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## DRUG DECRIMINALIZATION, ADDICTION, AND MASS INCARCERATION: A THEORIES OF PUNISHMENT FRAMEWORK FOR ENDING THE “WAR ON DRUGS”

### I. INTRODUCTION

The United States is home to less than five percent of the world's population, but nearly a quarter of its incarcerated population, with more than 2.1 million people incarcerated in state and federal prisons and local jails in 2019,<sup>1</sup> a number that dropped to 1.8 million by mid-2020 due largely to the Covid-19 pandemic and pressure from advocates to release vulnerable inmates.<sup>2</sup> Despite this decline, the United States remains the world's leader in incarceration rates,<sup>3</sup> with dramatic increases over the last fifty years due primarily to the “War on Drugs,” beginning in the early 1970s when then-President Richard Nixon declared drug abuse “public enemy number one.”<sup>4</sup> This war led to the passage of harsh and \*268 excessive mandatory minimum drug sentencing laws, as well as increased and aggressive drug crime policing.<sup>5</sup> What followed were unprecedented incarceration rates, the brunt of which was (and still is) borne by low-level, nonviolent drug users and dealers, and people of color.<sup>6</sup> For instance, at the end of 2018, the last year for which this data is available, there were 1,249,700 persons sentenced in state prisons, of whom 176,300 (fourteen percent) had as their most serious offense a drug charge.<sup>7</sup> Of those, 3.7 percent were incarcerated for drug possession, the rest for manufacturing and sale.<sup>8</sup> On September 30, 2019 there were 158,107 sentenced people in federal prisons.<sup>9</sup> Of those, 73,210 (46.3 percent) had as their most serious offense a drug charge.<sup>10</sup> More than 99 percent of federal drug offenders were sentenced for trafficking.<sup>11</sup> \*269 Many state and federal prisoners suffer from substance use disorder (SUD),<sup>12</sup> or, if they do not meet the Diagnostic and Statistical Manual of Mental Disorders' definition of SUD, they were substance-involved at the time of their offense.<sup>13</sup>

In October of 2016, the Human Rights Watch and American Civil Liberties Union published a report entitled, “Every 25 Seconds: The Human Toll of Criminalizing Drug Use in the United States.”<sup>14</sup> “Every 25 seconds” signifies the unfortunate fact that every twenty-five seconds in the United States, someone is arrested for possessing drugs for their own use.<sup>15</sup> The irony in this figure is that nearly 60 years ago, the Supreme Court held that criminalizing addiction is unconstitutional.<sup>16</sup> *In Robinson v. California*, the Supreme Court recognized that drug addiction is an illness which may even be contracted involuntarily, and it struck down a state law that criminalized the “status” of being addicted to narcotics as “cruel and unusual punishment,” violative of the Eighth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment.<sup>17</sup> The Court was careful to limit its holding to laws imposing punishment *for the status or condition of being addicted*, rather than *for the possession or use of an illicit substance*, referencing the “broad power of a State to regulate the narcotic drugs traffic within its borders” in the latter situation.<sup>18</sup> Although the Supreme Court suggested that a state could validly exercise police power to

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regulate, criminalize, and penalize the use and possession (among other things) of “dangerous and habit forming drugs,” it also \*270 observed that the state might instead select a different course through, for example, public health efforts and education, or “[amelioration of] the economic and social conditions under which those evils might be thought to flourish.”<sup>19</sup> Saliently, the Court remarked, “[i]t is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease.”<sup>20</sup>

While the Supreme Court did not explicitly ban the criminalization of drug use and possession in *Robinson*, the distinction it attempted to draw between the status of being addicted and drug use/possession itself, is thin, at best. Indeed, a person addicted to drugs has inevitably possessed and used those drugs at some point. The *Robinson* Court's reasoning rests, at least in part, on the notion that a person cannot be punished for their status as a drug addict because the substantive criminal law necessarily requires a voluntary act as a prerequisite to punishment,<sup>21</sup> yet for many who possess drugs for personal use, changes to the brain's structure and function as a result of long-term drug use rob them of any true volition when it comes to drug-seeking behaviors and use.<sup>22</sup> More fundamentally, it seems odd to hold that legislators may not criminalize the disease of addiction, yet they may criminalize the symptoms of that disease, such as drug procurement, possession, and use.<sup>23</sup> Some scholars have argued that, \*271 even absent addiction, the criminalization of drug possession contravenes the longstanding common law principle that an individual should not be punished absent a voluntary *actus reus*, because the state of being in possession of a thing is not properly thought of as an “act.”<sup>24</sup>

Both of these contentions are largely outside the scope of this article, so for the sake of argument I assume that drug possession can properly be thought of as a voluntary act for purposes of imposing criminal liability. However, I argue in Section II, *infra*, that the justifications for criminal punishment-- deterrence, incapacitation, rehabilitation, and retribution--do not support criminalization of drug possession for personal use alone. Instead, these theories of penal sanction support adopting drug decriminalization<sup>25</sup> measures in the United States, such as those taken in Portugal in 2001, when Portugal became the first country in the world to decriminalize the possession and consumption of all drugs, reclassifying them as administrative violations subject solely to non-criminal penalties, like fines.<sup>26</sup> Namely, studies show that drug criminalization and the threat of imprisonment do not deter drug use, especially for users who also face addiction \*272 problems. Studies also show that the connection between drug use and violence is tenuous, and that locking up community members who use drugs does not make most communities safer. And while rehabilitation is certainly a legitimate goal for individuals with SUD, prisons, jails, and even drug courts, are ill-equipped to rehabilitate these individuals and often do more harm than good. Finally, from the retributivist's perspective, even if initial drug use and possession can properly be viewed as voluntary acts, the medically accepted disease model of addiction suggests that individuals whose drug possession and use is the result of an addiction are inherently less morally culpable than their non-addicted counterparts as a result of their disease. Even individuals whose drug use does not meet the medical definition of SUD are not deserving of criminal sanctions for what amounts to a victimless crime with little potential to hurt anyone but the drug users themselves.

In Section III of this article, I extend the above decriminalization framework, describing how it can be employed to support broader legislative, policy, and court reforms to the criminal justice system, including reforms to the ways in which the relevant institutional actors view and treat addiction at every stage of a non-drug possession criminal case. I argue that efforts to ameliorate this country's intertwined mass incarceration and opioid epidemics will require more than just drug decriminalization. The system needs both innovation and large-scale transformation, recognizing that when addiction is the root cause of criminality, the purposes of punishment often do not support incarceration.

## II. A THEORIES OF PUNISHMENT FRAMEWORK FOR DECRIMINALIZING DRUG USE AND POSSESSION

Justifications for criminal sanctions generally fall into two camps, utilitarian and retributive, both of which are incorporated into the federal Sentencing Reform Act of 1984<sup>27</sup> and many state sentencing regimes.<sup>28</sup> Utilitarian justifications--including deterrence, incapacitation, and rehabilitation--are forward-looking; penalties for criminal violations are imposed because of their perceived future benefit to society.<sup>29</sup> Because of utilitarianism's focus on consequences, that the deprivation of liberty imposed by punishment is justified by the positive effects of that deprivation to society at large, it is described as a \*273 form

of consequentialism, the ethics doctrine that actions must be evaluated on the basis of their consequences.<sup>30</sup> Classical utilitarian theory was founded by the late eighteenth/early nineteenth century English Philosopher Jeremy Bentham, who espoused the view that actions should be judged according to the extent they increase or decrease human well-being and utility, and that the purpose of the criminal law should be to maximize overall happiness within the general population.<sup>31</sup> Criminal law professor and scholar Joshua Dressler describes utilitarianism as follows:

[U]tilitarians believe that the pain inflicted by punishment is justifiable if, but only if, it is expected to result in a reduction in the pain of crime that otherwise would occur. For example, the imposition of five units of pain (however the “units” are measured) on *D* is justifiable if it will prevent more than five units of pain (in the form of crime or other undesirable consequences) that would have occurred but for *D*'s punishment.<sup>32</sup>

Within the broader utilitarian framework are three forward-looking sentencing theories. First, a criminal sanction should deter both the individual being sentenced and the community from future criminality (specific and general deterrence). “General deterrence is the pressure that the example of one criminal's pain and suffering exerts on potential criminals to forgo their contemplated crimes. Specific deterrence is the pressure that unpleasant memories of incarceration exert on a released convict, which cause him to obey the law.”<sup>33</sup> Second, a criminal sanction should promote public safety by removing the offender from society, effectively preventing his access to potential victims outside the prison walls.<sup>34</sup> A third and final utilitarian justification is rehabilitation. The idea is that prison should be used to reform the offender away from a life of crime, by, for instance, “provid[ing] the defendant with needed educational or vocational training, medical care, or other correctional treatment ....”<sup>35</sup>

\*274 On the other hand, retributivism, or the “just deserts” theory of punishment, has been described as backward-looking; the offender is punished as payback for the crime she previously committed and in proportion to the harm caused.<sup>36</sup> Retributivists believe that the consequences of punishment are generally irrelevant to its justification,<sup>37</sup> and that punishment is justified when it is deserved.<sup>38</sup> Underlying retributivist goals of punishment are the principles of proportionality and moral culpability, or blameworthiness. Indeed, “[r]etributive justice is based on the premise that we are free moral agents and that punishment is appropriate for moral wrong choices.”<sup>39</sup>

Whether one is a consequentialist or retributivist at heart (or believes in the legitimacy of both doctrines), there is little room for debate that punishing a person addicted to drugs for possession and personal use of those drugs to get high and stave off debilitating withdrawal symptoms, does not meaningfully serve any of these traditional purposes of punishment. Instead, what boils down, at its essence, to the criminalization of addiction, has the perverse effect of thwarting the utilitarian goals of punishment, is disproportionate to the “offensive” behavior, and has a discriminatory impact on historically marginalized Communities of Color, who are more frequently targeted for drug crime prosecutions than their White counterparts despite similar rates of drug use across races.<sup>40</sup>

### *A. General and Specific Deterrence*

The deterrence argument is fairly straightforward: by locking up would-be drug users, they and other would-be drug users will be deterred from future drug possession and use for fear of returning (or going) to jail. However, when it comes to SUD, reality fails to match perception, and deterrence fails as a useful crime control method. “The threat of imprisonment has no effect on a drug addict because the compulsions and threat of withdrawal that are elements of addiction far outweigh any consequences a drug addict may face for the commission of \*275 these acts.”<sup>41</sup> While the initial decision to use drugs is sometimes voluntary, with repeated use an individual's ability to exercise self-control and abstain from further use becomes impaired and drug-seeking and using behavior becomes compulsive.<sup>42</sup>

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Furthermore, a key prerequisite to a criminal sanction's deterrent value, that the actor is able to rationally perceive and weigh the costs of the offense (in this case, drug use) as greater than the benefit,<sup>43</sup> --is wholly absent in the case of laws banning drug use and possession. "Brain imaging studies show that people with addiction show physical changes in areas of the brain that are critical to judgment, decision-making, learning and memory, and behavior control."<sup>44</sup> Dr. Nora D. Volkow, the director of the National Institute on Drug Abuse (NIDA), affirms:

Chronic exposure to drugs of abuse disrupts the way critical brain structures interact to control and inhibit behaviors related to drug abuse. Just as continued abuse may lead to tolerance of the need for higher drug dosages to produce an effect, it may also lead to addiction, which can drive an abuser to seek out and take drugs compulsively. Drug addiction erodes a person's self-control and ability to make sound decisions, while sending intense impulses to take drugs.<sup>45</sup>

Similarly, a 2012 study by substance abuse researchers established that drugs damage an area of the brain known as the orbitofrontal cortex (OFC) which "is responsible for decisions made on the spur of the moment."<sup>46</sup> When the OFC is damaged, the individual is more likely to make decisions based on a desire for an immediate reward, rather than an evaluation of all the potential consequences.<sup>47</sup>

**\*276** Because drugs can alter the neural circuitry related to reward-seeking and decision-making systems by flooding the brain with the neurotransmitter dopamine, which causes the reinforcement of pleasurable but unhealthy activities, "[d]rug addiction manifests itself as an irrepressible drive to take a drug despite its undesirable consequences."<sup>48</sup> The impairment in areas of the brain related to impulse-control, rationality, judgment, and decision-making caused by prolonged and chronic drug use makes it extremely unlikely that an addicted person will be deterred from drug use and possession by the threat of jail time. As one scholar aptly observed,

[D]ue to the nature of drug use, addicts and drug dependent persons are, in general, much less likely than the archetypal "rational man" to respond as classical deterrence theory anticipates .... Whether one views addiction as a "chronic, relapsing brain disease" or a mental illness or behavioral problem that can be ameliorated by treatment coupled with economic and social supports that help addicts choose to reduce or discontinue their drug use, drug addiction is certainly a condition for which appeals to logic face an uphill battle.<sup>49</sup>

In her discussion of the potential deterrent effect of criminal sanctions on pregnant drug users, Professor Linda C. Fentiman examined studies of government interventions, including increasing the severity of punishment, aimed at curbing drunk driving.<sup>50</sup> She noted that increasing punishment did not lead to general or specific deterrence in this context.<sup>51</sup> In particular, individuals with severe alcohol dependence issues were likely to reoffend despite the risk of incarceration either because of their "diminished ability to rationally assess the risks of punishment or because their alcohol dependency causes them to seek immediate gratification--getting drunk."<sup>52</sup> Instead, sanctions with a greater deterrent effect on this population were administrative in nature, such as license revocations and stiff fines.<sup>53</sup> Extrapolating from these studies, an administrative **\*277** sanction system--like that employed in Portugal--in the context of drug possession and use might also prove more effective at deterring drug use than criminal arrest and punishment.

In line with the drunk driving studies, in a comprehensive review of recent research into the connection between increased law enforcement and drug crimes and use, the Vera Institute of Justice<sup>54</sup> observed that increased enforcement and severity of criminal penalties over the past several decades have not led to a significant reduction in drug supply or use.<sup>55</sup> The authors note that, somewhat ironically, "[t]he use of incarceration for people convicted of drug offenses may actually increase crime,"

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since people sentenced to prison for drug offenses have higher recidivism rates than those sentenced to probation.<sup>56</sup> In fact, illegal drug use is said to be among the least deterrable crimes.<sup>57</sup>

A final illustration of the limited deterrent value of this country's punitive drug laws and policies is in the rates at which Americans consume illicit drugs in comparison to drug use rates in countries with more lax laws. Rates of self-reported drug use in the United States far exceed those of other countries, despite the fact that this country “spend[s] more money and imprison[s] more people in our drug control effort than most other nations.”<sup>58</sup> In 2008, the World Health Organization (WHO) published a survey of data from 17 countries, including the United States, regarding self-reported rates of alcohol, tobacco, \*278 cannabis, and cocaine use.<sup>59</sup> The United States had the highest rates of tobacco, cannabis, and cocaine use of all the countries surveyed.<sup>60</sup> With respect to cocaine use in particular, 16 percent of respondents in the United States reported they had tried cocaine at least once compared to only 4.3 percent in New Zealand, which had the second highest rates.<sup>61</sup> This survey data led the WHO to conclude,

The US, which has been driving much of the world's drug research and drug policy agenda, stands out with higher levels of use of alcohol, cocaine, and cannabis, despite punitive illegal drug policies, as well as (in many US states), a higher minimum legal alcohol drinking age than many comparable developed countries. The Netherlands, with a less criminally punitive approach to cannabis use than the US, has experienced lower levels of use, particularly among younger adults. Clearly, by itself, a punitive policy towards possession and use accounts for limited variation in nation-level rates of illegal drug use.<sup>62</sup>

These studies highlight that rational, well-reasoned drug policies must not be based on the false notion that prison time deters drug use.

