The Incarceration Addiction:
A Toxic, Symbiotic Relationship and an Ethical Response

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This paper is dedicated to my nineteen classmates at Augusta Correctional Center and to our professor, who encouraged us to find our vocations at the intersection of the world's greatest need and our greatest joy.

Charles Terry and the Rabbit Hole

> *It is the position of the people that this man is a chronic drug addict, a career criminal, and a menacing threat to society. He has already been to prison and has proven that he is beyond rehabilitation. Therefore, we ask the court to sentence him to the maximum term prescribed by law.*[1]

The district attorney's words echoed in an almost-empty Oregon courtroom, occupied only with the judge, the bailiff, the court reporter, the public defender, the district attorney, and the defendant Mr. Charles Terry. Since the age of eighteen, heroin addiction had haunted Charles. He committed felonies daily to feed his uncontrollable addiction, befriended other addicts, and thrice found himself behind bars for drug-related crimes. Charles called hospital after hospital begging for help and quickly experienced the lucrative nature of addiction treatment facilities. Without insurance, addiction treatment would cost him five hundred dollars per day.[2] Between serving time, Charles started working and could afford to participate in a methadone maintenance treatment, living without heroin for eighteen months and demonstrating his desire to change; however, all attempts to remain clean eventually failed, and prison loomed inevitable.[3] Charles' life had become a potent concoction of "prison time, sickness, suffering, and shame," landing him in the Oregon courtroom in March of 1984.[4] In the wake of the district

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[1] Charles Terry, *The Fellas: Overcoming Prison and Addiction* (Cengage Learning: 2002), 1.

[2] This is anecdotal information from Charles' book. Other medical practices in the United States offer methadone treatment for about $90 per week and $4680 per year. See McKenzie, M., Zaller, N., Dickman, S. L., Green, T. C., Parihk, A., Friedmann, P. D., & Rich, J. D. (2012). A randomized trial of methadone initiation prior to release from incarceration. *Substance abuse*, *33*(1), 19-29.

[3] Methadone is a synthetic opiate often used by public officials and physicians as a substitute drug during morphine and heroin detoxification and pain management.

[4] Terry, 4.

attorney's argument, the judge sentenced Charles to twenty years in the state penitentiary and recommended that he not receive parole for at least ten years.

Charles became unnaturally dependent on the state for food, clothing, shelter, and utilities. The phenomenon of "prisonization" seeped into his self-concept and behavior as Charles grew more accustomed to the hypermasculine, aggressive, controlled, and upside-down atmosphere of incarceration. Gradually, prison enclosed and engendered his whole world – his friendships, his community, and his very meaning. While incarcerated, Charles faced the unforgiving realities of withdrawal coupled with secret, sporadic fixes of heroin. Prison eroded his self-concept, reducing it to "addict" and "convict" in the eyes of himself and others. Like countless other individuals, Charles Terry faced his future, a rabbit hole of the spiraling, reciprocal relationship of addiction and incarceration.

I: Introduction

In the United States, the treatment of addiction as a crime instead of as a complex biological and behavioral phenomenon is neither practically effective nor morally permissible. 58 percent of state prisoners met the criteria for drug dependence or abuse in 2007-2009, whereas only five percent of the general population met these criteria.[5] This paper examines the interlocking factors in the toxic, symbiotic relationship between addiction and incarceration. It begins by discussing the "War on Drugs" that heralded the globally unprecedented swelling of the U.S. prison population, which increased to more than two million individuals behind bars in

[5] U. S. Department of Justice. Bureau of Justice Statistics. Special Report June 2017. "Drug Use, Dependence, and Abuse Among State Prisoners and Jail Inmates, 2007-2009." Jennifer Bronson, Ph.D., Jessica Stroop, BJS Statistician. Stephanie Zimmer and Marcus Berzofsky, Dr.P.H., RTI International

2017.[6] The paper then describes the biological components of addiction, which have been distorted and minimized by stigma and thus fail to inform policy. The paper evaluates how the connection between addiction and incarceration stumbles short of the moral and practical objectives of the criminal justice system. Finally, this paper demands the preservation of the human rights of individuals experiencing addiction, who should not be inequitably incarcerated. It proposes several policy recommendations to ensure that the vulnerable population of individuals experiencing addiction are held accountable for their actions in a manner that respects their central capabilities.

II: The Present Situation

The "War on Drugs" declared by the Nixon Administration in 1971 created a framework of laws to specifically target the production, distribution, and consumption of illegal drugs. Forty years later, the number of individuals behind bars has mushroomed by 500%, despite evidence that mass incarceration does not significantly contribute to public safety.[7] Not only is the number of prisoners growing; people are also serving longer sentences, due to mandatory minimum sentences and rollbacks in parole. Since 1980, drug arrests have tripled, with most offenders being first-time, nonviolent, and in possession of small quantities of drugs for personal use.[8] At

[6] 704,500 individuals in local jails, 1,228,800 in state prisons, 188,300 in federal prisons, 2,540 in Indian Country Jails, and 50,821 in juvenile detention. See “United States of America | World Prison Brief.” Accessed February 19, 2019. http://www.prisonstudies.org/country/united-states-america.

[7] “Criminal Justice Facts.” The Sentencing Project. Accessed March 19, 2019. https://www.sentencingproject.org/criminal-justice-facts/.

