Health Care/Intellectual Property Law

Criminalizing Addiction: A Disease or a Crime?

Can we criminalize the symptoms of mental illness? Some feel that the manifestations of a substance abuse disorder, or addiction, is no more controllable than the division of abnormal cells (cancer) or uncontrollable tics associated with Tourette syndrome. Our country, and specifically Long Island, is facing an epidemic largely stemming from prescription opioids.[1]

Diseased Mind

Since the start of this country, crime required *mens rea*, a criminal mind.[2] "Historically, the law has required that before an individual is deemed a criminal, he must have acted with intent to do wrong."[3] However, "[o]utside medicine, where law and the mind intersect, mental illness is deemed a personal responsibility, manageable through self-control."[4] Addiction, itself, implies a lack of will in the compulsive use or device in which one engages. Perhaps the inquiry should become whether addiction or disease is so entangled with the purchase, possession and, sometimes, sale of that illegal substance that such allegation can still result in either pretrial or post-trial incarceration.

Can a diseased mind formulate the required *mens rea* to possess, loiter or use illegal substances if the subject is *addicted* to those substances? "[I]f there is no *mens rea* (of whatever degree is appropriate), then there is no just cause for the imposition of criminal penalties through the government's monopoly on the use of lawful force."[5] Although "[p]rescription opioids are misused much more widely than heroin, nearly 80 percent of today's heroin users said they formerly misused prescription opioids."[6] Historically, from engaging in homosexuality and adultery to overbearing criminal laws punishing otherwise innocent conduct, the legal community should ask for what purpose do we punish the diseased mind? Or, perhaps, is the addiction not a legitimate medical disease deserving of 'special treatment,' leniency or recognition for the criminal justice system. Societal norms, values and mores should inform the decision.

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While adolescents and adults are more culpable, within and without the criminal justice system, for their behaviors, youth today (even toddlers) are offered mind altering drugs, 'diagnosed,' and regularly prescribed drugs. Where many parents celebrated the death of television commercials depicting Joe Camel[7] smoking tobacco, millions of Americans comfortably gaze into the myriad of animated figures discussing prescription medications: follow the bouncing ball, the animated pill, the big bad wolf animation…designed to attract the consumer and increase sales of prescribed pharmaceuticals. Does this overcome freewill? What about for young people? Are these young minds robbed, or hijacked, of their ability to develop free of mind altering substances and tremendous social influence? As Peg O'Connor retorts, "[t]here is a kind of intentionality to hijacking that clearly is absent in addiction. No one plans to become an addict. One certainly may plan to drink in reckless or dangerous ways, not with the intention of becoming an addict somewhere down the road. Addiction develops over time and requires repeated and worsening use."[8] Should the legal system draw a distinction?

Options

Perhaps we should decline to prosecute addicted individuals for illegal drug possession. A criminal defendant cannot be punished for suffering from a medical disease.[9] In the noncriminal context, an employee's previous alcohol or drug addiction qualifies as a "disability" under the Americans with Disabilities Act if the addiction created a record of impairment that substantially limited a major life activity.[10] The American Psychiatric Association, recognizing that addiction to alcohol or drugs is a form of mental illness, sets forth standards for making a diagnosis of "substance dependence," which is "[a] maladaptive pattern of substance use, leading to clinically significant impairment or distress, as manifested by three (or more) of [seven specified behaviors] ... occurring at any time in the same 12month period ... "[11] If that is the case, we cannot punish an opioid addict for possessing illegal drugs anymore than we can punish an alcoholic for buying liquor.[12]

Perhaps addiction is a case of weak will. "A patient who knows he has chronic obstructive pulmonary disease and refuses to wear a respirator or at least a mask while using noxious chemicals is making a choice that exacerbates his condition. A person who knows he meets the D.S.M.-IV criteria for chemical abuse, and that abuse is often the precursor to dependency, and still continues to use drugs, is making a choice, and thus bears responsibility for it."[13] If this is so, are we awarding socially reprehensible behavior? As Dr. Connor concludes, "Addicts are neither hijackers nor victims."[14] If culpable, we bear the toll for the onslaught of costs of care and incarceration and, yes, perhaps incarceration is the appropriate way to manage such individuals.