### ***B. Protection of the Public***

Another purpose of punishment is to remove the “dangerous” offender from society to promote the safety and security of the general public. Most drug offenders will not be incarcerated forever. Thus, it is imperative to consider long-term public safety goals, not just the immediate short-term impact of a custodial sentence. Yet, as noted above, the fact that punitive sanctions, such as incarceration, do not deter drug crimes, and can instead lead to higher rates of reoffending, suggests that public safety is hampered by a criminal justice approach to drug use and addiction as opposed to a public health and harm reduction<sup>63</sup> approach. Indeed, acclaimed author and civil rights attorney, Michelle Alexander observes,

\*279 Imprisonment ... now creates far more crime than it prevents, by ripping apart fragile social networks, destroying families, and creating a permanent class of unemployables. Although it is common to think of poverty and joblessness as leading to crime and imprisonment, ... research suggests that the War on Drugs is a major cause of poverty, chronic unemployment, broken families, and crime today.<sup>64</sup>

In his seminal look inside the now defunct Lorton Central Prison outside of Washington, D.C., Professor Robert Blecker spent hundreds of hours interviewing inmates to compare the traditional justifications for punishment with the lived experiences of men housed there long-term.<sup>65</sup> One inmate, Itchy Brooks, commented upon his own observations of the violence-inducing and criminogenic effects of incarceration:

“What do you do with a Doberman Pinscher when you want him to be mean? You make him hungry and keep him chained up, restrained from everything. When you let him loose he goes wild. It's no different with us,” Itchy said. “You in such a state of deprivation when you leave here, you want everything and you want it now. You don't want to wait. You've been waiting too long. You've been waiting on too many lines. You done took shit from too

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many people. You ain't taking any more shit.[“] [S]o when you go on the street with that attitude you're dangerous. And that's that. This is a monster. But where did that monster come from? You were a small monster when you came but you're a giant one when you go out of here.”<sup>66</sup>

A perhaps more fundamental flaw with incapacitation theory as it relates to drug use and addiction is that the pervasive public perception that drug use is a precursor to serious, violent crime, borne largely from racist stereotyping, <sup>280</sup> political rhetoric, and media campaigns of the early twentieth century,<sup>67</sup> is largely unfounded. In 1985, drug and crime researcher Paul J. Goldstein proposed a model suggesting drug use is related to violence in three primary ways: (1) short or long-term ingestion of specific intoxicants causes a psychopharmacological violent reaction; (2) drug users commit economically-induced and compulsive violent crimes motivated by a desire to obtain money to purchase drugs; and (3) drug use leads to systemic violence endemic to the illicit drug trade.<sup>68</sup> However, since Goldstein's work was first published, attempts by other researchers to prove or disprove his theory have largely been unsuccessful.<sup>69</sup> In particular, researchers “have been unable to prove that drugs have a direct influence on the use of violence, though there is some limited support for a correlation between or common causes underlying drug use and violent behavior.”<sup>70</sup>

In the early 1990s, the United States Sentencing Commission formed a Task Force to study the link between drug use and violence.<sup>71</sup> In particular, the group of academics, researchers, government officials, politicians and administrators were tasked with examining Goldstein's theory, along with other relevant works.<sup>72</sup> Despite their efforts, the group was unable to reach consensus about the validity of any link between drug use and violence.<sup>73</sup> However, the Task Force's unpublished final report concluded that “drug-crime relationships were not nearly as clear or as strong as politicians and legislatures had presumed based upon the motivations for enacting the drug laws.”<sup>74</sup> Notably, where there did <sup>281</sup> appear to be some connection between drugs and violence, that connection most often involved drug selling, as opposed to use.<sup>75</sup>

In a comprehensive empirical analysis of national data between the years of 1990 and 2006 for over 117,000 criminal defendants located in 75 large urban counties, Professors Shima Baradaran and Frank L. McIntyre determined that defendants charged with drug possession and trafficking were among the least likely to be rearrested for a violent crime while on bail.<sup>76</sup> For those arrested for drug sales, only 1.6 percent were rearrested for a violent felony; for drug possession, the rate was even lower, at 1.1 percent.<sup>77</sup> The purported connection between addiction and violent crime that the media, judges, politicians, and legislatures have promoted for decades as close and causal in nature, is actually inconclusive, weak and attenuated, at best.<sup>78</sup>

Professor Baradaran explains:

The perception that drug use causes violent crime is not supported by the evidence, and upon closer look the relationship appears to be very complicated. There is no proof that drugs pharmacologically cause violence. Indeed, most drug offenders commit nonviolent offenses and at low rates. Studies do not support the commonly held belief that drug use results in the user's involvement in predatory crime. Though certainly drug addicts commit more crimes, the connection between drugs and violent crime is complex and not conclusive.<sup>79</sup>

Similarly, as early as 1973, some judges recognized that the popular belief that all individuals with addiction issues are violent is largely unfounded:

[A]ccording to popular mythology the addict is perceived as a criminal aggressor driven to rape and violence by the evil effects of the drug itself. Yet nothing could be farther from the truth, for in reality heroin produces

a tranquil, lethargic state in the user, inhibiting aggressive and sexual activities. As a result, crimes of \*282 violence are rarely, and sexual crimes almost never, committed by addicts.<sup>80</sup>

And most salient for purposes of the drug decriminalization debate, is the evidence that most drug-related violence stems from the enforcement of drug laws, not drug use itself.<sup>81</sup> “[W]hen drug crimes do involve violence, the violence often results from competition among drug traffickers to establish their territory, which has more to do with the illegality of drugs than anything else.”<sup>82</sup> Thus, one would expect the decriminalization of drugs to result in a decrease in violence, or to have no impact at all on rates of violence, rather than to increase violence. Likewise, studies have shown that increasing enforcement of drug laws has not reduced drug trafficking-related violence.<sup>83</sup> Instead, “criminalization of drugs can increase prices because the supply of drugs is limited [and as] prices increase, criminals have greater incentive to engage in illegal activity and utilize violence to maintain their share of the market.”<sup>84</sup> Additional consequences of drug criminalization include: requiring users to acquire greater resources due to increased drug prices, making steady employment difficult due to the time and effort needed to locate a safe source of supply, making it difficult to maintain employment due to cycling in and out of the justice system, and forcing drug users into a criminal subculture; these side effects lead to criminal activity, rather than the drug use itself.<sup>85</sup> Another hypothesis regarding the link between increased drug enforcement and rising rates of property and other crimes, known as the “opportunity cost” of anti-drug efforts, postulates that when scarce law enforcement resources are consumed by policing drug possession and use, there \*283 are fewer resources to combat property and other crimes, leading to an overall increase in commission of those crimes.<sup>86</sup>

Despite the compelling evidence that the link between drug use and crime is attenuated and complex, law enforcement agencies advance as “fact” the proposition that crime, violence, and drug use go hand-in-hand, to scare the general public away from decriminalization.<sup>87</sup> In support of this proposition, the Drug Enforcement Agency cites 2004 Department of Justice (DOJ) survey data indicating:

[Thirty-two] percent of state prisoners and 26 percent of federal prisoners said they had committed their current offense while under the influence of drugs. Among state prisoners, drug offenders (44 percent) and property offenders (39 percent) reported the highest incidence of drug use at the time of the offense. Among federal prisoners, drug offenders (32 percent) and violent offenders (24 percent) were the most likely to report drug use at the time of their crimes.<sup>88</sup>

While it is certainly true that many people who use drugs also commit crimes,<sup>89</sup> this correlation is not synonymous with causation. Indeed, “[t]here is evidence that the characteristics which lead an individual to commit crimes against persons and property also lead that individual to consume drugs.”<sup>90</sup> Some of those characteristics may include a high risk-tolerance and little fear of moral condemnation and social stigma.<sup>91</sup> Accordingly, drug use is better thought of as a factor that combines with others to, at most, contribute to criminality.<sup>92</sup> “Psychological predisposition, environment, peer pressure, economic station, \*284 and opportunity converge to create a propensity to commit crimes that would not occur if drug use were an isolated factor.”<sup>93</sup> Viewed in this light, the DOJ’s survey data does not compel the conclusion that drug use inevitably leads the user to become violent; the weight of the evidence appears to be to the contrary.

Finally, arguments that drug use must be criminalized because addiction leads to violence and crime often rest on the flawed assumption that decriminalization will lead to increased rates of drug usage.<sup>94</sup> The Drug Policy Alliance studied empirical evidence from the United States and around the world and concluded that “eliminating criminal penalties for possession of some or all drugs would not significantly increase rates of drug use.”<sup>95</sup> Following Portugal’s decriminalization of all drugs in 2001, rates of drug use remained relatively flat, with some slight increases in lifetime use that are most likely a reflection

of regional trends.<sup>96</sup> Notably, “Portugal's drug use rates remain below the European average--and far lower than the United States.”<sup>97</sup> Indeed, despite its punitive drug laws and policies compared to other nations, the United States has some of the highest levels of drug use in the world.<sup>98</sup>

### *C. Rehabilitation and Drug Courts*

A third ostensible purpose for criminal punishment is to reform the offender into a positive, contributing member of society. While the Federal Sentencing Reform Act (SRA) explicitly recognizes rehabilitation as a legitimate goal of criminal sentencing,<sup>99</sup> it also indicates that when considering imposing a term of imprisonment (as opposed to supervised release, probation, and fines), the sentencing court must consider that “imprisonment is not an appropriate means \*285 of promoting correction and rehabilitation.”<sup>100</sup> Indeed, part of the impetus for the federal government's passage of the SRA, which completely overhauled the prior federal indeterminate sentencing system and practice in favor of a system of uniform and determinate Federal Sentencing Guidelines, was Congress's growing skepticism about whether prison programs could ever routinely and reliably rehabilitate offenders.<sup>101</sup> The relevant Senate Report states:

The sentencing provisions of current law were originally based to a rehabilitation model in which the sentencing judge was expected to sentence a defendant to a fairly long term of imprisonment. The defendant was eligible for release on parole after serving one-third of his term. The parole commission was charged with setting his release date if it concluded that he was sufficiently rehabilitated. At present, the concepts of indeterminate sentencing and parole release depend for their justification exclusively upon this model of ‘coercive’ rehabilitation--the theory of correction that ties prison release dates to the successful completion of certain vocational, educational, and counseling programs within the prisons. Recent studies suggest that this approach has failed, and most sentencing judges as well as the parole commission agree that the rehabilitation model is not an appropriate basis for sentencing decisions. We know too little about human behavior to be able to rehabilitate individuals on a routine basis or even to determine accurately whether or when a particular prisoner has been rehabilitated.<sup>102</sup>

Thus, Congress warned the newly created Sentencing Commission to “insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.”<sup>103</sup>

While rehabilitation is what people with SUD need most, prisons and the criminal justice system, as a whole, are not medical institutions and are not designed to render the proper treatment and care. Scholar and Professor of Epidemiology Sana Loue notes:

Numerous barriers attend the provision of effective drug treatment in the prison setting. Limited resources impede \*286 institutions' ability to address the specific needs of the many inmates who are polydrug users and to identify those who may be suffering from undiagnosed mental illness, in addition to their substance abuse. Violent or difficult prisoners may be prohibited from participating in the treatment programs, which are voluntary. The separation of participating inmates from the general prison population may not be possible, rendering the recovery process more difficult. Despite the recent proclivity toward the arrest and imprisonment of substance-using pregnant women, few prisons are equipped to provide substance abuse treatment that considers the special needs of pregnant women. Too, the sentence to be served may require less time than the treatment program demands, resulting in a decreased probability of recovery due to the premature termination of treatment.<sup>104</sup>

These barriers to effective custodial treatment are evidenced by the relevant statistics. Despite the significant number of state prisoners who suffered from substance abuse and/or dependence in 2004, only 14.1 percent of inmates who used drugs in the

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month before their offense had participated in treatment since their admission to prison, a figure that was down substantially from 36.5 percent in 1991.<sup>105</sup> There were similar declines in the federal prison system, where 15.2 percent of regular drug users were receiving treatment while in custody versus 33.7 percent in 1991.<sup>106</sup>

For those who do participate in treatment while incarcerated, it is often less effective than community-based programs. Studies have shown that medication-assisted treatment (MAT) with substances such as suboxone and methadone reduces drug abuse and the risk of overdose, death, and unhealthy behaviors such as needle sharing, and increases the likelihood that the patient will maintain treatment when they return home from prison.<sup>107</sup> MAT involves the use of these \*287 medications in conjunction with counseling and behavioral therapies to successfully treat addiction.<sup>108</sup> MAT in the short term assists longer-term abstinence by helping to normalize brain chemistry, subdue physiological cravings, and block the negative and euphoric effects of the drug.<sup>109</sup> The National Institute on Drug Abuse, “the lead federal agency supporting scientific research on drug use and its consequences,”<sup>110</sup> recommends MAT as a “whole patient approach” to the treatment of opioid addiction, noting that after buprenorphine (suboxone) became available in Baltimore, heroin overdose deaths decreased by 39 percent during the period evaluated.<sup>111</sup> Research suggests that MAT participation while in custody reduces the risk of fatal overdose upon reentry by fourteen-fold.<sup>112</sup> However, as of 2017, “of the 3,200 jails around the country, just 23 provide[d] methadone or Suboxone maintenance therapy to inmates” and “[o]f the 50 state prison systems, four [did].”<sup>113</sup> The Marshall Project<sup>114</sup> reports, “Forced abstinence during incarceration makes users' tolerance go down and cravings go up. As a result, in the two weeks after release, inmates are 12 times more likely to die--and 129 times more likely to die of an overdose--than the general population.”<sup>115</sup> Finally, of the small number of correctional institutions \*288 that offer some form of MAT, there is insufficient data to assess the circumstances that qualify an inmate for access to the medication and whether it is provided during the initial detoxification period only, or more long-term, as recommended.<sup>116</sup> The incomplete and fragmented data available suggest that MAT offered in correctional settings “is often inadequate and not based on established best practices.”<sup>117</sup> Meanwhile, the common belief that a period of incarceration will impede the addict's access to drugs rests on the misperception that drugs are not available behind bars; this is not always the case.<sup>118</sup>