[8] Robert G. Lawson, Drug Law Reform—Retreating from an Incarceration Addiction, 98 Ky. L.J. 202 (2009-2010). https://uknowledge.uky.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=1137&context=law_facpub

the beginning of 2017, the United States had a total prison population of 2,121,600 individuals.[9] The United States imprisons more individuals than any other country, at the highest per-capita incarceration rate of 655 prisoners per 100,000 people.[10]

Laws on the Books

The laws targeting substance abuse err on the more draconian side, congruent with a nationwide "War on Drugs" attitude. Curbing judicial discretion, the Criminal Sentencing Reform Act of 1981 installed compulsory sentencing for many drug crimes.[11] In 1986, the Omnibus Crime Reduction Act increased the number of people behind bars for drug use, possession, and trafficking – crimes that had previously been handled by fines, probation, community service, or shorter sentences.[12] In 1994, Habitual Offender Laws, more commonly known as Three-Strike Laws, began requiring life sentences without the possibility of parole for individuals who have committed three felonies.[13]

Policymaking in the past four decades has deepened and widened the net of laws sentencing drug offenders to prison. Some states consider trafficking drugs within 1,000 yards of a school to be a class D felony. The law is intended to protect minors; however, the law converts conduct otherwise punishable by a misdemeanor into a felony. Some individuals without any

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[9] 704,500 individuals in local jails, 1,228,800 in state prisons, 188,300 in federal prisons, 2,540 in Indian Country Jails, and 50,821 in juvenile detention. See "United States of America | World Prison Brief." Accessed February 19, 2019. http://www.prisonstudies.org/country/united-states-america.

[10] "Highest to Lowest - Prison Population Rate | World Prison Brief." Accessed February 19, 2019. http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All.

[11] Vanessa Alleyne, "Locked Up Means Locked Out," Montclair State University. January 2007. *Women & Therapy*. DOI 10.1300/J015v29n03_10 https://www.researchgate.net/profile/Vanessa_Alleyne/publication/254379574_Locked_Up_Means_Locked_Out/links/5604333a08aea25fce30bcde.pdf. 188.

[12] Ibid, 188.

[13] Ibid, 188.

connection to the school besides proximity serve longer prison sentences, instead of shorter jail sentences, due to the widening of the net by the more severe policies.[14] Sentences additionally increase due to repeated or multiple simultaneous offenses. Individuals in some states charged with a second possession of cocaine are imprisoned for five to ten years for a Class C felony.[15] An individual possessing marijuana, cocaine, Xanax, and a cocaine pipe can be convicted of four different crimes for a single act of possession.[16] Lawmakers are often out of touch with the actual lives they are affecting. The increasingly severe laws have had marginal effects on drug use while successfully flooding prisons with some individuals who have arguably done more harm to themselves than to others.[17]

Drug Courts

Beginning in the 1990s, drug courts began to take a public health approach to individuals who had committed nonviolent drug or drug-related crimes. With the intention of helping addicted offenders reach long-term recovery, drug courts often defer or suspend a normal prison sentence in exchange for the successful completion of a drug rehabilitation program.[18] Drug courts install a system of sanctions and rewards to incentivize the individual to continue treatment and strive towards abstinence.

While drug courts are more practically effective and ethical than simply incarcerating individuals, the courts are not a panacea for addiction and mass incarceration.[19] Drug courts have not proven to reduce recidivism or relapse; some individuals fail at rehabilitation and go to

[14] Lawson, 215.
[15] Ibid, 218.
[16] Ibid, 224.
[17] Ibid, 258.
[18] Ibid, 207.
[19] Ibid, 209.

prison, while others pass the treatment program and perhaps are incarcerated later for a different crime.[20]

Movement Towards Reformation in Recent Years

In recent years, the reformation of the criminal justice system has received bipartisan support in Congress. The Comprehensive Addiction and Recovery Act, signed into law by President Obama in July of 2016, authorized over $181 million for recovery community organizations, addiction treatment, and public education. This comprehensive movement targeted the six pillars in combating the opioid epidemic – "prevention, treatment, recovery, law enforcement, criminal justice reform, and overdose reversal."[21] Additionally, the 21st Century Cures Act of 2016 allocated funding to research regarding opioid abuse and increased the availability of psychiatric hospital beds.[22] In December of 2018, President Donald Trump signed into law the First Step Act, a prison reform bill to expand rehabilitative programs, to decrease recidivism, and to reduce mandatory minimum sentences for drug-related crimes.[23] Although the tide is beginning to turn, there remains much work ahead to ensure that individuals experiencing addiction receive the care they require and are not disproportionately incarcerated.

Summary of the Present Situation

It has become common knowledge that the "War on Drugs" failed to accomplish its goal of decreasing drug abuse and curtailing the circulation of illegal drugs. The investment in

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[20] Ibid, 208.

[21] "Comprehensive Addiction and Recovery Act (CARA) | CADCA." Accessed May 1, 2019. https://www.cadca.org/comprehensive-addiction-and-recovery-act-cara ; Comprehensive Justice and Mental Health Act of 2015 (2016 - H.R. 1854)." GovTrack.us. Accessed May 1, 2019. https://www.govtrack.us/congress/bills/114/hr1854.

[22] Commissioner, Office of the. "21st Century Cures Act." FDA, February 8, 2019. /regulatory-information/selected-amendments-fdc-act/21st-century-cures-act.

[23] Dan Sullivan, "First Step Act of 2018" (21 December 2018) S.756 - 115th Congress (2017–2018).

incarceration, which costs far beyond just dollars, has impacted crime rates with modest, diminishing returns. As a result of the "War on Drugs," the criminal justice system has shouldered the burden of the substance abuse and addiction crisis, which neither alleviates the pressing substance abuse crisis nor provides adequate care to individuals in need. The policies of the "War on Drugs" assumed addiction to be the irresponsible choice of an individual; in reality, addiction results from a complex interaction between behavior and biology. The ineffectiveness of the current policies is due to the fundamental discounting or misunderstanding the biological components of addiction. The future of ethical and practical policy rests on the understanding and application of the biological aspects of addiction.

