JD Georgetown University, MS Columbia University

III. Analysis

a. *Punishment versus rehabilitation*

Given our recent understanding of the genetic components underlying addiction, it is clear that substance use disorder requires treatment rather than punishment. The three most relevant goals of penal sanctions are deterrence, rehabilitation, and incapacitation. Deterrence is the idea that mandatory minimum sentences will prevent addicts from violating drug laws because the threatened loss of freedom outweighs the perceived benefits (from the addict's perspective) of drug use. If deterrence were effective, states with higher rates of incarceration for drug crimes would have lower rates of drug use.[4] This is not the case. Further, shorter sentences have not led to higher recidivism rates.[5] The correlation between prison sentences and drug use is thin.

Prisons in the United States have a more punitive than rehabilitative focus. Over 75 percent of inmates released from prison are reincarcerated within five years due to the lack of rehabilitative programs, which include educational and reintegration programs.[6] Rehabilitation programs in prison targeted at substance use disorder are utilized by only 40-50 percent of the prison population with drug addictions. Despite the availability of these programs in most prisons, drugs are also widely available in prisons. [7] Those with substance use disorder are less likely to be able to resist using drugs when exposed to them; this is now acknowledged as a symptom of the disorder as opposed to a weakness of character.[8] Confining an addict to an environment that challenges his self-control is not conducive to his successful rehabilitation.

b. Easy cases

Incapacitation embodies the idea that incarcerating drug offenders increases public safety. Here the analysis splits into two paths: the easy cases and the hard cases. First, I will address the easy cases. While drug use is itself a crime and often leads to other crimes, petty crimes in conjunction with drug use must be considered differently than more serious crimes. Lesser crimes such as shoplifting often co-occur with drug use (for example, a heroin addict stealing needles). In these cases, it is likely that but for the addiction, the crime would not have occurred. Drug use alone and drug use in conjunction with petty crimes should not involve prison time because there are minimal associated public safety concerns. Other penal options that achieve the goals of incapacitation, retribution, and deterrence include home confinement and fines, in addition to the completion of a court-ordered drug treatment program that achieves the penal goal of rehabilitation.

For example, German prisons emphasize reintegration rather than punishment; the conditions of confinement are not part of the punishment. Rather, the punishment is "the incarceration, the imprisonment itself…the loss of freedom, that's it." [9] Prisoners—including those who have committed violent crimes—have the keys to their own private cells, complete with a private bathroom. They can decorate how they wish and play darts in common areas throughout what resembles a college campus. The conditions are luxurious compared to prison conditions in the United States, yet the recidivism rate is lower.[10] The loss of freedom is the key, which acts as both a punishment and a deterrent.

Similarly, in the case of mandatory drug treatment programs that we might impose on those with substance use disorder instead of prison, the loss of freedom is the punishment: an addict is removed from his family and forced into a rehabilitation program. Extracting him from his environment is a critical step as well, because it is important to extinguish environmental cues when treating substance use disorder. For example, an individual may associate heroin with the people he is with or the apartment he is in when using

the drug. Environmental experiences can trigger a drug craving. Such environmental cues are a type of memory. It would be difficult to extinguish such cues in a prison environment where drugs are rampant and new cues are able to evolve before the individual has been treated for addiction.

Further, drug use often co-occurs with other psychiatric disorders like PTSD. Punishing a self-medicating, traumatized individual with punitive action that may contribute to additional trauma is reinforcing. For example, a female victim of domestic violence and sexual abuse may use drugs to alleviate the stress of her situation. If she is imprisoned for drug possession, sexual assault and violence while incarcerated, and the presence of male guards in a position of authority, may add to her trauma.[11] A focus on rehabilitation rather than punishment speaks more to the needs of those with substance use disorder and more successfully achieves the apparent aims of the penal system.

c. *Difficult cases*

There are more difficult cases where drug use co-occurs with more serious crimes such as murder. The balance in these cases weighs more heavily in favor of prison for incapacitation purposes due to concerns over public safety. However, the rehabilitative goal should not be disregarded simply because prison is appropriate. To move beyond the challenges that a prison environment presents for those with substance use disorder, the conditions of confinement must improve. An individual who is released from prison after a long sentence may be more difficult to treat due to what is recognized among psychologists and criminologists as "post-incarceration syndrome."[12] Researchers at Vrije Universiteit Amsterdam used neuropsychological tests to show that even after a short incarceration, prisoners demonstrated increased impulsivity and decreased attentional control, and concluded that "released prisoners may be less capable of living a lawful life than they were prior to their imprisonment."[13] Compounding this with substance use disorder that is unlikely to have been treated in prison may leave addicts prone to even greater dependence on drugs than before entering prison.

d. *Autonomy and culpability*

One remaining question is whether an individual with substance use disorder can be said to be culpable for any crime—regardless of severity—if his autonomy is impaired due to his addiction. Punishment for crimes committed by those with other psychiatric disorders may provide some clarity.

Since 1955, the number of patients housed in psychiatric institutions has declined by 95 percent.[14] This is not due to a decline in the number of people with psychiatric illnesses, but because psychiatric hospitals have largely gone out of existence. Many of the mentally ill ended up homeless or in prison. Indeed, 15 percent of state prison inmates suffer from a psychotic disorder.[15] Prior to this deinstitutionalization, an individual with schizophrenia, for example, who committed murder because voices in his head ordered him to do so would be sent to a psychiatric institution for both mental health care and incapacitation purposes. Now, this same individual would likely be incarcerated. Even though pleading insanity may reduce his sentence, prison conditions—for example, being placed in solitary confinement—may exacerbate this issue.[16]

Individuals with antisocial personality disorder (psychopaths and sociopaths) are treated differently in that the insanity defense does not apply.[17] On a spectrum, these individuals are the most culpable. Their behavior and lack of remorse does not fit the Model Penal Code test of insanity, where an "individual is not liable for criminal offenses if, when he or she committed the crime or crimes, the individual suffered from a mental disease or defect that resulted in the individual lacking the substantial capacity to appreciate the

wrongfulness of his or her actions…"[18] Under this test, schizophrenics are less culpable because while they committed the crime, they suffered from volitional impairment. Those with substance use disorder suffer from a similar volitional impairment, though the insanity defense is not available to them. However, the availability of the insanity defense to a defendant does not determine culpability; volitional impairment, which provides the legal basis for the insanity defense, is the key.