Opponents of drug decriminalization often rely on the advent of the drug treatment court movement to justify continued drug criminalization. Drug courts began cropping up in the United States in the late-1980s as a form of non-adversarial therapeutic jurisprudence designed to divert certain low-level drug offenders from jails and prisons and into drug treatment.<sup>119</sup> Drug courts currently employ two different models: under the pre-adjudication model, completion of drug treatment results in the dismissal of charges and under the post-adjudication model, completion results in a “time served” sentence on pleas to lesser charges.<sup>120</sup> A failure to complete the program, results in the offender's return to the traditional court system.<sup>121</sup>

Drug court proponents justify continued drug criminalization on the premise that drug courts offer diversion from jails and prisons and much-needed treatment to drug users such that systemic legal and policy changes are \*289 unnecessary.<sup>122</sup> However, there exist a multitude of flaws and misconceptions about how drug courts currently function inherent in this logic. As an initial matter, resource limitations make drug courts a viable option for only a small percentage of offenders with a history of drug use.<sup>123</sup> Ironically, many of the individuals selected to participate in drug court are social users who do not suffer true addiction.<sup>124</sup> This is because drug courts have been known to “cherry-pick” participants most likely to succeed.<sup>125</sup> Many drug courts limit their potential to both rehabilitate and improve public safety by excluding individuals with a history of violence, who are on probation/parole or have another open charge, or who have co-occurring drug and mental health problems.<sup>126</sup> The last factor is particularly troubling given the significant rate at which mental health disorders co-occur with Substance Use Disorder.<sup>127</sup>

\*290 Additionally, several studies have noted the “relative lack of success” of drug courts in reducing recidivism rates.<sup>128</sup> And, overall completion rates vary wildly.<sup>129</sup> Those least likely to succeed are the ones for whom drug courts were originally designed--individuals with genuine substance use disorders.<sup>130</sup> Moreover, low-income people of color fare disproportionately

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worse in drug courts than wealthier non-minorities because drug courts, as part of the conventional justice system, suffer from the same institutional biases as their traditional court counterparts.<sup>131</sup>

Drug courts also *contribute to*, rather than ameliorate, mass incarceration in a number of ways. One is by promoting the phenomenon of “net-widening,” whereby introduction or expansion of a new diversionary treatment program leads to the arrests of individuals who would have originally been diverted away \*291 from the criminal justice system.<sup>132</sup> Law enforcement and prosecutors may believe the additional resources will allow drug users to get help, but in reality, with capacity and eligibility restrictions, many of these individuals will face incarceration rather than diversion.<sup>133</sup> Additionally, for participants who flunk out, their stints in drug court often expose them to more time behind bars than if they would have remained in the traditional court system.<sup>134</sup>

Finally, drug courts, like corrections institutions, often employ an abstinence-only approach to treatment,<sup>135</sup> which runs contrary to the medical and public health community's understanding of addiction as a chronic brain disease that is characterized by periods of relapse and remission.<sup>136</sup> Behavior change theory posits that change is nonlinear and involves “recycling through various stages of change”; as applied to addiction, “relapse is seen as a component part of the effort to ... modify addictive behavior.”<sup>137</sup> “[I]t is unclear to what extent, if any, principles of behavior change are integrated into the judicial decision to permit the non-adherent defendant to continue with treatment or to impose a prison sentence.”<sup>138</sup> That said, it is clear that drug courts readily use incarceration \*292 sanctions for treatment violations, including multiple positive drug tests.<sup>139</sup> In turn, incarceration sanctions are associated with a higher likelihood of rear-rest and lower likelihood of program completion.<sup>140</sup> Moreover, stress related to attempted compliance with drug court abstinence policies can make maintaining sobriety even harder for the drug court participant.<sup>141</sup> Finally, drug courts, like most jails and prisons, treat MAT with skepticism because these therapies run counter to an abstinence-only approach to treatment. Thus, many drug courts prohibit maintenance therapies and other evidence-based treatments that public health experts say are crucial to the recovery process.<sup>142</sup>

#### **D. Retribution**

A fourth and final justification for punishment is retribution, or the idea that bad actors deserve to be punished and that punishment should be proportional to their degree of moral culpability (the “eye for an eye” philosophy). It's hard to come up with strong justifications for punishing drug use and possession on moral wrongfulness grounds, although a primary motivation for passage of this country's strict federal drug laws was Congress's view that drug use was “‘eating away at the moral fiber of our nation.’”<sup>143</sup> Criminology reports from the early 1900s warned that the habitual drug user was a “criminal and a menace to the community,” whose “moral sense is blunted.”<sup>144</sup> Likewise, 100 years ago drug addiction was regarded by the medical community as “a manifestation of ‘moral perversion.’”<sup>145</sup> Medical literature from the early 1900s depicted persons with drug addiction as “moral derelicts,” “weak-minded deteriorated wretches,” “misfits,” and “constitutional psychopath[s].”<sup>146</sup> Since then, however, advances in the relevant scientific community's understanding of the way addiction \*293 impacts the brain reveal that SUD is not a moral failing, nor a weakness of character or will,<sup>147</sup> but a disease, much like heart disease, that “disrupt[s] the normal, healthy functioning of an organ in the body, [causing] serious harmful effects ....”<sup>148</sup>

As an initial matter, retribution theory presupposes free will and intentional decision-making, because “to deserve punishment, one has to have a free choice to break the law in the first place.”<sup>149</sup> As one scholar notes, the theory of retribution “rests on the idea that a person *should have* acted differently in a given context, assuming that the person could have acted differently.”<sup>150</sup> Thus, an individual is only deserving of punishment if her will is not so overcome that she *could have* resisted the urge to commit the criminal act, and is, therefore, morally culpable for that act.<sup>151</sup>

In some ways there is an inherent conflict in the notion that a person with SUD is a rational, free-thinking actor who is morally responsible for her drug use. The disease model of addiction suggests she is not: “Brain imaging studies of people with addiction

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show physical changes in areas of the brain that are critical to judgment, decision-making, learning and memory, and behavior control. These changes help explain the compulsive nature of addiction.”<sup>152</sup> Addictive drugs trigger the release of higher than normal levels of dopamine in the brain, which, in turn, create a reward signal that becomes associated with the environmental stimuli that preceded the reward.<sup>153</sup> With repeated drug use, dopamine cells stop firing in response to the drug itself, and instead fire in an anticipatory response to environmental cues that signal imminent drug use.<sup>154</sup> These environmental surges of dopamine trigger powerful cravings for the drug that become “deeply ingrained” and can persist long after drug use has ceased, even in the face of \*294 known legal sanctions.<sup>155</sup> As time goes on, the brain responds to repeated drug use by releasing smaller and smaller amounts of dopamine, meaning that people with addiction stop experiencing the same euphoric highs they felt when they first started using, and need more of the same drug to mimic those earlier effects.<sup>156</sup> These neuroadaptations lead to increased reactivity to stress and create negative emotions that give rise to the “highly dysphoric phase of drug addiction that ensues when the direct effects of the drug wear off.”<sup>157</sup> “As a result of these changes, the person with addiction transitions from taking drugs simply to feel pleasure or to ‘get high,’ to taking them to obtain transient relief from dysphoria.”<sup>158</sup>

Similar brain modifications occur in the prefrontal cortex, “seriously impairing executive processes, among which are the capacities for self-regulation, decision making, flexibility in the selection and initiation of action, attribution of salience (the assignment of relative value), and the monitoring of error.”<sup>159</sup> Because of impaired signaling in this region of the brain, the person with addiction becomes controlled by his desire to seek the “reward,” and avoid the displeasure of the withdrawal period.<sup>160</sup> This dampening of the ability to resist urges despite the negative consequences of drug use, explains why people who struggle with addiction are often sincere in their desire to get better, but frequently fail in their attempts to quit using the drug.<sup>161</sup> In other words, because drugs of abuse “hijack and reregulate,” the neural circuitry that governs rewards and decision-making<sup>162</sup> such that the user is no longer an independent, rational, free-thinking being,<sup>163</sup> she cannot be held to account in the same way as someone whose choices are unconstrained by forces beyond her control. This phenomenon has caused some in the medical community to observe, “[t]he concept of addiction as a disease of \*295 the brain challenges deeply ingrained values about self-determination and personal responsibility that frame drug use as a voluntary, hedonistic act.”<sup>164</sup>

On the other side of this debate is the argument that the person with SUD exercises free will and rational choice at least in her initial decision to use drugs, or at some later point along the continuum of use, and that this rational, short-term response to curiosity and/or cravings makes her morally blameworthy, and therefore deserving of punishment.<sup>165</sup> Thus, by broadening the time frame within which we assess culpability, drug addiction can be seen as a moral failing as opposed to the uncontrollable byproduct of a physical brain disease.<sup>166</sup>

While acknowledging that the initial decision to use drugs is often voluntary, some still view drug use and possession that derive from an addiction as inherently choiceless acts, for which revenge is an inappropriate response.<sup>167</sup> For instance, in his dissenting opinion in *United States v. Moore*, Chief Judge Wright, joined by three other judges of the District of Columbia Circuit Court of Appeals, argues that a heroin addict should be able to lodge an addiction defense to the \*296 charge of unlawful possession of heroin because his addiction robs him of free will, making concomitant calls for retribution ring hollow:

Unlike other goals of penology, the retributive theory of criminal justice looks solely to the past for justification, without regard to considerations of prevention or reformation. Although the primordial desire for vengeance is an understandable emotion, it is a testament to the constantly evolving nature of our social and moral consciousness that the law has, in recent decades, come to regard this “eye-for-an-eye” philosophy as an improper basis for punishment. But even if this barbaric notion of justice retained its validity, *it clearly would be inapplicable to those persons who act under a compulsion*. Revenge, if it is ever to be legitimate, must be premised on moral blameworthiness, *and what segment of our society would feel its need for retribution satisfied when it wreaks vengeance upon those who are diseased because of their disease?*<sup>168</sup>

In response to the majority's free will argument, Judge Wright opines,

It is of course true that there may have been a time in the past before the addict lost control when he made a conscious decision to use drugs. But imposition of punishment on this basis would violate the long-standing rule that the law looks to the immediate, and not to the remote cause; to the actual state of the party, and not to causes, which remotely produced it ... [F]or no matter how the addict came to be addicted, once he has reached that stage he is clearly sick, and a bare desire for vengeance cannot justify his treatment as a criminal.<sup>169</sup>

Similarly, in the context of a non-drug possession offense, one federal judge concluded that addiction diminishes the addict's capacity to evaluate consequences and mitigates culpability, which is intrinsically tied to the retributive purpose for punishment.<sup>170</sup> Thus, the *Hendrickson* court granted a six-month downward variance at sentencing for a defendant convicted of possessing stolen firearms to account for the fact that he had been addicted to drugs since age 14.<sup>171</sup>

\*297 Scholars have, for decades, engaged in this free will versus determinism debate as it relates to criminal responsibility,<sup>172</sup> and I do not intend to further traverse that well-trodden legal terrain in this article. There are a host of complex biological, environmental, and other factors at play that lead the experimental drug user to become addicted,<sup>173</sup> and many of these factors are beyond her control. More, as noted above, it is clear that with continued use, a person's ability to stop using becomes seriously hampered; indeed, “[t]his impairment in self-control is the hallmark of addiction.”<sup>174</sup> But at early stages of drug use, there typically is some rational, voluntary decision-making involved,<sup>175</sup> although that is not always the case.<sup>176</sup> That said, for someone who made the voluntary choice to use before becoming addicted and even for someone who uses drugs on occasion or socially but does not have a SUD, retribution is still an inappropriate legal theory upon which to ground drug criminalization policy for the simple fact that a person whose only misconduct involves self-medicating or experimentation through drug use poses a greater harm to herself than others. In this sense, her crime is a “victimless” one, undercutting any argument that she is particularly depraved or immoral. So, to the extent that a retributive sentence must be proportional to the harm the offender causes society, people who use drugs do not deserve stringent penal sanctions. An administrative system, like that in place in Portugal, whereby drug users may be subject to non-criminal sanctions such as \*298 fines, is more proportional to the level of blameworthiness of the individual user, whether that person has an addiction or not.

### III. ADDICTION-RELATED REFORMS NEEDED AT EVERY STAGE OF A CRIMINAL CASE

As the above demonstrates, applying a theories of punishment framework, drug decriminalization makes sense from a policy perspective. Indeed, recognizing the benefits of a public health approach to drug use in the absence of formal decriminalization, some progressive District Attorneys have instituted policies against charging individuals arrested for simple possession of some illicit substances.<sup>177</sup> Likewise, in Seattle, city officials developed a program in 2011 known as Law Enforcement Assisted Diversion (LEAD), whereby law enforcement direct some drug users to treatment and other supportive services rather than arresting them, a form of de facto decriminalization that helps keep drug addicts out of the criminal justice system.<sup>178</sup>

These local prosecutorial and law enforcement efforts are a good first step, and have helped spark a national conversation about, and interest in, the merits of drug decriminalization policies. In Oregon, for instance, voters recently approved Measure 110, which decriminalized the use and possession of small amounts of illicit substances, making those activities civil infractions, subject to a \$100 fine, which is waived with a health screening at an Addiction Recovery \*299 Center.<sup>179</sup> That said, these reforms efforts, and even larger-scale adoption of drug decriminalization, are not a panacea for what plagues this country's criminal justice system. They should be regarded as a first step in what needs to be an extensive national effort at systemic legislative, policy, and judicial reform of the ways in which addiction is viewed and treated at every stage of a criminal case. It is one thing to decriminalize drug use and possession, allowing individuals with SUD the demonstrated benefit of the public health and harm reduction approach to care, but it is another entirely to say to someone with SUD who also happens to be involved with more serious crime that she is also worthy of evidence-based approaches to her comorbid brain disease and criminality.