III: Biology

> *Treatment methods were determined before anybody really understood the science of addiction. We started off with the wrong model.* [24]
>
> - Dr. A. Thoams McLellan

A fog of stigma hovers around addiction. Although the fog is beginning to lift, society traditionally views addiction as a moral failure and a weakness of willpower. From its origins, the United States has fostered rugged individualism and a "pull-yourself-up-by-the-bootstraps" work ethic. A distorted view of addiction yields a distorted, ineffective response, which routinely comes in a combination of the following options: first, to instruct the individual to "get tough" and overcome their struggle with the substance; second, to suggest or to coerce the individual's participation in a drug treatment program, usually abstinence-based; third, to incarcerate the individual. Because policy and attitude regarding addiction rest on misconceptions about

[24] Dr. A. Thomas McLellan is the co-founder of the Treatment Research Institute; Cherkis, Jason. "There's A Treatment For Heroin Addiction That Actually Works. Why Aren't We Using It?" The Huffington Post. Accessed March 18, 2019.

addiction itself, the responses to it fail to address fundamental causal factors. The complexities of addiction cannot be reduced to shortcomings of character. Corrupted brain chemistry, genetic predisposition, epigenetics, and interlaced mental health disorders, among other factors, compose the algorithm for addiction.[25] Understanding the significant effect of opiate addiction on brain chemistry could both inform the treatment of patients and could improve the policy of the national criminal justice system.

The use of heroin, oxycodone, and other morphine-derived drugs kickstarts a biological process that inclines an individual to continue using the drug. It is difficult to stop the progression of drug tolerance, dependence, and addiction once it begins; an individual retains free will, but chemical changes in the brain combat even the strongest willpower. Recovery consists of struggling to overcome these chemical changes. Opioids travel through the bloodstream to the brain and attach to receptor proteins, triggering the biochemical response for pleasure, which is why physicians prescribe opioids for pain relief.[26] The risk for drug tolerance, dependence, and addiction increases when an individual uses the drug in the absence of pain. Some individuals who begin taking medication to treat their pain continue to use the drug while pain-free. Not uncommonly, individuals who run out of prescribed drugs purchase heroin, among other drugs, on the street for a lower cost and a longer-lasting euphoria. Other individuals begin using opiates without ever starting with a prescription. People who consent to trying a drug once often do not understand the biological ramifications of their choice.

When opioids trigger the biochemical pleasure response in the absence of significant pain, the individual will often seek to repeat the high through continual use of the drug. The

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[25] Epigenetics studies the phenotypic changes caused by modifying gene expression.

[26] T. R. Kosten & T.P. George (2002). The neurobiology of opioid dependence: implications for treatment. *Science & Practice Perspectives,* (1), 13-20.

pleasure response generates signals that release dopamine in the nucleus accumbens.[27] The biochemical response also creates a conditioned associated between the feeling of pleasure and the surrounding circumstances, causing a craving for the drug whenever the individual encounters the environmental triggers of previous use.[28] Repeated drug use induces dependence, the need to continue taking drugs to avoid a sometimes excruciating withdrawal, the symptoms of which can include jitters, anxiety, depression, cramps, and sleep deprivation.[29] Over time, the brain develops a tolerance to opioids, meaning the individual must take increasingly larger doses of the opioid to achieve the same high.[30] Chronic opioid use produces long-lasting abnormalities in brain chemistry, inducing compulsions to use months and years even after dependency is gone – the biological basis of addiction.[31] The addiction specialist and neurobiologist Dr. Mary Jeanne Kreek describes the effect of opiate addiction on the brain:

> It alters multiple regions in the brain, including those that regulate reward, memory and learning, stress responsivity, and hormonal response, as well as executive function which is involved in decision-making – simply put, when to say yes and when to say no.[32]

Opioid addiction alters the biological baseline, causing the brain to release less dopamine during normally pleasurable activities.[33] In conjunction with psychological and behavioral treatments, biological treatment significantly contributes to the recovery process.

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[27] Dopamine is a neurotransmitter present in areas of the brain responsible for regulating pleasure, motivation, emotion, and movement. The nucleus accumbens is an area of the brain associated with pleasure.

[28] Kosten, "The Neurobiology."

[29] Cherkis, "There's a Treatment."

[30] Kosten, "The Neurobiology."

[31] Ibid.

[32] Cherkis, "There's a Treatment."

[33] Kosten, "The Neurobiology."

IV: The Purpose of Prisons

The idea of incarceration rests on social contract theory, a concept that dates back to the ancient Greeks and gained popularity during the 17th and 18th century Enlightenment era. Social contract theory describes how individuals freely and willingly enter an agreement to create a society. An individual exchanges some personal freedoms in return for the society's protection. The Social Contract is broken if an individual violates the rights of another; thus, the society reserves the right to punish the offending to protect the society as a whole.[34] The American scholar of criminal justice Graeme R. Newman defines punishment as:

> Pain or other unpleasant consequence that results from an offense against a rule and that is administered by others, who represent legal authority, to the offender who broke the rule.[35]

Although inflicting pain on others is fundamentally unethical, the justification for inflicting punishment rests on two main rationales.