The nervous system of an individual with substance use disorder reacts to drugs in a way that is reinforcing. All addictive drugs stimulate the release of dopamine in the nucleus accumbens. An individual may inherit an atypical response to opiates, for example, where the drug makes him feel euphoric and thus is highly reinforcing. By contrast, another individual who has been prescribed opiates after a traumatic physical injury may find that they don't make him feel anything other than a decrease in pain—i.e. there is no feeling of euphoria, or "high." The former has an inherited risk of developing substance use disorder. Even if he desires to stop using heroin, he may be unable to do so as a result of genetic or biological predispositions. He is stripped of his autonomy in this sense. Because of this volitional impairment, it is unethical to find him culpable for using drugs. His culpability with regard to other crimes may depend on whether he would have committed the crime if he did not suffer from substance use disorder.

CONCLUSION

Research has shown that addiction is a psychiatric disorder. Although substance use can be a crime, it must be treated differently than other crimes. The current penal system in the United States focuses on punishment rather than rehabilitation. This does not speak to the needs of those with substance use disorder, and likely thwarts efforts at reintegrating prisoners into society. Without proper treatment, those with substance use disorder will likely continue to use drugs. Their genetic makeup leaves them vulnerable to addiction and threatens their autonomy. This loss of autonomy means that—like those who suffer from other psychiatric disorders and are volitionally impaired—they are not culpable for the crime of substance use. Cases in which drug use co-occurs with other crimes are more difficult, but an individual's culpability should depend on whether the additional crime would have occurred in the absence of drug addiction. Even if an individual with substance use disorder is incarcerated for the purpose of incapacitation in the context of a serious crime, the institution to which he is sentenced must provide proper rehabilitation. In most cases, it is unethical to sentence an individual with substance use disorder to prison where other options are available.

---

[1] *Graham v. Florida*, 130 S.Ct. 2011 at 2012 (2010).

[2] American Psychiatric Association, *Diagnostic and Statistic Manual of Mental Disorders*, 5th Edition, "Substance Use Disorder"

[3] *See generally* Hasin, Deborah S. et. al, Am. J. Psychiatry, "DSM-5 Criteria for Substance Use Disorders: Recommendations and Rationale" (2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3767415/

[4] Pew Trusts, "More Imprisonment Does Not Reduce State Drug Problems," March 8, 2018, https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/03/more-imprisonment-does-not-reduce-state-drug-problems

[5] U.S. Sentencing Commission, "U.S. Sentencing Commission Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses," news release, Dec. 11, 2007, http://www.ussc.gov/about/news/press-releases/december-11-2007; Kim

Steven Hunt and Andrew Peterson, "Recidivism Among Offenders Receiving Retroactive Sentence Reductions: The 2007 Crack Cocaine Amendment" (2014), U.S. Sentencing Commission, http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/ 20140527_Recidivism_2007_Crack_Cocaine_Amendment.pdf.

[6] University of Pennsylvania, Wharton Public Policy Initiative, "The Economic Impact of Prison Rehabilitation Programs," August 17, 2017, https://publicpolicy.wharton.upenn.edu/live/news/2059-the-economic-impact-of-prison-rehabilitation/for-students/blog/news.php

[7] Welsh-Huggins, Andrew, Associated Press, "Prison Staff in 2 States Treated for Exposure to Drugs," August 29, 2018, https://www.usnews.com/news/best-states/ohio/articles/2018-08-29/report-prison-guards-inmates-treated-for-exposure
[8] Hartney, Elizabeth, PhD, "A Guide to DSM 5 Criteria for Substance Use Disorders," September 26, 2018, https://www.verywellmind.com/dsm-5-criteria-for-substance-use-disorders-21926

[9] CBS 60 Minutes Presents: Behind Bars, https://www.cbsnews.com/news/60-minutes-presents-behind-bars-prison/

[10] The Marshall Project, "Prison Without Punishment," September 25, 2015, https://www.themarshallproject.org/2015/09/25/prison-without-punishment

[11] *See also* Hogenboom, Melissa, BBC, "Locked up and vulnerable: When prison makes things worse," April 16, 2018, http://www.bbc.com/future/story/20180411-locked-up-and-vulnerable-when-prison-makes-things-worse, discussing how women who are victims of trauma are re-victimized by prison.

[12] Jarrett, Christian, BBC, "How Prison Changes People," May 1, 2018, http://www.bbc.com/future/story/20180430-the-unexpected-ways-prison-time-changes-people

[13] *Id.*

[14] Kozlowska, Hanna, *The Atlantic,"*Should the U.S. Bring Back Psychiatric Asylums," January 27, 2015, https://www.theatlantic.com/health/archive/2015/01/should-the-us-bring-back-psychiatric-asylums/384838/

[15] *Id.*

[16] *Id.*

[17] Cornell University Legal Information Institute, "Insanity defense," https://www.law.cornell.edu/wex/insanity_defense

[18] Cornell University Legal Information Institute, "Model Penal Code Insanity Defense," https://www.law.cornell.edu/wex/model_penal_code_insanity_defense