Although there is no demonstrated cause and effect between drug use and crime, as addressed, there appears to be a significant correlation. Thus, many of the individuals who encounter the justice system for non-drug possession offenses have drug and/or alcohol abuse problems. For instance, in 2004 the Bureau of Justice Statistics (BJS) reported that 53 percent of state and 45 percent of federal prisoners met the DSM-IV criteria for drug dependence or abuse.<sup>180</sup> More recently, researchers at the National Center on Addiction and Substance Abuse (CASA) at Columbia University conducted an exhaustive examination of data regarding substance abuse among America's prison population between 1996 and 2006.<sup>181</sup> They concluded that the percentage of adults incarcerated in local, state, and federal correctional institutions rose by 32.8 percent during this ten-year period, but the percentage of substance involved<sup>182</sup> inmates grew by 43.2 percent.<sup>183</sup> They further concluded that substance use disorders<sup>184</sup> among American inmates was rampant, and at "epidemic" levels.<sup>185</sup> Almost two-thirds (65 percent) of the total inmate population in the United States in 2006 met the \*300 medical criteria for a substance use disorder.<sup>186</sup> Prisoners and jail inmates were over seven times more likely than the general population to have a substance use disorder.<sup>187</sup> These already high percentages increase even further when taking account of the total number of people under correctional control, including those on community supervision, with drug abuse problems.<sup>188</sup> In 2011, between 60 and 80 percent of the total population under the supervision of the criminal justice system had been charged with a drug crime, committed a crime to support a drug habit, or abused drugs or alcohol regularly.<sup>189</sup>

Given that most of this country's federal and state prison inmates are not there for drug possession alone,<sup>190</sup> in order to truly curb this country's exorbitant incarceration rates, the policy considerations that favor a public health approach to drug use and possession, must also be employed to mitigate incarceration rates and lengths for substance addicted and involved offenders responsible for non-possession offenses. Namely, policymakers, probation and pretrial services officers, legislatures, and courts must institute change at every phase of the life of a criminal case, recognizing the role that addiction should play in our justice system. The above discussion on drug use and theories of punishment informs that: (1) a defendant's addiction, alone, does not make her less suitable than someone without an addiction for bail; (2) addiction mitigates, rather than aggravates, a defendant's sentence; and (3) zero-tolerance and abstinence-only drug policies in connection with probation, parole, and supervised release sentences are counterintuitive, counterproductive, and contribute significantly to mass incarceration.

#### *A. Bail*

At the pre-trial stage, drug addiction can hurt an arrestee's chances of being released on bail. The pretrial detention population is a major driver of mass incarceration in the United States.<sup>191</sup> Even if drug use and possession is \*301 decriminalized, for people who use drugs and are involved in other criminal activity and are swept into the justice system as a result, their drug use and/or addiction is often considered a risk factor militating against release by the magistrate judge presiding over the detention hearing.

In federal court, the Bail Reform Act (BRA), governs the pretrial release or detention of criminal defendants.<sup>192</sup> In making the determination of whether to release a defendant before trial, and on what conditions, courts must determine whether the defendant poses a serious flight risk or a danger to the community.<sup>193</sup> In making the dangerousness assessment, courts are to consider the risk that the defendant will engage in new criminal activity while on bail, including nonviolent criminal activity.<sup>194</sup> Courts are instructed to release the defendant on the least restrictive conditions or combination of conditions that will reasonably assure the appearance of the person and the safety of the community.<sup>195</sup> The BRA further lists factors with a supposed bearing on the defendant's risk of flight and danger, and includes a history of drug or alcohol abuse as one such factor.<sup>196</sup>

Increasingly, both federal and state courts are turning to risk assessment tools, which are computerized mathematical algorithms, to assist in making these flight and safety risk determinations with objective data.<sup>197</sup> The federal risk assessment tool, Pretrial Risk Assessment (PTRA), explicitly considers substance abuse problems as a potential reason to detain pending trial based on the premise that drug and alcohol abuse facilitates or instigates criminal behavior and increases the risk of pretrial failure.<sup>198</sup> However, the research discussed in section III, *supra*, shows this assumption is based on the false premise that drug use leads to criminality, rather than the more likely reality that there is a correlation between the two because individuals more likely to

engage in criminal conduct are also more likely to use drugs. State courts utilize a variety of risk assessment <sup>199</sup> tools, but one that is growing in popularity, the Arnold Foundation's Public Safety Assessment (PSA), <sup>200</sup> has stopped using a history of drug abuse as a risk factor, having apparently determined that substance abuse alone does not make an arrestee more likely to engage in new criminal activity or fail to appear for subsequent court hearings. This is encouraging and courts that still rely on substance use as a proxy for dangerousness and/or risk of flight, should follow suit. Reforming pretrial risk assessments, and in particular, taking consideration of substance abuse out of the equation, is of vital importance given the number of substance-involved criminal defendants and the varied deleterious and enduring consequences of pretrial detention on the detainee's court case and life. <sup>201</sup>

### ***B. Sentencing***

The most important stage at which courts have the opportunity to impact incarceration rates is the sentencing stage, given the high percentages of federal and state inmates suffering from a substance use disorder, and the evidence, discussed in Section III.C., above, that community-based treatment, and in particular, MAT, is far more effective than custodial treatment. Courts have the opportunity to treat addiction as a mitigating factor at sentencing, but often do not. In federal court, before the federal sentencing guidelines were deemed advisory, courts were bound by the policy statements contained therein. <sup>202</sup> One policy statement advises courts that drug or alcohol dependence or abuse “ordinarily is not a reason for a downward departure” because substance abuse “is highly correlated to an increased propensity to commit crime.” <sup>203</sup> Another policy statement provides for a downward departure if the defendant committed the offense while suffering from a significantly reduced mental capacity, but <sup>203</sup> warns, the court should not depart if the diminished capacity “was caused by the voluntary use of drugs or other intoxicants.” <sup>204</sup>

Following the Supreme Court's decision in *United States v. Booker*, rendering the Federal Sentencing Guidelines advisory rather than mandatory, <sup>205</sup> federal courts are free to reject these policy statements and reduce a defendant's sentence according to [18 U.S.C. § 3553\(a\)](#) for a variety of reasons, including the history and characteristics of the defendant, which could include a history of drug addiction. <sup>206</sup> In a 2010 survey of federal judges conducted by the United States Sentencing Commission, 49 percent of judges said that drug dependence should ordinarily be considered a mitigating factor at sentencing. <sup>207</sup> Scholars have found, however, that sentencing practices contradict this survey data. <sup>208</sup>

Drug dependence and substance abuse is not regularly cited as a reason for a reduced sentence. In 2014, sentences were handed down in 75,836 federal cases. Drug dependence or alcohol abuse was cited as a reason to impose a sentence below the guideline range under [§ 3553\(a\)](#) in only 423 cases. In addition to this, there were twenty-seven straight departures. Thus, substance abuse impacts penalty in less than 1% of cases. <sup>209</sup>

More recent data from the Sentencing Commission covering fiscal year 2019 shows that federal courts were slightly more inclined to reduce a defendant's sentence based on drug dependence or alcohol abuse in 2019 than they were in 2014. <sup>210</sup> Data was gathered on 76,538 federal cases that year, and courts varied <sup>204</sup> downward under [§ 3553\(a\)](#) for drug dependence or alcohol abuse in 2,531 cases, or 2.7 percent of the time. <sup>211</sup> Courts granted downward departures under §5H1.4 for drug dependence or alcohol abuse in 875 cases, or 1.9 percent of cases. <sup>212</sup> In 2020, data was gathered on 64,565 federal cases; <sup>213</sup> the percentages from 2019 remain largely unchanged. <sup>214</sup> Still, these numbers are woefully low, and federal courts also enhance sentences for substance use, <sup>215</sup> likely resulting from the common misperception that drug use causes crime and violence, as the Sentencing Commission warns.

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Drug addicted offenders in state court often fare no better. In recent years, several state courts seem to be trending away from treating substance abuse as a mitigating factor at sentencing.<sup>216</sup> For instance, in Florida, cases from the 1980s stated that drug addiction may be a reason to grant a sentencing reduction, but in 1997, Florida's rules of criminal procedure were amended to provide that substance abuse and addiction are no longer mitigating factors warranting a downward departure at sentencing.<sup>217</sup> Yet, Florida courts are permitted to consider drug dependence as an aggravating factor.<sup>218</sup> Other examples of states<sup>219</sup> that specifically disallow drug use or addiction to mitigate a defendant's \*305 sentence include Tennessee,<sup>220</sup> Washington,<sup>221</sup> New Jersey,<sup>222</sup> and Alaska.<sup>223</sup> Likewise, in Ohio, a demonstrated pattern of drug or alcohol abuse that is related to the criminal offense may be considered an aggravating factor at sentencing because it is viewed as an indicator that the defendant will recidivate.<sup>224</sup> These federal and state court policy statements, sentencing statutes, and judicial practices reflect a myopic view of addiction that is not grounded in science or public health. They appear to rely on the same faulty link between drug use and crime relied upon by the federal Sentencing Commission, and to reject the brain disease model of addiction despite a wealth of information that now suggests that in most cases addiction reduces the offender's level of culpability. They also fail to appreciate the unique rehabilitative needs of this population of offenders.

### C. Post-Conviction

As of 2018, approximately one in 58 adults, or 4,399,000 people, were under community supervision in the United States.<sup>225</sup> Rates of substance use disorder are two to three times higher among this population than in the general population.<sup>226</sup> Not surprisingly, violations of probation, parole, and supervised release<sup>227</sup> are a major driver of mass incarceration.<sup>228</sup> Many individuals addicted to drugs involved with the criminal justice system end up behind bars for technical violations of supervision resulting from continued drug use while on \*306 supervision.<sup>229</sup> This is because some courts employ abstinence only and zero-tolerance policies with respect to drug use for supervision releasees who have a history of drug use and/or addiction.<sup>230</sup> In these courtrooms, even one positive drug test can result in the supervisee's release being revoked, and their immediate incarceration for days, weeks, months, or even years for what amounts to a symptom of their chronic condition.<sup>231</sup> These "war on drugs"-type policies are contraindicated by the medical and public health community's collective understanding of addiction as a chronic, relapsing, brain condition and result in the incarceration and ensuing disruption of treatment of countless nonviolent, drug-addicted individuals.<sup>232</sup> As a result, some reform-minded advocates recommend reducing the use of supervision sentences, and where supervision \*307 terms are imposed, shortening their length, reducing the number of conditions imposed, and limiting the use of incarceration sanctions for technical violations.<sup>233</sup> These and other reforms are critical to controlling overall incarceration rates in the United States, including for offenders with substance abuse problems. Moreover, as with the punitive treatment of offenders with substance use disorder at the bail and sentencing stages, the purposes of punishment do not support the incarceration of non-violent drug users who relapse while on supervision.

## IV. CONCLUSION

At the moment, America faces two complex and multilayered crises: the opioid epidemic, which claimed the lives of over 70 percent of the 70,630 drug-related deaths in 2019,<sup>234</sup> and mass incarceration. Because of the United States' punitive "drug war" laws and policies, they each feed and help to sustain the other. We incarcerate people with drug addiction purportedly for their own well-being and for the betterment of society, and, in turn, this incarceration often exacerbates addiction issues through, *inter alia*, the disruption of community supports, including drug treatment. What results is a dizzying and deleterious feedback loop where neither problem is the least bit remedied. As shown herein, rational drug policy requires recognition that addiction is a chronic, relapsing brain disease and that it be treated as such.

Reforming the United States' drug laws and policies, as well as the ways in which addiction informs bail, sentencing, and post-conviction supervision decisions is critical to curbing this country's exorbitant incarceration rates and improving the health outcomes of people suffering from SUD. Key reforms, like informal and formal prosecutorial and law enforcement policies not to arrest certain active drug users are already taking place in some jurisdictions, and they provide a good first step. However, the additional initiatives identified and outlined herein, beginning with widescale drug decriminalization at the state and federal

level, must be seriously considered to tackle the opioid and mass incarceration epidemics. Innovations such as drug courts, while well-meaning, are not the answer because they remain firmly rooted within the criminal justice system and can have the perverse effect of exacerbating addiction issues and mass incarceration--another cog in the wheel of harm. Instead, removing criminal penalties for the symptoms of the illness of addiction, and employing variegated decarceration reform efforts at every stage of a criminal case where \*308 addiction is at play, will better serve the communities affected, resulting in a net positive impact on incarceration and drug overdose rates, as well as public safety.

### Footnotes

- a1 Leslie E. Scott is an Assistant Professor of Law at University of Detroit Mercy School of Law. Prior to joining Detroit Mercy Law, Professor Scott was an Assistant Federal Public Defender in the Western District of New York. The author would like to thank the faculty, staff, and students of Northern Kentucky University (NKU) Chase College of Law for hosting this symposium. She is especially thankful to the student editors of the NKU Law Review for their superb editing assistance. In addition, the author would like to thank her two research assistants, Liam Marin and Bahaar Chaudhry, students at Detroit Mercy Law, for their dedicated hard work; their research assistance proved invaluable.
- 1 See Leslie E. Scott, *Federal Prosecutorial Overreach in the Age of Opioids: The Statutory and Constitutional Case Against Duplicious Drug Indictment*, 51 U. TOL. L. REV. 491, 521 (2020) (citing *Highest to Lowest-- Prison Population Total*, WORLD PRISON BRIEF, [https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field\\_region\\_taxonomy\\_tid=All](https://www.prisonstudies.org/highest-to-lowest/prison-population-total?field_region_taxonomy_tid=All) (last visited Feb. 26, 2020)).
- 2 See JACOB KANG-BROWN, CHASE MONTAGNET & JASMINE HEISS, VERA INST. OF JUST., PEOPLE IN JAIL AND PRISON IN 2020 1 (2021), <https://www.vera.org/downloads/publications/people-in-jail-and-prison-in-2020.pdf>.
- 3 See *id.*
- 4 Conor Friedersdorf, *The War on Drugs Turns 40*, THE ATLANTIC, June 15, 2011, <https://www.theatlantic.com/politics/archive/2011/06/the-war-on-drugs-turns-40/240472/>; see also JIM PARSONS & SCARLET NEATH, VERA INST. OF JUST., MINIMIZING HARM: PUBLIC HEALTH AND JUSTICE SYSTEM RESPONSES TO DRUG USE AND THE OPIOID CRISIS 2 (2017), <https://www.vera.org/downloads/publications/Minimizing-Harm-Evidence-Brief.pdf> (“The number of Americans incarcerated for drug offenses has grown at a faster pace than has the total number of incarcerated Americans, increasing more than tenfold in 25 years, from 40,900 people in 1980 to 469,545 in 2015.”); Shima Baradaran, *Drugs and Violence*, 88 S. CAL. L. REV. 227, 295-97 (2015) (“The war on drugs more than doubled America's prison population between 1981 and 1990, from 344,283 to 755,425 inmates. Between 1980 and the mid-1990s, the percentage of drug offenders who made up the state prison population increased from 6 percent to nearly 25 percent, and from 25 percent to 60 percent of the overall federal inmate population. While the number of arrests for all crimes rose by 45 percent in the 1980s and 1990s, the number of arrests for drug offenses rose a staggering 160 percent. The arrest rate for sale or manufacture of drugs specifically rose even more between 1980 and 1989, increasing 210 percent. Arrests for use or possession alone increased 89 percent between 1980 and 1989. Indeed, drug convictions account for much of the rise in incarceration rates.”).
- 5 See Baradaran, *supra* note 4, at 249 (citations omitted) (“During President Reagan's tenure in office, two major anti-drug laws were passed: the Anti-Drug Abuse Act of 1986 and the Anti-Drug Abuse Act of 1988. The 1986 bill continued with the precedent established by prior bills of mandating minimum sentences.”); Aila Hoss, *Decriminalization as Substance Use Disorder Prevention*, 51 U. TOL. L. REV. 477, 483 (2020) (“The 1980s and 1990s saw reforms through the use of increased penalties for drug-related crimes, leading to the dramatic increase of incarceration for nonviolent drug offenses.” (citing *A Brief History of the Drug War*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/issues/brief-history-drug-war> (last visited Feb. 25, 2020))).
- 6 See Scott, *supra* note 1, at 521-23; Hoss, *supra* note 5, at 483 (“Statistics show that between 1980 and 1997 [drug-related] incarcerations increased from 50,000 to 400,000. The Comprehensive Crime Control Act of 1984, federal sentencing

guidelines, and increased penalties across state criminal codes all contributed to this increase. Like its predecessors, these criminal laws are disproportionately enforced against black and brown people, especially men.”); Baradaran, *supra* note 4, at 294-300 (describing the increase in minority incarceration rates due to disproportionate drug crime sentencing); NILA NATARAJAN ET AL., JUST. POL’Y INST., SUBSTANCE ABUSE TREATMENT AND PUBLIC SAFETY 1 (2008), [http://www.justicepolicy.org/images/upload/08\\_01\\_rep\\_drugtx\\_ac-ps.pdf](http://www.justicepolicy.org/images/upload/08_01_rep_drugtx_ac-ps.pdf) (“With an estimated 6.8 million Americans struggling with drug abuse or dependence, the growth of the prison population continues to be driven largely by incarceration for drug offenses.”); *Vera Institute of Justice: About Us*, VERA INST. OF JUST., <https://www.vera.org/about> (last visited April 30, 2021) (people of color make up 30 percent of the U.S. population, but 60 percent of the U.S. prison population).