Utilitarian Rationale for Punishment

According to the utilitarian rationale, punishment is justified if the pain results in a greater good for most of society. Thus, just punishment must reduce crime through deterrence, incapacitation, or rehabilitation.[36]

Deterrence

General deterrence describes how the punishment of one individual deters others in society from that behavior.[37] The "War on Drugs" rests on the false assumption that more

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[34] Jocellyn M. Pollock. *Prisons Today and Tomorrow*. Jones & Bartlett Publishers. October 5th, 2009. San Marcos. Part I: The Philosophy and History of Prisons. Chapter 1: The Rationale for Imprisonment.

[35] Ibid, 4.

[36] Ibid, 4.

[37] Ibid, 6.

draconian punishments deter drug users and reduce the damage of addiction.[38] In reality, the "replacement effect" ensures that as long as an appetite exists for illegal drugs, suppliers are constantly entering the lucrative market.[39] The rates of drug use remain substantial despite the incarceration of hundreds of thousands of individuals for the possession, use, and trafficking of drugs. Between 2002 and 2012, the United States experienced a fourfold increase in the number of deaths from opiates.[40] In 2015, director of the Center for Disease Control and Prevention Dr. Tom Frieden reported that 17,000 die from prescription overdoses annually, and heroin-related deaths doubled between 2010 and 2012.[41] The criminal justice system currently fails at deterring individuals from drug use.

Incapacitation

Incapacitation describes an individual being prevented from inflicting further harm.[42] Incarceration does not prevent substance use; rather, it complicates the process of obtaining and using drugs. The prison environment fosters risky injection practices. Although needles and syringes are contraband, many imprisoned individuals continue to covertly inject drugs while in prison. Frequently crafted by the handiwork of inmates, syringes are scarce and priceless despite being bent, old, or dull. One incarcerated individual reflects on this phenomenon:

> It's a nightmare…You see syringes that have literally been around for months and months, if not years... patched and repaired, used over and over and over and over again… many cases of HIV were transmitted because of those practices... sharing. Everybody shares.[43]

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[38] Lawson, 203.
[39] Ibid, 204.
[40] Cherkis, "There's a Treatment."
[41] Ibid.
[42] Pollock, 7.
[43] Will Small, "Incarceration, Addiction and Harm Reduction: Inmates Experience Injecting Drugs in Prison."

Networks of inmates share the syringes, increasing the risk of prisoners for blood-borne pathogens. Although many prisons provide bleach for decontamination of syringes, incarcerated individuals are denied access to sterile needles.[44] Incarcerated individuals, especially injectional drug users, have a significantly higher burden of human immunodeficiency virus (HIV), acquired immunodeficiency syndrome (AIDS), hepatitis B and C viruses, tuberculosis, and sexually transmitted diseases.[45] Although incarceration seeks to punish individuals for drug offenses, substances are accessible and even common within prison. Prison intends to incapacitate drug users, yet the correctional policies do not prevent drug use and rather deny incarcerated individuals the opportunity to protect their health while using during their sentence.[46]

Rehabilitation

Rehabilitation describes the internal change and the discontinuation of the targeted negative behavior.[47] Congruent with this principle, the 1870 and 1970 Prison Congresses declared offenders shall be afforded:

> the opportunity to engage in productive work, participate in programs… and other activities that will enhance self-worth, community integration, and economic status.[48]

In many ways, incarceration is antithetical to substance abuse recovery. Despite the punitive measures of the United States, the U.S. has the highest level of cocaine and cannabis use in the

[44] Small, 839.
[45] McKenzie, "A Randomized Trial."
[46] Small, 839.
[47] Pollock, 8.
[48] American Correctional Association. (1970/2002). Past, present and future. Retrieved from http://www.aca.org/pastpresentfuture/principles.asp

world.[49] Stringent criminalization does not produce lower drug usage.[50] Prison removes potentially helpful mechanisms of recovery, such as adequate medical treatment, social support, and employment.[51] A variety of cross-sectional studies have failed to demonstrate a positive relationship between addiction recovery and incarceration.[52]

The lack of rehabilitation also affects the specific deterrence, how the punishment of one individual deters the individual him or herself from committing further crimes.[53] Drug-dependent offenders often re-offend without adequate substance abuse treatment.[54] As of 2012, more than half of former prisoners relapse to using drugs within one month of release from prison. Criminal behavior and recidivism often accompany post-release relapse. Incarceration is ripe with opportunity for positive intervention, which must balance the respect for autonomy with the opportunity for recovery. The present situation squanders the opportunity of using incarceration as fertile ground for recovery and rehabilitation.

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[49] Glenn Greenwald, "Drug Decriminalization in Portugal: Lessons for Creating Fair and Successful Drug Policies." SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, April 2, 2009. https://papers.ssrn.com/abstract=1464837. Page 24.

[50] Ibid, 25.

[51] DeBeck, K., Kerr, T., Li, K., Milloy, M. J., Montaner, J., & Wood, E. (2009). Incarceration and drug use patterns among a cohort of injection drug users. *Addiction (Abingdon, England), 104*(1), 69-76.

[52] Bruneau J, Brogly S, Tyndall M, Lamothe F, Franco E. Intensity of drug injection as a determinant of sustained injection cessation among chronic drug users: the interface with social factors and service utilization. Addiction. 2004;99:727–37; Sherman S, Hua W, Latkin C. Individual and environmental factors related to quitting heroin injection. Subst Use Misuse. 2004;39:1199–214.

[53] Pollock, 6.