The legal profession must confront the reality that *mens rea* is lacking in some of these individuals. Perhaps, "[t]he drugs or the neurochemicals produced by the behaviors overpower and redirect the brain's normal responses, and thus take control of (hijack) it. For addicted people, that martini or cigarette is the weapon-wielding hijacker who is going to compel certain behaviors."[15] In either case, there are enormous costs associates with criminalizing addiction. "The annual cost of the opioid crisis increased from $29.1 billion in 2001 to an estimated $115 billion in 2017 (all cost estimates are shown in 2016 dollars). The growth rate between 2011 and 2016 was double the rate observed between the previous 5 years, and is projected to increase again in 2017."[16] This problem is impacting all races, all genders and is explosively increasing. Indeed, "the epidemic has transitioned away from older people to younger ones and from prescription opioids to illicit drugs. The number of opioid overdose deaths is estimated to have exceed 62,500 in 2017 based on data through June."[17]

Conclusion

Incarceration of addicts continues to lead to poor results. "[H]igher rates of drug imprisonment did not translate into lower rates of drug use, lower drug arrests, or lower overdose deaths."[18] "The most effective response to the growth in opioid misuse, research suggests, is a combination of law enforcement to curtail trafficking and halt the emergence of new markets; alternative sentencing to divert nonviolent drug offenders from costly imprisonment; treatment to reduce dependency and recidivism; and prevention efforts that can identify individuals at high risk for developing substance use disorders."[19] Putting aside federal crimes, state prosecutors, judges and criminal defense practitioners can push for these alternatives, refuse to prosecute and routinely dismiss such cases in the interests of justice.[20]

As legal professionals, we should help the law evolve. "The criminalization of the mentally ill is not only inhumane in its neglect, but also diverts resources from more equitable distribution."[21] Many people can remember a time when homosexuality was not only illegal but a diagnosable disease. Less than fifty years later, same-sex couples can legally marry. Soon America will celebrate the centennial of the 19th amendment, allowing suffrage for women. It is likely that we will judge the society of today in a hundred years from now in horror when school-age children learn of the mass incarceration of non-violent drug addicts. We are failing to utilize the most effective treatments and intervention[22] for our most vulnerable populations. The opioid crisis is of paramount concern, fiscally, socially, perhaps personally, and, most importantly, for the continued legitimacy of our criminal justice system.

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1. Center for Behavioral Health Statistics and Quality, Substance Abuse and Mental Health Services Administration, "2015 National Survey on Drug Use and Health: Detailed Tables" (2016), https://www.samhsa.gov/data/sites/default/files/NSDUH-DetTabs-2015/NSDUH-DetTabs-2015.pdf.
2. *See* 4 William Blackstone, Commentaries *358 (a crime consists of "a vicious will" and "an unlawful act consequent upon such vicious will.").
3. Paul Rosenzweig, *Congress Doesn't Know Its Own Mind— And That Makes You a Criminal,* The Heritage Foundation (July 18, 2013), available at http://report.heritage.org/lm98.
4. Charlotte Schwarz, *Irreconcilable Differences: Mens Rea and Mental Illness*, Writing 20 (Spring 2009): Writing In and About Medicine Professor Gretchen Case (November 11, 2009).
5. Rosenzweig, *supra* note 3.
6. Adam Gelb, Letter to Chris Christie, President's Commission on Combatting Drug Addiction and the Opioid Crisis, Letter to the White House, PEW Charitable Trust, P.2 (June 19, 2017) available at: http://www.pewtrusts.org/~/media/assets/2017/06/the-lack-of-a-relationship-between-drug-imprisonment-and-drug-problems.pdf (footnotes omitted).
7. Stuart Elliot, *Joe Camel, a Giant in Tobacco Marketing, Is Dead at 23*, New York Times (July 11, 1997), https://nyti.ms/2jSZPZ9.
8. Peg O'Connor, *The Fallacy of the Hijacked Brain*, NY Times (June 10, 2012) , https://opinionator.blogs.nytimes.com/2012/06/10/the-hijacked-brain/.
9. *See Robinson v. California*, 370 U.S. 660 (1962)(a statute providing for imprisonment of anyone addicted to drugs violated the Eighth Amendment since criminalizing a condition such as drug addiction is akin to criminalizing mental illness).
10. 42 USC. §§ 12101 (a), 12102(2)(A, B), 12114(b); *Buckley v. Consolidated Edison Co. of New York, Inc.*, 127 F.3d 270, 27273 (2d Cir. 1997).
11. American Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994)("DSMIV"), at 181; *see also id.*, at 182, 190, 19596.
12. See *Robinson*, 370 U.S. 660.
13. See O'Connor, supra note 8.
14. *Id.*
15. *Id.*
16. Sarah Litton, *Economic Toll Of Opioid Crisis In U.S. Exceeded $1 Trillion Since 2001*, Alatrum (February 13, 2018), https://altarum.org/about/news-and-events/economic-toll-of-opioid-crisis-in-u-s-exceeded-1-trillion-since-2001.
17. *Id.*
18. *See* Gelb, *supra* note 6.
19. *Id.* (footnotes omitted).
20. CPL §§ 170.40(1), 210.40(1), *People v. Bolton*, 224 A.D.2d 436 (2d Dept. 1996).
21. Charlotte Schwarz, *Irreconcilable Differences: Mens Rea and Mental Illness*, Writing 20 (Spring 2009): Writing In and About Medicine Professor Gretchen Case (Nov. 11, 2009).
22. The Pew Charitable Trusts, "The Case for Medication-Assisted Treatment" (Feb. 01, 2017), http://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2017/02/the-case-for-medication-assistedtreatment.