7 ANN CARSON, BUREAU OF JUST. STATS., U.S. DEP’T OF JUST., PRISONERS IN 2019 21 tbl. 14 (2020), <https://www.bjs.gov/content/pub/pdf/p19.pdf>.

8 *Id.*

9 *Id.* at 22 tbl. 15.

10 *Id.*

11 *Id.* at 22.

12 The fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-V) describes substance use disorder (SUD) as the “recurrent use of alcohol or other drugs that causes clinically and functionally significant impairment, such as health problems, disability, and failure to meet major responsibilities at work, school, or home.” Nora D. Volkow, George F. Koob, & A. Thomas McLellan, *Neurobiologic Advances from the Brain Disease Model of Addiction*, 374 NEW ENG. J. MED. 363, 364 (2016). SUD is further classified as either mild, moderate, or severe. *Id.* Some experts define addiction as synonymous with the DSM-V’s classification for the most severe form of substance-use disorder, involving “a substantial loss of self-control, as indicated by compulsive drug taking despite the desire to stop taking the drug.” *Id.* However, in this article, I use the terms “addiction” and “SUD” interchangeably, as do other experts. *See* Brief for the Probationer On a Reported Question and On Appeal from a Finding of Probation Violation from the Concord Division of the District Court Dep’t at 4, n. 5, *Commonwealth v. Eldred*, 101 N.E.3d 911 (Mass. 2018) (No. SJC-12279) [hereinafter Brief for Probationer Eldred].

13 *See infra* Section III for statistics related to drug addiction and use among state and federal inmates in the United States.

14 TESS BORDEN & ARYEH NEIER, HUMAN RIGHTS WATCH & ACLU, EVERY 25 SECONDS: THE HUMAN TOLL OF CRIMINALIZING DRUG USE IN THE UNITED STATES (2016), [https://www.hrw.org/sites/default/files/report\\_pdf/usdrug1016\\_web\\_0.pdf](https://www.hrw.org/sites/default/files/report_pdf/usdrug1016_web_0.pdf).

15 *Id.* at 2.

16 *See*  *Robinson v. California*, 370 U.S. 660 (1962).

17  *Id.* at 666 (citing  *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947)).

18  *Id.* at 664.

19 *Id.* at 664, 665 (quoting *Minnesota ex rel. Whipple v. Martinson*, 256 U.S. 41 (1921)).

20 *Id.* at 666.

21 *See id.* at 666-67;  *Powell v. Texas*, 392 U.S. 514, 533 (1968) (“The entire thrust of Robinson’s interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common

law terms, has committed some actus reus.”); cf.  [Martin v. State](#), 17 So.2d 427 (Ala. Ct. App. 1944) (reversing public drunkenness conviction where appellant was forcibly removed from his home by police and taken onto a public highway in an inebriated state because the statute required a voluntary appearance in public).

22 See Lynne M. Brennan, *Drug Courts: A New Beginning for Non-Violent Drug Addicted Offenders--An End to Cruel and Unusual Punishment*, 22 HAMLIN L. REV. 355, 355-56 (1998) (“While the Supreme Court has recognized that punishing the status of being a drug addict is a notation of the Eighth Amendment, actions such as acquisition, possession, and use of drugs, which are inherently related to the status of being a drug addict, continually result in sentences of imprisonment. The acts of purchasing, possessing, and using fall directly within the ‘status’ of addiction over which the drug addict has no control.” (citing  [Robinson](#), 370 U.S. at 672)). *But see infra* Section II.D. (highlighting counterpoints to the “lack of free will” argument in the context of drug addiction).

23 See, e.g.,  [United States v. Moore](#), 486 F.2d 1139, 1237 (D.C. Cir. 1973) (Wright, C.J., dissenting) (“[T]he [*Robinson*] opinion might ... be interpreted as holding that narcotics addiction, like mental illness, leprosy and venereal disease, is an illness and as such cannot constitutionally be punished as crime. The implications of this interpretation are far-reaching, for if punishment for having a common cold (to use the Court's example) is constitutionally prohibited, it would make little sense to permit a legislature to punish one who has a cold for sneezing or taking medicine. Similarly, this interpretation would seem logically to prohibit not only the criminalization of the status of ‘being addicted,’ but also punishment of an addict for those acts, such as possession or use of narcotics, which are symptomatic of the disease and therefore beyond his power to avoid.” (citing  [Driver v. Hinnant](#), 356 F.2d 761 (4th Cir. 1966); [Morales v. United States](#), 344 F.2d 846 (9th Cir. 1965))).

24 See, e.g., Andrew Ashworth, *The Unfairness of Risk-Based Possession Offences*, 5 J. CRIM. L. & PHIL. 237, 242 (2011) (“I conclude that the effort to bring offences of possession within the act requirement involves considerable stretching. It is much more natural to state that such offences penalize a state of affairs rather than an act.”); Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & PHIL. 829, 859-60 (2001) (“Possession ... also does away with the traditional requirement that criminal liability must be predicated on an actus reus, an affirmative act or at least a failure to act (rather than a status, like being in possession of something).”).

25 Decriminalization is the elimination of criminal penalties for drug use and possession. DRUG POL’Y ALL., IT’S TIME FOR THE U.S. TO DECRIMINALIZE DRUG USE AND POSSESSION 4 (2017), [https://drugpolicy.org/sites/default/files/documents/Drug\\_Policy\\_Alliance\\_Time\\_to\\_Decriminalize\\_Report\\_July\\_2017.pdf](https://drugpolicy.org/sites/default/files/documents/Drug_Policy_Alliance_Time_to_Decriminalize_Report_July_2017.pdf) [Hereinafter DRUG POL’Y ALL., TIME TO DECRIMINALIZE]. When an offense is decriminalized, it is still prohibited conduct, but is reclassified from a criminal offense to a non-criminal, or administrative, offense, such as a parking ticket. Legalization, on the other hand, refers to shifting conduct from prohibited to permitted. *Video: What is decriminalization of drugs?*, EUROPEAN MONITORING CENTER FOR DRUGS AND DRUG ADDICTION (April 6, 2015), <https://www.emcdda.europa.eu/video/2015/what-is-decriminalisation-of-drugs>. When a substance is legalized, not only are criminal penalties removed for its possession and use, but the government regulates the legal production and sale of the substance to adults without a prescription. DRUG POL’Y ALL., TIME TO DECRIMINALIZE, *supra* note 25, at 4. In this article, I explore the policy reasons supporting decriminalization of drug use and possession, and do not examine legalization.

26 See, e.g., Naina Bajekal, *Want to Win the War on Drugs? Portugal Might Have the Answer*, TIME (Aug. 1, 2018), <https://time.com/longform/portugal-drug-use-decriminalization/>; DRUG POL’Y ALL., TIME TO DECRIMINALIZE *supra* note 25, at 22.

27 See  18 U.S.C. § 3553(a) (2018).

28 Compare *id.* (requiring a court to impose sentences considering the defendant's personal circumstances and the purposes of punishment) with OHIO REV. CODE ANN. § 2929.11 (Baldwin 2018) and N.C. GEN. STAT. ANN. § 15A-1340.12 (West 1994) (providing that a court shall consider numerous factors in determining a criminal defendant's culpability).

- 29 See JENS DAVID OHLIN, *CRIMINAL LAW: DOCTRINE, APPLICATION, AND PRACTICE* 25 (2d ed. 2018) (describing utilitarianism as “forward-looking” because they “justify punishment” as a “positive consequence[] to society ...”).
- 30 See Mark A. Michael, *Utilitarianism and Retributivism: What's the Difference?*, 29 AM. PHIL. Q. 173, 174 (1992); JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 14 (6TH ED. 2012); BRIAN DUIGAN & HENRY R. WEST, ENCY. BRITANNICA, *UTILITARIANISM* (2001), <https://www.britannica.com/topic/utilitarianism-philosophy>.
- 31 JAMES E. CRIMMINS, *STANFORD ENCYCLOPEDIA OF PHILOSOPHY, JEREMY BENTHAM* (2019), <https://plato.stanford.edu/entries/bentham/>; see also DRESSLER, *supra* note 30, at 14.
- 32 DRESSLER, *supra* note 30 at 14.
- 33 Robert Blecker, *Haven of Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 STAN. L. REV. 1149, 1150 (1990).
- 34 DRESSLER, *supra* note 30, at 15.
- 35  18 U.S.C. § 3553(a)(2)(D) (2018).
- 36 OHLIN, *supra* note 29, at 25.
- 37 Michael, *supra* note 30, at 174.
- 38 See Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1315-16 (2000) (citing H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 234-35 (1967)) (describing retribution as punishment “as ends rather than means” and “imposing merited harm upon the criminal for his wrong”).
- 39 Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011 (1991) (citing MICHAEL WALZER, *EXODUS AND REVOLUTION* 83 (1985)).
- 40 See Scott, *supra* note 1, at 521-23 (describing the disproportionate impact of drug crime policing on Communities of Color).
- 41 Brennan, *supra* note 22, at 356.
- 42 See NAT'L INST. ON DRUG ABUSE, *NAT'L INSTS. OF HEALTH, DRUGS, BRAINS, AND BEHAVIOR: THE SCIENCE OF ADDICTION* 6 (2020), <https://www.drugabuse.gov/sites/default/files/soa.pdf> [hereinafter NAT'L INST. ON DRUG ABUSE, *SCIENCE OF ADDICTION*].
- 43 See Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L. J. 949, 953 (2003) (describing the three “hurdles” to crime's deterrent value as knowledge of the rule, perception of the rule violation's costs and benefits, and ability and willingness to rationally assess those perceived costs and benefits).
- 44 NAT'L INST. ON DRUG ABUSE, *SCIENCE OF ADDICTION*, *supra* note 42 at 6.
- 45 *Id.* at 20.
- 46 Rick Nauert, *How Drugs Hijack Decision-Making in the Brain*, PSYCHCENTRAL (Nov. 27, 2012), <https://psychcentral.com/news/2012/11/27/how-drugs-hijack-decision-making-in-the-brain#1>.
- 47 *Id.*

- 48 David M. Eagleman, Mark A. Corroero & Jyotpal Singh, *Why Neuroscience Matters for Rational Drug Policy*, 11 MINN. J. L. SCI. & TECH. 7, 8 (2010); see also NAT'L INST. ON DRUG ABUSE, NAT'L INSTS. OF HEALTH, UNDERSTANDING DRUG USE AND ADDICTION 2 (2018), <https://www.drugabuse.gov/sites/default/files/drugfacts-understanding-drug.pdf> [Hereinafter NAT'L INST. ON DRUG ABUSE, UNDERSTANDING DRUG USE].
- 49 Linda C. Fentiman, *Rethinking Addiction: Drugs, Deterrence, and the Neuroscience Revolution*, 14 U. PA. J. L. & SOC. CHANGE 233, 266 (2011) (citations omitted); cf. Robinson & Darley, *supra* note 36, at 955 (“[T]here is a host of conditions that interfere with the rational calculation of self-interest by potential offenders [including drug or alcohol use].”)
- 50 Fentiman, *supra* note 49, at 263.
- 51 *Id.*
- 52 *Id.*
- 53 *Id.* at 264
- 54 See VERA INSTITUTE OF JUSTICE, *supra* note 6 (“Vera works in partnership with local, state, and national government officials to create change from within.”).
- 55 PARSONS & NEATH, *supra* note 4, at 3 (citing JEREMY TRAVIS, ET AL., eds., THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 153-54 (Washington DC: The National Academies Press, 2014)); see also David C. Leven, *Our Drug Laws Have Failed--So Where is the Desperately Needed Meaningful Reform?*, 28 FORDHAM URB. L. J. 293, 295-96 (2000) (analyzing the impact of New York's draconian Rockefeller Drug Laws, which imposed harsh mandatory minimum sentences for the possession and sale of even small amounts of narcotics, on rates of illicit drugs sales and use and concluding that those laws did not deter drug addicts and abusers from drug use, which remained “undiminished” during in New York during the relevant time period).
- 56 PARSONS & NEATH, *supra* note 4, at 4 (citing Cassia Spohn and David Holleran, *The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders*, 40 CRIMINOLOGY 213, 330, 345-46 (2002)).
- 57 David I. Shapiro, Note, *Sentencing the Reformed Addict: Departure Under the Federal Sentencing Guidelines*, 91 COLUM. L. REV. 2051, 2072 (1991) (citing William J. Chambliss, *Types of Deviance and the Effectiveness of Legal Sanctions*, 1967 WIS. L. REV. 703-19 (1967)).
- 58 ALEX KREIT, AM. CONST. SOC'Y, TOWARD A PUBLIC HEALTH APPROACH TO DRUG POLICY 3 (2009), <https://www.acslaw.org/wp-content/uploads/2018/06/Kreit-Issue-Brief.pdf>.
- 59 See Louisa Degenhardt et al., *Toward a Global View of Alcohol, Tobacco, Cannabis, and Cocaine Use: Findings from the WHO World Mental Health Surveys*, 5 PLOS MEDICINE 1053 (2008), <https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.0050141> [hereinafter “WHO Survey”].
- 60 *Id.* at 1057 tbl. 2.
- 61 *Id.*
- 62 *Id.* at 1062.
- 63 PARSONS & NEATH, *supra* note 4, at 5. (citing Alison Ritter & Jacqui Cameron, *A Review of the Efficacy and Effectiveness of Harm Reduction Strategies for Alcohol, Tobacco, and Illicit Drugs*, DRUG AND ALCOHOL REVIEW 25, No. 6 (2006) (Harm reduction is “a public health philosophy that focuses on addressing the negative impacts of drug use” with “an emphasis on promoting personal and community health and safety, without an insistence on abstinence.”)