[54] Bureau of Justice Statistics. (1995). *Drugs and crime facts, 1994: A summary of drug data published in 1994*. Washington, DC: Bureau of Justice Statistics.; Gendreau, P., Little, T., & Goggin, C. (1996). A meta-analysis of the predictors of adult offender recidivism: What works! *Criminology, 34*(4), 575–607. ; Horney, J., Osgood, D. W., & Marshall, I. H. (1995). Criminal careers in the short-term: Intra-individual variability in crime and its relation to local life circumstances. *American Sociological Review, 60*, 655–673. MacKenzie, D. L., Browning, K., Skroban, S. S., & Smith, D. A. (1999). The impact of probation on the criminal activities of offenders. *Journal of Research in Crime and Delinquency*, *36*(4), 423–453.

Retributive Rationale for Punishment

> *For the most part, people with money go to places like Betty Ford Clinic and the poor go to prison.*[55]

According to the retributive rationale, punishment is justified as long as the punishment is lawful and proportional to the wrong committed.[56] In keeping with this principle, the 1870 and 1970 Prison Congresses upheld corrections that demonstrate "integrity, respect, dignity, and fairness" with sanctions "commensurate with the seriousness of the offense."[57] How does one assess the severity of the "wrong committed" when addiction is situated at the intersection of biology and behavior, the intersection of circumstance and choice?

58 percent of state prisoners and 63 percent of jail inmates meet the criteria for drug dependence or abuse, as defined by the *Diagnostic and Statistical Manual of Mental Disorders,* Fourth Edition (DSM-IV).[58] For comparison, only five percent of the general population meets these criteria.[59] The number of incarcerated drug offenders has risen steeply as a direct result of the "War on Drugs:" From 1980 to 1995, the proportion of drug offenders in federal prisons

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[55] Terry, 4.

[56] Pollock, 4.

[57] American Correctional Association. (1970/2002). Past, present and future. Retrieved from http://www.aca.org/pastpresentfuture/principles.asp

[58] The fifth edition of the DSM was published in May of 2013; however, the DSM-IV was current at the time of data collection. The data were standardized twice to account for prison and jail populations as well as sex, race, Hispanic origin, and age. See U. S. Department of Justice. Bureau of Justice Statistics. Special Report June 2017. "Drug Use, Dependence, and Abuse Among State Prisoners and Jail Inmates, 2007-2009." Jennifer Bronson, Ph.D., Jessica Stroop, BJS Statistician. Stephanie Zimmer and Marcus Berzofsky, Dr.P.H., RTI International; Local law enforcement usually operates jails, which hold individuals awaiting trial or serving a short sentence, whereas the state government or the Federal Bureau of Prisons (BOP) usually operate prisons, which hold individuals convicted of more serious crimes serving longer sentences.

[59] "Drug Use, Dependence, and Abuse Among State Prisoners and Jail Inmates."

went from 25.2 percent to 59.9 percent.[60] The "tough on crime" policies disproportionately and unjustly affect individuals experiencing addiction, putting them behind bars instead of addressing the biological, psychological, and behavioral aspects of their disease.

V: Capabilities Approach

In the early 21st century, the American philosopher Martha C. Nussbaum theorized that there are ten central capabilities necessary for living a life of human dignity. [61] Nussbaum

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[60] Bureau of Justice Statistics, U.S. Department of Justice, Correctional Populations in the United States, 1994 I, II (1996) (and 1995 (1997)).

[61] Nussbaum, Martha C. *Creating Capabilities*. Harvard UP, 2011.33-34.

1. *Life*. Being able to live to the end of a human life of normal length; not dying prematurely, or before one's life is so reduced as to be not worth living.

2. *Bodily Health*. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.

3. *Bodily Integrity*. Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.

4. *Senses, Imagination, and Thought*. Being able to use the senses, to imagine, think, and reason—and to do these things in a "truly human" way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing works and events of one's own choice, religious, literary, musical, and so forth. Being able to use one's mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercise. Being able to have pleasurable experiences and to avoid nonbeneficial pain.

5. *Emotions*. Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one's emotional development blighted by fear and anxiety. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.)

6. *Practical Reason*. Being able to form a conception of the good and to engage in critical reflection about the planning of one's life. (This entails protection for the liberty of conscience and religious observance.)

7. *Affiliation*. (A)Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech.) (B) Having the social bases of self-respect and nonhumiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of

believed society has a moral obligation to foster these capabilities, which comprise the minimum standard for a just society. She defined "capabilities" as the abilities residing inside a person as well as the freedoms to make choices.[62] Nussbaum's comprehensive list may be used as a tool to assess the moral permissibility of the current relationship between addiction and incarceration; furthermore, her framework may be used to make policy recommendations in order to foster these central capabilities. Addiction and substance abuse may exemplify Nussbaum's classification of "corrosive disadvantage" describing a "deprivation that has particularly large effects in other areas of life;" addiction may negatively pervade self-image, community, relationships, family structure, and subsequent generations, among other aspects in life.[63] The symbiotic relationship between addiction and incarceration can corrode human capability. Drug addiction and incarceration are diverse experiences. While central capabilities are not always lacking, individuals experiencing addiction are particularly vulnerable to compromised capabilities in several ways.

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nondiscrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin.

8. *Other Species*. Being able to live with concern for and in relation to animals, plants, and the world of nature.

9. *Play*. Being able to laugh, to play, to enjoy recreational activities.

10. *Control over One's Environment*. (A) *Political*. Being able to participate effectively in political choices that govern one's life; having the right of political participation, protections of free speech and association. (B) *Material*. Being able to hold property (both land and movable goods), and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.

[62] Ibid, 20.

[63] Ibid, 44.