- 64 MICHELE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 236-37 (2012); *see also* Anne R. Traum, *Mass Incarceration at Sentencing*, 64 *HASTINGS L. J.* 423, 434-35 (2013) (observing that increased incarceration rates in disadvantaged urban communities leave those communities less safe due to disruptions of social order and destabilization of community life).
- 65 Robert Blecker, *Haven or Hell? Inside Lorton Central Prison: Experiences of Punishment Justified*, 42 *STAN. L. REV.* 1149, 1154 (1990).
- 66 *Id.* at 1195; *see also* Matthew D. Moyer, Note, *Free Will's Enormous Cost: Why Retribution, Grounded in Free Will, is an Invalid and Impractical Penal Goal*, 92 *NOTRE DAME L. REV.* 2231, 2256 (2017) (“Despite the fact that the United States incarcerates a majority of nonviolent criminals, violence runs rampant in our jails and prisons, which may suggest that violent tendencies are created in otherwise nonviolent offenders during incarceration.”)
- 67 Baradaran, *supra* note 4, at 238-42 (discussing the racialized historical development of the public's perception of drug use being linked to violent crime, including politicians' reliance on racial stereotypes linking drugs to people of color and people of color to crime); *see also* Fedders, *supra* note 93, at 398-401 (describing ways in which American policymakers have relied upon a variety of racialized tropes to draft current drug laws); *cf.* Francis Fisher Kane, *Drugs and Crime: Report of Committee “G” of the Institute*, 8 *J. CRIM. L. & CRIMINOLOGY* 502, 502-03 (1917) (“Cocaine parties among the negroes mean knife slashings and assaults.”).
- 68 *See generally* Paul J. Goldstein, *The Drugs/Violence Nexus: A Tripartite Conceptual Framework*, 15 *J. DRUG ISSUES* 493 (1985).
- 69 Baradaran, *supra* note 4, at 277.
- 70 *Id.*
- 71 *See* Deborah W. Denno, *When Bad Things Happen to Good Intentions: The Development and Demise of a Task Force Examining the Drugs-Violence Interrelationship*, 63 *ALB. L. REV.* 749 (2000) (discussing the United States Sentencing Commission's Task Force on the interrelationship between drugs and violence).
- 72 *Id.* at 751, 753-54, 755-56.
- 73 *Id.* at 755.
- 74 *Id.* at 756.
- 75 *See id.*
- 76 *See* Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 *TEX. L. REV.* 497, 500, 524, 528, 558 (2012).
- 77 *Id.* at 561 tbl. 3.
- 78 *See* Baradaran, *supra* note 4, at 271-73, 278.
- 79 *Id.* at 271-72.
- 80  *United States v. Moore*, 486 F.2d 1139, 1227-28 (D.C. Cir. 1973) (Wright, C.J., dissenting) (citations and quotation marks omitted). The *Moore* dissenters did, however, draw a distinction between depressants, such as opiates, and stimulants, like cocaine, which do not have the same calm-inducing effects.
- 81 *See* Baradaran, *supra* note 4, at 288-89.
- 82 *Id.* at 289.

- 83 *Id.* at 290 (“A comprehensive review of over fifteen studies demonstrates that increasing drug law enforcement actually does not reduce drug market violence; however, gun violence and high homicide rates may be an inevitable result of the illegal drug market, and disrupting drug markets can actually increase violence levels.”).
- 84 *Id.*; see also Bruce L. Benson, Ian Sebastian Leburn & David W. Rasmussen, *The Impact of Drug Enforcement on Crime: An Investigation of the Opportunity Cost of Police Resources*, 31 J. DRUG ISSUES 989, 989 (2001) (“Drug enforcement can disrupt drug markets, leading to an increase in violent crime as drug dealers fight over turf and market share.”).
- 85 Bruce Benson, et al., *Is Property Crime Caused by Drug Use or by Drug Enforcement Policy?*, 24 J. APPLIED ECON. 679, 680 (2001).
- 86 Benson, Leburn & Rasmussen, *supra* note 84, at 990, 1002; see also DRUG POL’Y ALL., *supra* note 25, at 15.
- 87 See, e.g., DRUG ENF’T AGENCY, U.S. DEP’T OF JUST., SPEAKING OUT AGAINST DRUG LEGALIZATION 50 (2010), <https://northstarbehavioral.com/wp-content/uploads/2015/06/DEASpeakingOutAgainstDrugLegalization201>.
- 88 *Id.* at 51 (citing BUREAU OF JUST. STATS., U.S. DEP’T OF JUST., DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS 2004 (2007)).
- 89 See Benson et al., *supra* note 85, at 680; NAT’L INST. ON DRUG ABUSE, U.S. DEP’T OF JUST., PRINCIPLES OF DRUG ABUSE TREATMENT FOR CRIMINAL JUSTICE POPULATIONS 12 (2014), [https://www.drugabuse.gov/sites/default/files/txcriminaljustice\\_0.pdf](https://www.drugabuse.gov/sites/default/files/txcriminaljustice_0.pdf) (“Drug abuse is implicated in at least three types of drug-related offenses: (1) offenses defined by drug possession or sales, (2) offenses directly related to drug abuse (e.g., stealing to get money for drugs), and (3) offenses related to a lifestyle that predisposes a drug abuser to engage in criminal activity, for example, though association with other offenders or with illicit markers.”).
- 90 Benson et al., *supra* note 85, at 681.
- 91 See Timothy Edwards, *The Theory and Practice of Compulsory Drug Treatment in the Criminal Justice System: The Wisconsin Experiment*, 2000 WIS. L. REV. 284, 304 (2000).
- 92 *Id.* at 305.
- 93 *Id.* at 305-06; see also Barbara Fedders, *Opioid Policing*, 94 IND. L. J. 389, 416 (2019) (“[I]nasmuch as there is a connection between drug use and crime, it is difficult to discount the many negative social and economic factors--homelessness and unemployment, for example--that frequently accompany addiction and that may equally explain criminal activity.”); Benson et al., *supra* note 85, at 681 (“[G]iven some individuals' risk perceptions, degree of myopia, and opportunity costs, drug use may be a gross complement to other crimes .... However, it does not follow that substance abuse induces criminal behavior.”).
- 94 See, e.g., DRUG ENF’T AGENCY, *supra* note 87, at 46 (“It’s clear from history that periods of lax controls are accompanied by more drug abuse, and that periods of tight controls are accompanied by less drug abuse.”).
- 95 DRUG POL’Y ALL., TIME TO DECRIMINALIZE, *supra* note 25, at 14.
- 96 DRUG POL’Y ALL., DRUG DECRIMINALIZATION IN PORTUGAL: A HEALTH-CENTERED APPROACH 1 (2015), [https://drugpolicy.org/sites/default/files/DPA\\_Fact\\_Sheet\\_Portugal\\_Decriminalization\\_Feb2015.pdf](https://drugpolicy.org/sites/default/files/DPA_Fact_Sheet_Portugal_Decriminalization_Feb2015.pdf).
- 97 *Id.*
- 98 See WHO Survey, *supra* note 59.
- 99  18 U.S.C. § 3553(a)(2)(D) (2018).
- 100 *Id.* § 3582(a); see also  *Tapia v. United States*, 564 U.S. 319, 326 (2011).

- 101  *Tapia*, 564 U.S. at 323-25.
- 102 S. REP. NO. 98-225, at 40 (1983), reprinted in 1994 U.S.C.C.A.N. 3182, 3223.
- 103  28 U.S.C. § 994(k) (2006).
- 104 Sana Loue, *The Criminalization of the Addictions: Toward a Unified Approach*, 24 J. LEGAL MED. 281, 317 (2003).
- 105 MARC MAUER & RYAN KING, A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 15 (2007), <https://www.sentencingproject.org/publications/a-25-year-quagmire-the-war-on-drugs-and-its-impact-on-american-society/>.
- 106 *Id.*
- 107 See Beth Schwartzapfel, *A Better Way to Treat Addiction in Jail*, THE MARSHALL PROJECT (Mar. 1, 2017), <https://www.themarshallproject.org/2017/03/01/a-better-way-to-treat-addiction-in-jail>; Leo Beletsky et al., *Fatal Re-entry: Legal and Programmatic Opportunities to Curb Opioid Overdose Among Individuals Newly Released from Incarceration*, 7 NE. U. L. J. 149, 161-62 (2015) (“Providing MAT during incarceration and connecting patients to appropriate treatment immediately following release significantly reduces substance use relapse and overdose deaths among re-entering individuals. One illustrative study following people who were incarcerated and participated in prison-based methadone treatment found that post-release, seventeen individuals among those who did not maintain MAT participation died from overdose during the four-year follow-up period; in contrast, none of those who maintained their MAT enrollment experienced a fatal overdose death.” (citing Kate A. Dolan et al., *Four-Year Follow-Up of Imprisoned Male Heroin Users and Methadone Treatment: Mortality, Reincarceration, and Hepatitis C Infection*, 100(6) ADDICTION 820, 820-28 (2005)).
- 108 SUBST. ABUSE AND MENTAL HEALTH SERVS. ADMIN., U.S. DEPT OF HEALTH & HUMAN SERVS., MEDICATION ASSISTED TREATMENT (MAT), <https://www.samhsa.gov/medication-assisted-treatment> (last visited May 1, 2021).
- 109 *Id.*
- 110 NAT'L INST. ON DRUG ABUSE, NAT'L INSTS. OF HEALTH, *Home*, <https://www.drugabuse.gov/> (last visited May 1, 2021).
- 111 NAT'L INST. ON DRUG ABUSE, NAT'L INSTS. OF HEALTH, EFFECTIVE TREATMENT FOR OPIOID ADDICTION 1 (2016), <https://www.drugabuse.gov/sites/default/files/policybrief-effectivetreatments.pdf>.
- 112 Beletsky et al., *supra* note 107, at 162.
- 113 *Id.*
- 114 *Mission Statement*, THE MARSHALL PROJECT, <https://www.themarshallproject.org/about?via=navright> (last visited May 1, 2021). “The Marshall Project is a nonpartisan, nonprofit news organization that seeks to create and sustain a sense of national urgency about the U.S. criminal justice system.”
- 115 Schwartzapfel, *supra* note 107; see also Beletsky et al., *supra* note 107, at 158 (“[A]fter spending time in jail or prison, a person's tolerance decreases drastically. As a result, what was a normal dose for an individual prior to incarceration could suddenly be enough to kill him or her. Lowered tolerance can also be exacerbated by use of more than one drug at a time. Combining alcohol with an opioid, for instance, can increase the propensity of opioids to suppress breathing. In fact, the risk of death doubles with every illicit drug consumed in combination with opioids.”).
- 116 Beletsky et al., *supra* note 107, at 164.

- 117 *Id.*
- 118 *See, e.g.*, ALLISON FRANKEL & ARYEH NEIER, HRW & ACLU, REVOKED: HOW PROBATION AND PAROLE FEED MASS INCARCERATION IN THE UNITED STATES 175 (2020), [https://www.hrw.org/sites/default/files/media\\_2020/07/us\\_supervision0720\\_web\\_1.pdf](https://www.hrw.org/sites/default/files/media_2020/07/us_supervision0720_web_1.pdf) (“[I]ncarceration does not necessarily keep people away from drugs, which are readily accessible in many jails and prisons.”); Dan Rosen, *The Never-Ending Drug Hustle Behind Bars*, THE MARSHALL PROJECT (Nov. 7, 2019), <https://www.themarshallproject.org/2019/11/07/the-never-ending-drug-hustle-behind-bars>; Steven Greenhut, *The State Can't Keep Drugs Out of Prisons. How Was It Ever Going to Keep Them Out of America?*, REASON (May 24, 2019), <https://reason.com/2019/05/24/the-state-cant-keep-drugs-out-of-prisons-how-was-it-ever-going-to-keep-them-out-of-america/>.
- 119 *See, e.g.*, Jessica M. Eaglin, *The Drug Court Paradigm*, 53 AM. CRIM. L. REV. 595, 603 (2016); Eric Miller, *Drugs, Courts, and the New Penology*, 20 STAN. L. & POL'Y REV. 417, 420 (describing the genesis of drug and reentry courts); DRUG POL'Y ALLIANCE, DRUG COURTS ARE NOT THE ANSWER: TOWARD A HEALTH-CENTERED APPROACH TO DRUG USE 5 (2011), [https://drugpolicy.org/sites/default/files/Drug%20Courts%20Are%20Not%20the%20Answer\\_Final2.pdf](https://drugpolicy.org/sites/default/files/Drug%20Courts%20Are%20Not%20the%20Answer_Final2.pdf) [Hereinafter DRUG POL'Y ALLIANCE, HEALTH-CENTERED APPROACH].
- 120 Eaglin, *supra* note 119, at 603-04.
- 121 Eaglin, *supra* note 119, at 603-04.
- 122 *See* DRUG POL'Y ALLIANCE, TIME TO DECRIMINALIZE, *supra* note 25, at 11; DRUG ENFT AGENCY, *supra* note 87, at 62 (“For those who end up hooked on drugs, there are also programs, like drug courts, that offer non-violent users the option of seeking treatment and staying out of either federal or state prisons. Drug court programs provide court supervision, unlike voluntary treatment centers.”).
- 123 Eaglin, *supra* note 119, at 604.
- 124 DRUG POL'Y ALLIANCE, HEALTH-CENTERED APPROACH, *supra* note 119, at 4 (“[A]bout one-third of drug court participants do not have a clinically significant substance use disorder.”); *see also* Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 798 (2008) (observing that in New York City drug courts, prosecutors are reluctant to allow recidivists into drug court despite the fact that defendants with no criminal history were less likely to suffer addiction issues).
- 125 DRUG POL'Y ALLIANCE, HEALTH-CENTERED APPROACH, *supra* note 119, at 10 (“[P]rosecutors and judges may cherry-pick defendants because of the limited capacity of the drug court combined with the political importance of high success rates. Second, some drug courts may opt to knowingly enroll persons who do not need treatment, but for whom drug court is seen as the only way to avoid a criminal record for a petty drug law violation.”); Eric Miller, *Embracing Addiction Drug Courts and the False Promise of Judicial Interventionism*, 65 OHIO ST. L. J. 1479, 1553 (2004) (“Treatment programs, in an effort to demonstrate effectiveness, start cherry picking the low-risk candidates who would have been screened out of a traditional diversion system and channeling up and into the criminal justice system the high-risk candidates they were originally designed to serve.” (citing STANLEY COHEN, VISIONS OF SOCIAL CONTROL: CRIME, PUNISHMENT, AND CLASSIFICATION 52-54 (1985))).
- 126 DRUG POL'Y ALLIANCE, HEALTH-CENTERED APPROACH, *supra* note 119, at 4 (“[A] 2008 survey of drug courts found that roughly 88 percent exclude people with any history of violent offending, and half exclude those on probation or parole or with another open criminal case .... 49 percent of drug courts actually exclude people with prior treatment history and almost 69 percent exclude those with both a drug and mental health condition.”); Edwards, *supra* note 91, at 345 (“If, as some suggest, public safety ‘is something more than the confinement or correction of individual offenders who have diminished it,’ our refusal to provide treatment to a population that stands to benefit from its application is a sobering illustration of how desert limits and retributive theory undermine our stated commitment to public safety.” (quoting MICHAEL E. SMITH & WALTER J. DICKEY, WHAT IF CORRECTIONS WERE SERIOUS ABOUT PUBLIC SAFETY? 9 (1997) (unpublished manuscript))).