Life and Bodily Health

The Life and Bodily Health of individuals experiencing addiction are sometimes compromised. The U.S. current criminal justice system regards addiction as a choice rather than a combination of complex factors. Because individuals are criminalized rather than medicalized, severe addiction may remain untreated. More people experiencing addiction are put behind bars than are treated in hospitals. In 2007-2009, only 28% of prisoners in need of substance abuse treatment received the necessary treatment during their sentence.[64] The Bodily Health of individuals experiencing addiction and incarceration may be threatened by higher risk of blood borne pathogens and drug overdoses. More than half of released prisoners resume drug use within one month of being released.[65] Without adequate treatment, an addicted individual being released from prison may be faced with a fatal relapse: with physical cravings intact yet without tolerance, an addicted individual may inject a previously-normal amount of drug and easily overdose, experiencing cardiac and respiratory distress.[66]

In 2012, the National Center on Addiction and Substance Abuse at Columbia University questioned whether the United States' low level of substance abuse treatment for addiction patients constitutes medical malpractice.[67] In 2005, 22.2 million individuals qualified diagnostically for substance abuse treatment; however, fewer than two million people received it.[68] A disparity in care exists in the field of addiction and substance abuse that remains

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[64] "Drug Use, Dependence, and Abuse Among State Prisoners and Jail Inmates, 2007-2009."

[65] McKenzie, 19-29.

[66] Cherkis, "There's A Treatment".

[67] Ibid.

[68] SAMHSA. (2005). 2003 National survey on drug use and health: Findings. Retrieved January 15, 2019, from http://oas.samhsa.gov/nhsda/2k3nsduh/2k3Results.htm

unparalleled in other areas of healthcare.[69] Currently, individuals experiencing addiction are denied the care that modern medicine can provide.

Senses, Imagination, Thought, and Practical Reason

Many individuals who experience addiction did not actively pursue the path of drug abuse; rather, biological and behavioral inclinations led them to dependency. Before beginning to use, many individuals remain unaware of the danger of drug use, which may hinder the ability to engage in critical reflection and the planning of one's life. Although there have been improvements, the United States public health system does not adequately educate individuals about the repercussions of drug use. Practical Reason may be threatened or hindered by the biological aspects of addiction.

Emotions and Affiliation

The current relationship between addiction and incarceration can threaten Emotions and Affiliation of individuals. Instead of fostering a community of reciprocal love and care to help an individual recover from addiction, the criminal justice system strips individuals of their most valuable mechanisms of support.

Control Over One's Environment

Addiction is a balance between choice and circumstance. To some degree, addiction compromises an individual's autonomy and control; a desire to quench a dependency may override a desire to stop using. Imprisoned individuals may lack the capability of entering treatment programs or vocational programs within prison, which could be essential to the recovery process.[70]

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[69] Alleyne, 191.

[70] Recovery entails a continual process of healing the biological, psychological, emotional, and social damage caused by addiction.

VI: Policy Recommendations

Several changes are necessary to ensure that individuals experiencing addiction first, are not inequitably incarcerated, and second, have their human capabilities, and thus their human dignity, upheld. In order to craft effective criminal justice policy surrounding addiction and incarceration, the United States must consider alternative options to the present U.S. framework, which is both practically ineffective and morally impermissible. The U.S. should carefully consider the trends in Europe, and in Portugal specifically, suggesting that criminalization does not produce lower drug rates, and perhaps the opposite might be true.[71]

Case Study: Portugal

On July 1, 2001, the nation of Portugal decriminalized the purchase, possession, and consumption of all drugs.[72] The policy change was driven by the acknowledgement that the criminalization of drug use was exacerbating Portugal's drug problem. The country "decriminalized" drugs without "legalizing" drugs: Portugal still legally prohibits the purchase, possession, and consumption of drugs, but violations of these prohibitions are handled administratively, outside the criminal realm.

The police refer an individual purchasing, possessing, or consuming a drug to a panel. First, the panel determines whether the individual is an occasional or a dependent drug user.[73] Non-addicted offenders are warned, fined, or given a non-monetary penalty, such as community service. The panel may impose a wider range of sanctions on drug-dependent individuals: the prohibition of associating with high-risk establishments or individuals, the prohibition of

[71] Greenwald, 27.
[72] Greenwald, 1.
[73] Hughes, Caitlin Elizabeth and Stevens, Alex (2007) The effects of the decriminalization of drug use in Portugal. Discussion paper. The Beckley Foundation, Oxford.

international travel, the suspension of the right to practice a licensed profession, the termination of public benefits, or the obligation to submit regular substance abuse reports.[74] The panel is not authorized to mandate treatment; however, the suspension of the aforementioned sanctions may be contingent on the offender's seeking treatment.[75] The policy is designed to discourage new users and to encourage dependent users to enter treatment.[76]

Improved Prevention and Treatment

Portugal's shift away from criminal justice and law enforcement has been a move towards prevention and treatment. Before 2001, the fear of prosecution and imprisonment was the most significant barrier preventing addicted individuals from seeking treatment.[77] By decoupling addiction and incarceration, decriminalization encourages individuals to seek treatment.[78] After 2001, Portugal reallocated funds from the criminal justice system to the improvement of drug treatment programs. The nation increased its number of therapeutic communities and halfway houses. After decriminalization, a higher proportion of drug users in Portugal have been treated for their addiction.[79] From 1999 to 2003, the number of individuals receiving substitution treatment grew by 147%.[80] This increase does not reflect a worsening drug problem; rather, it reflects the increased willingness of the population to seek treatment.