- 127 See THE NAT'L CTR. ON ADDICTION AND SUBSTANCE ABUSE, COLUMBIA UNIVERSITY, BEHIND BARS II: SUBSTANCE ABUSE AND AMERICA'S PRISON POPULATION 3 (2010), <https://drugfree.org/reports/behind-bars-ii-substance-abuse-and-americas-prison-population/> [hereinafter BEHIND BARS II] (“A quarter (24.4 percent) of prison and jail inmates has both a substance use disorder and a co-occurring mental health problem.”); *cf.* Brief on Behalf of the Mass. Med. Soc’y et al., Amicus Curiae at 27-29, [Commonwealth v. Eldred](#), 101 N.E.3d 911 (Mass. 2018) [hereinafter Eldred Med. Soc’y Brief] (examining studies addressing the link between mental health disorders and substance use disorder, and concluding that the presence of a mental health disorder makes the afflicted more susceptible to developing a SUD).
- 128 See Loue, *supra* note 104, at 322-23 (“A 1991 study by the American Bar Association examined the DCM-based drug courts in Cook County, Illinois, Milwaukee, and Philadelphia, as well as the treatment-based court in Dade County, Florida. Although the drug courts had successfully reduced the amount of time required for the processing of cases, there was no reduction in the rate of recidivism. A later study of the Dade County system found lower rates of recidivism associated with drug court but, alarmingly, higher rates of defendant failure to report. A study of the Baltimore drug court indicated decreases in recidivism rates in both the traditional and the drug courts. A later study conducted by the United States General Accounting Office concluded that insufficient data exists to determine whether drug courts aid in reducing recidivism and preventing relapse.”).
- 129 See PARSONS & NEATH, *supra* note 4, at 6 n.40; U.S. GOV'T ACCOUNTABILITY OFFICE, REPORT TO CONG. COMM., ADULT DRUG COURTS: STUDIES SHOW COURTS REDUCE RECIDIVISM, BUT DOJ COULD ENHANCE FUTURE PERFORMANCE MEASURES REVISION EFFORTS 20 (2011), <https://www.gao.gov/assets/gao-12-53.pdf> (reviewing Bureau of Justice Assistance evaluations of 32 drug court programs and finding completion rates ranging from 15 percent to 89 percent); STEVEN BELENKO, THE NAT'L CT. ON ADDICTION AND SUBSTANCE ABUSE, COLUMBIA UNIVERSITY, RESEARCH ON DRUG COURTS: A CRITICAL REVIEW 2001 UPDATE 1, <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.192.2535&rep=rep1&type=pdf> (conducting a critical review of 37 published and unpublished evaluations of drug courts and determining that the average rate of completion was only 47 percent).
- 130 Bowers, *supra* note 124, at 803 (“Compared to the volitional thrill-seeking chippers and for-profit drug dealers who strategically game into unneeded treatment, acutely addicted defendants and defendants from historically disadvantaged groups are far less likely to succeed in drug courts. Specifically, studies have shown consistently higher termination rates for recidivists and hard-drug users--two characteristics reflective of genuine dependency.”).
- 131 See *id.* at 804-07 (addressing the ways in which race, socioeconomic status, community ties, and addiction intersect to disadvantage people of color within the drug treatment court setting).
- 132 See, e.g., Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1502-03 (2000) (“It is clear there is a significant feedback phenomenon going on between the arrest and prosecution end of the process on the one hand and the adjudicatory end on the other hand. The very presence of drug court, with its significantly increased capacity for processing cases, has caused police to make arrests in, and prosecutors to file, the kinds of ten-and twenty-dollar hand-to-hand drug cases that the system simply would not have bothered with before, certainly not as felonies.”); DRUG POL’Y ALLIANCE, HEALTH-CENTERED APPROACH, *supra* note 119 at 14 (discussing the impact of net-widening in Denver where arrests for relevant offenses doubled following establishment of drug courts).
- 133 DRUG POL’Y ALLIANCE, HEALTH-CENTERED APPROACH, *supra* note 119, at 14.
- 134 *Id.* at 14 (“[P]eople who do not complete drug court may actually face longer sentences--up to two to five times longer, according to one study-- than it they had been conventionally sentenced in the first place.”); Bowers, *supra* note 124, at 792 (discussing studies completed by the Center for Court Innovation and New York State Unified Court System analyzing drug courts in several New York counties, that found the sentencing lengths for failing participants were often two-to-five times longer than for similarly-situated defendants who did not participate in drug courts).
- 135 See DRUG POL’Y ALLIANCE, TIME TO DECRIMINALIZE, *supra* note 25, at 11.

- 136 See NAT'L INST. ON DRUG ABUSE, UNDERSTANDING DRUG USE, *supra* note 48, at 1 (explaining that repeated drug use can lead to persistent brain changes that result in repeated relapse); Volkow, Koob & McLellan, *supra* note 12, at 363 (recent advances in neurobiological research support the brain disease model of addiction); e Soc'y Brief, *supra* note 127, at 31 (“Recovery from [Substance Use Disorder] characteristically involves periods of recurrence and remission [and] relapse is an almost inevitable feature of SUD ....”).
- 137 Loue, *supra* note 104, at 329.
- 138 *Id.* at 330.
- 139 DRUG POL'Y ALLIANCE, HEALTH-CENTERED APPROACH, *supra* note 119, at 14; Loue, *supra* note 104, at 329-30.
- 140 DRUG POL'Y ALLIANCE, HEALTH-CENTERED APPROACH, *supra* note 119, at 12.
- 141 Cf. Eldred Amicus Brief, *supra* note 127, at 38-39 (discussing the stress associated with attempting to comply with an abstinence-only policy in the context of a probation sentence and condition).
- 142 Beletsky et al., *supra* note 107, at 165-66.
- 143 Moyer, *supra* note 66, at 2247 (quoting 116 CONG. REC. S1159, at 1183 (daily ed. Jan 26, 1970 (statement of Sen. Robert Byrd))).
- 144 Kane, *supra* note 67, at 502.
- 145 Brief for Probationer Eldred, *supra* note 12, at 2 (quoting Alfred C. Prentice, M.D., *The Problem of the Narcotic Drug Addict*, 76 J.A.M.A. 1551, 1556 (1921)).
- 146 *Id.* at 2-3, 3 n. 3 (quoting Ernest S. Bishop, M.D., *Narcotic Addiction--A Systemic Disease Condition*, 60 J.A.M.A. 431, 431 (1913) and Charles E. Sceleth & Sydney Kuh, M.D., *Drug Addiction*, 82 J.A.M.A. 679, 680 (1924)).
- 147 See, e.g., Volkow et al., *supra* note 12, at 364 (“The concept of addiction as a disease of the brain challenges deeply ingrained values about self-determination and personal responsibility that frame drug use as a voluntary, hedonistic act.”); Eldred Amicus Brief, *supra* note 127, at 31 (“The fact that relapse is an almost inevitable feature of SUD leads to the straightforward conclusion that relapse is ‘not weakness of character or will.’” (quoting WORLD HEALTH ORG. & UNITED NATIONS OFFICE ON DRUGS & CRIME ET AL., SUBSTITUTION MAINTENANCE THERAPY IN THE MANAGEMENT OF OPIOID DEPENDENCE AND HIV/AIDS PREVENTION 7 (2004))).
- 148 NAT'L INST. ON DRUG ABUSE, SCIENCE OF ADDICTION, *supra* note 42, at 4.
- 149 Moyer, *supra* note 66, at 2233.
- 150 *Id.* at 2240.
- 151 See Miller, *supra* note 125, at 1524.
- 152 NAT'L INST. ON DRUG ABUSE, SCIENCE OF ADDICTION, *supra* note 42, at 6.
- 153 Volkow et al., *supra* note 12, at 364.
- 154 *Id.*
- 155 *Id.* at 366.
- 156 See *id.*

- 157 *Id.* at 367.
- 158 Volkow et al., *supra* note 12, at 367.
- 159 *Id.*
- 160 *Id.*
- 161 *Id.*
- 162 Eagleman, et al., *supra* note 48, at 9, 16.
- 163 *See, e.g.*, Moyer, *supra* note 66, at 2233 (“In the context of addiction, it is easy to understand that the addict might lack free will, as his brain is fundamentally altered by the drugs he takes. Addiction is an obvious case of lessened or lacking free will and is easily understood: drugs act on the brain and change its chemistry, altering the drug user’s behavior.” (citing NAT’L INST. ON DRUG ABUSE, DRUGS, BRAINS, AND BEHAVIOR: THE SCIENCE OF ADDICTION 7 (2014))).
- 164 Volkow et al., *supra* note 12, at 364; *cf.* Moyer, *supra* note 66, at 2240-41 (“Drug laws are examples of proscriptions that rely on preserving the moral fabric of society, a feature of retribution, for justification. Thus, they are fundamentally flawed. Such laws ignore the compelling force of addiction. Even further, in the context of nonaddicting drugs the choice is similarly non-free; in that context, the determining events leading to the choice are simply more numerous and less obvious than the single compulsion of addiction. Since retribution is not justified in either case, it should be removed from consideration in the making of drug laws.”).
- 165 *See, e.g.*, Miller, *supra* note 125, at 1521 (“[W]hile the addict may initially contract the disease involuntarily, it is not clear that the addict’s subsequent acts in ‘feeding’ the disease are similarly unchosen. There are a variety of ways in which to understand the resulting addiction that do not depend upon the complete abdication of free will that is a feature of the disease model. Instead, we can explain addiction as a rational, albeit short-term response to the cravings and the agent as responsible for her choice to take the drugs. Under the ... retributivist theory, that choice is blameworthy.”);  [United States v. Moore](#), 486 F.2d 1139, 1151 (D.C. Cir. 1973) (“According to appellant’s thesis, an addict only has a choice as to the manner in which he obtains the funds (or the drugs) to support his habit; this neglects the choice that each addict makes at the start as to whether or not he is going to take narcotics and run the risk of becoming addicted to them. Although the narcotics user may soon through continued use acquire a compulsion to have the drug, and thus be said to have lost his self-control (insofar as he must take the drug regularly) due to ‘disease,’ it is a disease which he has induced himself through a violation of the law.”).
- 166 *See, e.g.*, Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 600-01 (noting that by opening up the time frame of criminal responsibility, drug addicts may be viewed as morally responsible for becoming addicted, even if they seem blameless in the narrow time frame within which they are arrested); *cf.* Edwards, *supra* note 91, at 327 (“While traditional rehabilitative policy closely follows the medical model of addiction, retribution is based on an entirely different set of assumptions that highlights drug use as a moral failing.”).
- 167 *See, e.g.*,  [Moore](#), 486 F.2d at 1242, 1243 (Wright, C.J., dissenting) (arguing that drug addiction should be recognized as a defense to drug possession and use for at least some addicts because of the overwhelming “psychological and physiological need” to use drugs, which “cannot be overcome by mere exercise of free will” and vitiates the legitimacy of any retribution-based argument for punishment).
- 168  *Id.* at 1242-43 (emphasis added).
- 169  *Id.* at 1243 (citing [United States v. Drew](#), 25 F. Cas. 913, 914 (C.C.D. Mass. 1828)).
- 170 *See* [United States v. Hendrickson](#), 25 F. Supp. 3d 1166, 1174 (N.D. Iowa 2014).