Harm Reduction

After decriminalization, Portugal has experienced a reduction in drug-related harm. The country began to implement needle and syringe exchange programs in prison. Portugal also

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[74] Greenwald, 3.
[75] Ibid, 3.
[76] Hughes, 1.
[77] Greenwald, 8.
[78] Ibid, 28.
[79] Greenwald, 10.
[80] Ibid, 15.

modified paraphernalia laws, such that possessing sterile injection equipment ceased to be a crime. Drug-related diseases have become less prevalent: between 1999 and 2003, new cases of drug-related HIV decreased by 17%.[81] The number of drug-related deaths have fallen, as well. Between 1999 and 2003, the number of drug-related deaths in Portugal decreased by 59%.[82]

Changes in Drug Use

Prior to 2001, opponents of decriminalization in Portugal believed the change in policy would herald both the rampant proliferation of drug use among the youth and the transformation of the country into a tourist drug haven; however, these anticipated negative consequences did not come to fruition. After decriminalization, the rates of drug usage in Portugal have remained roughly the same.[83] In some older age groups, there has been a mild increase in drug usage, particularly the use of cannabis. Drug use patterns in the malleable teenage age years are the most potent harbingers of lifelong drug usage: the lifetime drug usage prevalence of 7-9th grade students dropped from 14.1% in 2001 to 10.6% in 2006, and the lifetime drug usage prevalence of 10-12th grade students dropped from 27.6% in 2001 to 21.6% in 2006.[84] On the whole, Portugal's drug prevalence has been below average for the European Union after decriminalization. While 8.2% of Portuguese citizens have consumed cannabis once in their lifetime, 7.1% of European Union citizens have consumed cannabis in the last year. Most countries in the European Union have double or triple the cannabis prevalence rate of Portugal.[85]

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[81] Ibid, 1.
[82] Ibid, 17.
[83] Ibid, 1
[84] Ibid, 11. Lifetime prevalence rates refer to how many people have consumed a particular drug or drugs over the course of their lifetime.
[85] Ibid, 17.

Reallocation of Resources

The decriminalization of drugs has allowed Portugal to reallocate its resources. Funds that were once allocated to prosecution and imprisonment were invested instead in treatment programs.[86] Furthermore, law enforcement in Portugal has focused more specifically on the interruption of large-scale drug trafficking, which the nation still prosecutes as a criminal offense.[87] Drug trafficking in Portugal has decreased since 2001.[88]

Consequences of Decriminalization

The adverse or ambiguous consequences of Portugal's drug decriminalization must be carefully considered. Practically, the relationship between drug use and crime is not completely causal. The patterns of drug use may operate independently of policy changes; perhaps Portugal's heroin epidemic had already peaked by 2001 and would have naturally declined without decriminalization.[89] Particularly due to the stigmatized and clandestine nature of drug use, the measurement of drug-related phenomena remains challenging. Portugal has experienced a marginal rise in cannabis use, although this increase could be attributed to increased self-reporting due to less stigma or the increased use of cannabis congruent with a wider European trend.[90] Morally and ethically, decriminalization may unintentionally condone drug use. Additionally, in an ideal world, individuals would seek treatment strictly voluntarily without the impetus of avoiding sanctions.

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[86] Ibid, 28.
[87] Hughes, 2.
[88] Greenwald, 15.
[89] Hughes, 3.
[90] Ibid, 3.

Possibilities for Application in the United States

The positive practical and ethical repercussions of decriminalization could possibly outweigh the adverse or ambiguous consequences. In 2010, Portugal was one of 93 countries to offer alternatives to incarceration for drug abuse.[91] Because Portugal suggests that decriminalization reduces drug-related public health problems, the U.S. should carefully consider the decriminalization of drugs, in part or in whole.[92] It is essential to move in the direction of softening the harsh laws that have flooded prisons with drug offenders. The laws of the United States must focus the police force on the profiteers, not the victims, of the drug trade. The U.S. must turn towards a public health approach to drug users.

Narcotic Maintenance

Freed from the obsession to use, people change.[93]

The majority of opioid addiction treatment programs in the United States promote complete abstinence, a posture which fails to address the biological components of addiction. Twelve-step programs such as Alcoholics Anonymous and Narcotics Anonymous promote a strict drug-free model of recovery. While abstinence has been accepted as effective in alcoholism recovery, its success rates with opiate addiction are significantly lower: upwards of 90 percent of opiate addicts in abstinence-based treatment programs relapse within a year.[94]

Narcotic maintenance is a pharmacological approach to caring for individuals experiencing dependency or addiction. Individuals take a prescribed synthetic opioid medication

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[91] Maia Szalavitz. TIME. Drugs in Portugal: Did Decriminalization Work. Sunday April 26th, 2009.

[92] Hughes, 3.

[93] Dr. Jeffrey T. Junig "Addiction Treatment With a Dark Side - The New York Times." Accessed March 18, 2019. https://www.nytimes.com/2013/11/17/health/in-demand-in-clinics-and-on-the-street-bupe-can-be-savior-or-menace.html?_r=0.

[94] Cherkis, "There's a Treatment."

to block the euphoric effects of other opiates, to prevent cravings and relapse, and to repress symptoms of withdrawal.[95] Narcotic maintenance functions without causing intoxication. Individuals may receive injection treatment or may take pills. The narcotic maintenance substances attach to the brain's opioid receptors, acting more gradually and less pervasively.[96] Narcotic maintenance offsets or reverses the changes in brain chemistry, making behavioral therapy more effective.[97] Narcotic maintenance seeks the long-term stabilization of an individual, which can lead to brain healing, time to seek counseling, and employment. Physicians recommend long-term tapering of narcotic maintenance. Some physicians compare narcotic maintenance treatment to the insulin treatment for diabetic patients; the treatment is necessary for life and bodily health. The psychiatrist Dr. Bankole Johnson describes narcotic maintenance simply as "the standard of care."[98] The treatment is effective when coupled with counseling and community support.[99] However, even the success of narcotic maintenance programs is predicated on the offender's participation in a community.

As of 2012, only half of U.S. prisons offer methadone to few prisoners under special circumstances. Doctors require a federal waiver to prescribe narcotic maintenance treatment, and waiting lists for care grow increasingly longer.[100] An underground market for narcotic maintenance substances has emerged in the United States, with addicts paying cash to stave off withdrawal instead of pursuing expensive treatment. The United States' reluctance to accessibly

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[95] McKenzie, 19-29. Synthetic opiates include Methadone, levo-alpha-acetyl-methadol (LLAM), buprenorphine ("bupe," Subutex), buprenorphine-naloxone (Suboxone)

[96] "Addiction Treatment With a Dark Side - The New York Times." Accessed March 18, 2019. https://www.nytimes.com/2013/11/17/health/in-demand-in-clinics-and-on-the-street-bupe-can-be-savior-or-menace.html?_r=0.

[97] Kosten, "The Neurobiology."

[98] Cherkis, "There's A Treatment."

[99] McKenzie, 19-29.

[100] Cherkis, "There's A Treatment."

implement medical approaches to addiction departs from the stances of other countries. France, for example, reduced overdose rates by 79% between 1995 and 1999 by using narcotic maintenance treatment. In 2005, the World Health Organization included narcotic maintenance treatment substances on the list of essential medicines.[101]

The initiation of narcotic maintenance within all U.S. prisons as well as within general society is a practically effective and morally permissible way to reduce recidivism, to decrease drug use, and to decrease the mortality of opiate users.[102] This proposed solution is far from ideal, for the narcotic maintenance substances have the potential to be diverted, misused, and abused; however, it is an improvement. Individuals who begin narcotic maintenance while incarcerated are significantly more likely to continue drug treatment upon release.[103] One of the substances, Suboxone, costs a relatively affordable sixteen dollars per day.[104] Narcotic maintenance treatment even deters and reduces the use of highly intense injection drug users.[105] Narcotic maintenance reduces imprisonment rates, reduces mortality, and reduces the prevalence of HIV.[106]

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[101] Cherkis. Specifically, the World Helath Organization included methadone and buprenorphine.

[102] Brugal, MT, Domingo-Salvany, A, Puig, R, Barrio, G, Garcia de Olalla, P & de la Fuente, L (2005), 'Evaluating the impact of methadone maintenance programmes on mortality due to overdose and aids in a cohort of heroin users in Spain', Addiction, vol. 100, no. 7, pp. 981-9; Joseph, H, Stancliff, S & Langrod, J (2000), 'Methadone maintenance treatment (MMT): a review of historical and clinical issues.' Mount Sinai Journal of Medicine, vol. 67, no. 5-6, pp. 347-64.; Michels, I, Stiver, H & Gerlach, R (2007), 'Substitution treatment for opioid addicts in Germany', Harm Reduction Journal, vol. 4, no. 1, p. 5.

[103] McKenzie,19-29.

[104] Junig, "Addiction Treatment With a Darker Side."

[105] DeBeck, 69-76.

[106] McKenzie, 19-29.

Pragmatic Policies Within Prison

The United States must offer comprehensive medical care for addiction within prison. The bodily health of inmates must be protected within prison if they choose to use drugs. This entails the consistent provision of bleach for the decontamination of injection equipment. In order to halt the transmission of blood-borne viruses, prisons must stop seizing sterile injection equipment. The U.S. must also implement needle-exchange programs in prison.

Therapeutic Communities

The United States should invest more funds and resources in therapeutic communities, both inside and outside of prisons. Therapeutic communities consist of participant-led treatment sessions focused on rehabilitation and reformation. Highly intense, individuals usually spend six to twelve months at a time within a therapeutic community. More intense programs are associated with more positive outcomes.[107] Participation in therapeutic community programs is consistently associated with reduced recidivism and reduced drug relapse.[108]

Conclusion

The state of addiction and incarceration in the United States is unjust. Because the country primarily treats addiction as a crime instead of a complex biological and behavioral phenomenon, the U.S. does not adequately combat this injustice. Although the nation is retreating from the incarceration addiction, much work lies ahead. The U.S. must move away from the ineffective and ethically corrosive criminalization of addiction. Instead, the country must move towards a public health approach to addiction by investing in the quality, quantity,

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[107] Mitchell, O., Wilson, D.B. & MacKenzie, D.L. J Exp Criminol Does incarceration-based drug treatment reduce recidivism? A meta-analytic synthesis of the research. (2007) 3: 353. https://doi.org/10.1007/s11292-007-9040-2

[108] Ibid, 353.

and accessibility of substance abuse treatment, incorporating a biological approach tethered to counseling and community support. When both science and compassion shape public health and criminal justice, individuals experiencing addiction will retain their human capabilities and will be free from inequitable incarceration.

The life of Charles Terry is a glimpse into the dark, convoluted, and spiraling rabbit hole of addiction and incarceration. After being granted parole in October of 1990, Charles, against all odds, became involved in twelve-step programs, earned his PhD from the University of California Irvine, got married, wrote a book articulating the challenges of addiction and incarceration, and worked as a professor of criminology at St. Louis University.[109] Charles exists, as we all do, in the liminal space between choice and circumstance. His transition from convict and addict to free, recovering man reveals universal truths of suffering, hope, and resilience of the human spirit. Even from deep inside the rabbit hole, a light of hope gleams in the distance – hope for policy reformation, for restoration, for freedom from the chains of addiction and incarceration.

[109] Terry, 2.

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