- 171 *Id.* at 1175 (citing Melissa S. Caulum, *Postadolescent Brain Development: A Disconnect Between Neuroscience, Emerging Adults, and the Corrections System*, 2007 WIS. L. REV. 729, 739 (2007)).
- 172 *See, e.g.*, Fentiman, *supra* note 49, at 235-36.
- 173 *See* NAT'L INST. ON DRUG ABUSE, SCIENCE OF ADDICTION, *supra* note 42, at 9 (describing the biological factors that increase the risk of addiction as genes, stage of development, gender, mental illness, and ethnicity; environmental factors that increase the risk of addiction as home and family life, peer pressure, school struggles, peer pressure, and poor social skills; and other factors as early age at which use begins and how the drug is taken).
- 174 *Id.* at 6.
- 175 *See* NAT'L INST. ON DRUG ABUSE, SCIENCE OF ADDICTION, *supra* note 42, at 6 (“The initial decision to take drugs is typically voluntary. But with continued use, a person's ability to exert self-control can become seriously impaired. This impairment in self-control is the hallmark of addiction.”); Nora D. Volkow & Marisela Morales, *The Brain on Drugs: From Reward to Addiction*, 162 CELL 712, 712 (2015) (“Current evidence shows that ... while initial experimentation is largely a voluntary behavior, continued drug use impairs brain function by interfering with the capacity to exert self-control over drug-taking behaviors and rendering the brain more sensitive to stress and negative moods.”); Eagleman et al., *supra* note 48, at 15 (“Although addiction may involve volitional choices early on, it is best understood in the chronic state as a brain disease.”). *But see* Moyer, *supra* note 66, at 2241 (arguing that even with the use of non-addictive substances, a substance user's decision to use is not free because all human behavior results from determining physical events the precede consciousness and are simply “more numerous and less obvious” than those attendant to addiction).
- 176 As in the case of someone who is lawfully prescribed a narcotic painkiller for medical purposes, and becomes involuntarily addicted.
- 177 For instance, in my hometown of Ann Arbor, Michigan, Washtenaw County District Attorney Eli Savit recently announced Policy Directive 2021-07, regarding the unauthorized use or possession of buprenorphine (suboxone), a medication commonly used to treat opioid addiction. *See* OFFICE OF THE PROSECUTING ATTORNEY, WASHTENAW COUNTY, POLICY DIRECTIVE 2021-07: POLICY REGARDING BUPRENORPHINE (Jan. 13, 2021), <https://www.washtenaw.org/DocumentCenter/View/19156/Buprenor-phine-Policy>. Buprenorphine is a Schedule III drug and has not been decriminalized or legalized in Michigan and buprenorphine-related charges are regularly filed in Michigan courts. *Id.* at 3. Buprenorphine possession is a felony and carries stiff penalties. *Id.* But, according to the new directive, Washtenaw County prosecutors will no longer charge people with the unauthorized use or possession of buprenorphine and will apply a “general presumption against” charging the unauthorized sale of buprenorphine. *Id.* at 4. The Washtenaw County District Attorney has announced similar policies related to the possession or small-scale distribution of marijuana, “magic mushrooms,” and other naturally occurring psychedelics. *See* Ryan Stanton, *Washtenaw Prosecutors Won't Charge People for Marijuana, Shrooms, Other Psychedelics*, MLIVE, Jan. 12, 2021, <https://www.mlive.com/news/ann-arbor/2021/01/washtenaw-prosecutor-wont-charge-people-for-marijuana-shrooms-other-psychedelics.html>. In Philadelphia, District Attorney Larry Krasner also implemented a policy not to prosecute people for possession of buprenorphine. Nina Feldman, *Krasner to Stop Charging for Possession of Opioid Treatment Drug Popular on the Street*, WHYY, Jan. 29, 2020, <https://whyy.org/articles/krasner-to-stop-charging-for-possession-of-opioid-treatment-drug-popular-on-the-street/>. And after a similar policy was instituted by the Chittenden County Prosecutor in Vermont, authorities there reported a 50 percent decrease in overdose deaths, the lowest level the County had achieved in at least six years. Katie Jickling, *Opioid Deaths Rise in Vermont but Plummet in Chittenden County*, SEVEN DAYS (Feb. 14, 2019), <https://m.sevendaysvt.com/OffMessage/archives/2019/02/14/opioid-deaths-rise-in-vermont-but-plummet-in-chittenden-county>.
- 178 DRUG POL'Y ALLIANCE, TIME TO DECRIMINALIZE, *supra* note 25, at 19.
- 179 *See* Kristian Foden-Vencil, *Oregon Takes a Sharp Turn Away from War on Drugs as Measure 110 Kicks In*, OBP, Feb. 1, 2021, <https://www.opb.org/article/2021/02/02/oregon-takes-turn-away-from-war-on-drugs-as-measure-110-kicks->

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in/; LEGIS. AND POL'Y RESEARCH OFFICE, STATE OF OREGON, MEASURE 110 (2020): BACKGROUND BRIEF (2020), [https://www.oregonlegislature.gov/lpro/Publications/Background-Brief-Measure-110-\(2020\).pdf](https://www.oregonlegislature.gov/lpro/Publications/Background-Brief-Measure-110-(2020).pdf).

180 CHRISTOPHER J. MUMOLA & JENNIFER KARBERG, BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS, 2004 1 (2006), <https://www.bjs.gov/content/pub/pdf/dudsfp04.pdf>.

181 BEHIND BARS II, *supra* note 127, at i.

182 CASA defined individuals as “substance-involved” if they “were under the influence of alcohol or other drugs at the time of their offense, stole money to buy drugs, are substances abusers, violated the alcohol or drug laws, or share some combination of these characteristics.” *Id.*

183 *Id.* at 2.

184 CASA defined substance use disorders using the DSM-IV's medical criteria for alcohol and other drug abuse and addiction. *Id.* at i.

185 *Id.* at 3.

186 *Id.*

187 BEHIND BARS II, *supra* note 127, at 3

188 *See* THOMAS FREUCHT & JOSEPH GFROERER, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., NAT'L INST. OF JUST., MENTAL AND SUBSTANCE USE DISORDERS AMONG ADULT MEN ON PROBATION OR PAROLE: SOME SUCCESS AGAINST A PERSISTENT CHALLENGE 1-2 (2011), <https://www.ojp.gov/pdffiles1/nij/235637.pdf>.

189 *Id.*

190 *See* CARSON, *supra* note 7, at 21-22.

191 *See, e.g.*, LEON DIGARD & ELIZABETH SWAVOLA, VERA INST. OF JUST., JUSTICE DENIED: THE HARMFUL AND LASTING EFFECTS OF PRETRIAL DETENTION 2 (2019), <https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf> (“Since 1970, the number of people who are detained while awaiting trial--the ‘pretrial population’--has increased more than fivefold: from 82,922 people in 1970 to 441,790 in 2015 .... While the pretrial population comprised about half of people in jail prior to the early 1990s, it now accounts for approximately two-thirds of people in jail nationwide.”).

192  18 U.S.C. § 3142 (2008).

193 *See id.*

194 *See* Lauryn P. Gouldin, *Reforming Pretrial Decision-Making*, 55 WAKE FOREST L. REV. 857, 893 (2020).

195  18 U.S.C. § 3142(c)(1)(B).

196  *Id.* at § 3142(g)(3)(A).

197 *See, e.g.*, Gouldin, *supra* note 194, at 887-88.

198 *See* OFFICE OF PROBATION AND PRETRIAL SERVS., FEDERAL PRETRIAL RISK ASSESSMENT SCORING GUIDE 15 (2013), <https://federaldefendersny.org/pdfs/Exh%20F.pdf>.

- 199 See Gouldin, *supra* note 194, at 892 (explaining that there are about eight risk assessment tools currently in use across the country).
- 200 See *id.* at 888 (“Forty jurisdictions at the state and local levels have implemented the Laura and John Arnold Public Safety Assessment (the ‘PSA’), and hundreds more have expressed interest in implementing the PSA.”).
- 201 See, e.g., DIGARD & SWAVOLA, *supra* note 191, at 4 (“Studies on pretrial detention have found that even a small number of days in custody awaiting trial can have many negative effects, increasing the likelihood that people will be found guilty, harming their housing stability and employment status, and ultimately, increasing the chances that they will be convicted on new charges in the future.”); Gouldin, *supra* note 194, at 871-74 (discussing the personal, financial, and case/system costs of pretrial detention).
- 202 See, e.g.,  [United States v. Webb](#), 134 F.3d 403, 406 (D.C. Cir. 1998) (holding, in a pre-*Booker* sentencing appeal, that the district court erred in deeming defendant's drug addiction a mitigating circumstance where Guidelines policy statement §5H1.4 forbade it, and where this directive was an “authoritative guide” and, therefore, binding on courts).
- 203  [USSG §5H1.4 \(2018\)](#).
- 204 *Id.* at §5K2.13 (2004)
- 205  [United States v. Booker](#), 543 U.S. 220 (2005).
- 206 See  [18 U.S.C. 3553\(a\)](#) (listing factors to be considered in imposing a federal sentence); [United States v. Hendrickson](#), 25 F. Supp. 3d 1166 (N.D. Iowa 2014) (considering addiction to be a mitigating factor under  [18 U.S.C § 3553\(a\)\(1\)](#) and granting a six-month downward variance below the low-end of defendant's Guideline range).
- 207 AMY BARON EVANS & JENNIFER NILES-COFFIN, NO MORE MATH WITHOUT SUBTRACTION: DECONSTRUCTING THE GUIDELINES' PROHIBITIONS AND RESTRICTIONS ON MITIGATING FACTORS 48 (2010, rev'd 2011) <https://fln.fd.org/files/training/no-more-math-without-subtraction.pdf>.
- 208 See Mirko Bagaric & Sandeep Gopalan, *A Sober Assessment of the Link Between Substance Abuse and Crime--Eliminating Drug and Alcohol Use from the Sentencing Calculus*, 56 SANTA CLARA L. REV. 243, 280 (2016).
- 209 *Id.*
- 210 Compare U.S. SENT'G COMM'N, 2019 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2019/2019-Annual-Report-and-Sourcebook.pdf> (last visited April 22, 2021) [Hereinafter 2019 ANNUAL REPORT] with U.S. SENT'G COMM'N, 2014 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, <https://www.ussc.gov/research/sourcebook/archive/sourcebook-2014> (last visited May 4, 2021).
- 211 *Id.* at 105 tbl. 44.
- 212 *Id.* at 104 tbl. 43.
- 213 U.S. SENT'G COMM'N, 2020 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 28, <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2020/2020-Annual-Report-and-Sourcebook.pdf> (last visited May 4, 2021) [hereinafter 2020 ANNUAL REPORT]
- 214 Compare *id.* at 102-105, tbls. 41-44 with 2019 ANNUAL REPORT at 102-105, tbls. 41-44.

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- 215 See 2020 ANNUAL REPORT at 102-103, tbls. 41-42 (courts granted upward departures or variances from the Guideline range for drug dependence and alcohol abuse in 44 cases).
- 216 See generally Elizabeth Williams, *Proof of Chemical Dependency and Rehabilitative Efforts as Factor in Sentencing*, 51 AM. JUR. *Proof of Facts* 3d 413, § 5 (1999, rev'd 2021).
- 217 See *id.* (citing cases);  FLA. STAT. § 921.0026(3) (West 2012) (“[T]he defendant's substance abuse or addiction, including intoxication at the time of the offense, is not a mitigating factor under subsection (2) and does not, under any circumstances, justify a downward departure from the permissible sentencing range.”).
- 218 *Id.* at § 5.
- 219 The following list is representative only. The author did not do a comprehensive search of all 50 state codes.
- 220 TENN. CODE ANN. § 40-35-113(8) (West 2010) (“If appropriate for the offense, mitigating factors may include, but are not limited to ... The defendant was suffering from a mental or physical condition that significantly reduced the defendant's culpability for the offense; however, *the voluntary use of intoxicants does not fall within the purview of this factor.*” (emphasis added)).
- 221  WASH. REV. CODE ANN. § 9.94A.535(1)(e) (West 2019) (court may not consider the voluntary use of drugs or alcohol to impose an “exceptional sentence below the standard range”).
- 222 See  *State v. Ghertler*, 555 A.2d 553, 556 (N.J. 1989) (refusing to extend N.J.S.A. 2C:44-1b(4) statute governing mitigating circumstances at sentencing where “substantial grounds” negate culpability to a defendant's drug dependency).
- 223  ALASKA STAT. ANN. § 12.55.155(g) (West 2019) (“Voluntary alcohol or other drug intoxication or chronic alcoholism or other drug addiction may not be considered an aggravating or mitigating factor.”).
- 224 See  OHIO REV. CODE ANN. § 2929.12(D)(4) (Baldwin 2014).
- 225 DANIELLE KAEBLE & MARIEL ALPER, BUREAU OF JUST. STATS., U.S. DEP'T OF JUST., PROBATION AND PAROLE IN THE UNITED STATES, 2017-2018 1 (2020), <https://www.bjs.gov/content/pub/pdf/ppus1718.pdf>.
- 226 FREUCHT & GFROERER, *supra* note 188, at 4.
- 227 Collectively referred to hereinafter as “supervision.”
- 228 See ALLISON FRANKEL & ARYEH NEIER, *supra* note 118, at 1 (reporting that in 2018, 28 percent of state and federal prison admissions stemmed from supervision violations).
- 229 See *id.* at 171; DRUG POL'Y ALLIANCE, TIME TO DECRIMINALIZE, *supra* note 25, at 7 (“Precise data do not exist, but the few studies that have been conducted on this population reveal that minor drug use or possession is a primary reason that people on probation or parole are incarcerated or re-incarcerated.”); *cf.* THE PEW CTR. ON THE STATES, THE PEW CHARITABLE TRUSTS, 1 IN 100 BEHIND BARS IN AMERICA 2008 18 (2008), [https://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing\\_and\\_corrections/onein100pdf.pdf0](https://www.pewtrusts.org/~media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/onein100pdf.pdf0) (“While some violators are reincarcerated for new crimes, a significant number wind up back in prison for so-called ‘technical’ violations--transgressions such as a failed drug test of missed appointment with a supervisory agent.”).
- 230 See, e.g., THE PEW CTR. ON THE STATES, *supra* note 229, at 9 (examining the tremendous growth in Florida's prison population between 1993 and 2007 and determining that it is attributable, in part, to “zero tolerance” policies that

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require probation officers to report every person who violates any condition of supervised release and increase prison time for these technical violations).

- 231 In one recent and highly publicized case, Julie Eldred, who struggles with Opioid Use Disorder, relapsed on fentanyl just 11 days into her sentence of probation. *See* Jan Hoffman, *She Went to Jail for a Drug Relapse. Tough Love or Too Harsh?*, N.Y. TIMES, June 4, 2018, <https://www.nytimes.com/2018/06/04/health/drug-addict-relapse-opioids.html>. As a result, Eldred was incarcerated pending placement in a residential treatment program. *Commonwealth v. Eldred*, 101 N.E.3d 911, 916-17 (Mass. 2018). Eldred's attorney appealed the probation revocation to the Massachusetts Supreme Court, arguing that the trial court's "drug-free" probation condition constituted cruel and unusual punishment in violation of the Eighth Amendment in light of her Opioid Use Disorder diagnosis. *See* Brief for Probationer Eldred, *supra* note 12, at 6. The Massachusetts Supreme Court rejected that argument, holding that the trial court did not abuse its discretion by imposing the "drug free" condition of probation. *Eldred*, 101 N.E.3d at 920. The ACLU of Massachusetts attorneys, who filed an amicus brief in the case, weighed in after the ruling came down, criticizing the court's decision as making probation "an instrument of the war on drugs." ACLU OF MASS., *Commonwealth v. Eldred*, <https://www.aclum.org/en/cases/commonwealth-veldred-0> (last visited April 29, 2021).
- 232 Eldred Med. Soc'y Brief, *supra* note 127, at 22 ("The District Court's requirement that Ms. Eldred 'remain drug free' in order to avoid incarceration is clinically contraindicated because it does not take into account the medical consensus regarding the effects of SUD."); *see also* Brief of the ACLU of Mass. et al., as Amicus Curiae at 12, *Commonwealth v. Eldred*, 101 N.E.3d 911 (Mass. 2019) (SJC-12279) ("This Court should use its supervisory power to prevent probationers who suffer from addiction from being subject to a requirement that they remain drug free. Threatening these probationers with imprisonment if they relapse predictably puts scores of addicted people behind bars based on a single failure to overcome addiction; it interrupts treatment; it recklessly endangers lives; and it can disproportionately affect poor people and people of color.").
- 233 *See, e.g.*, FRANKEL & NEIER, *supra* note 118, at 12.
- 234 Ctrs. for Disease Control and Addiction, *Understanding the Epidemic*, <https://www.cdc.gov/drugoverdose/epidemic/index.html> (last visited May 2, 2021). The CDC reports: "The number of drug overdose deaths increased by nearly 5% from 2018 to 2019 and has quadrupled since 1999."

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