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Courts' Adjudications of Addicts Still Reflect a Fundamental Lack of Understanding on the Nature of Addiction: Why the Fentanyl Crisis Should Force Courts to Reevaluate Their Current Policies on Forced Sobriety and Rehabilitation

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COURTS' ADJUDICATIONS OF ADDICTS STILL REFLECT A FUNDAMENTAL LACK OF UNDERSTANDING ON THE NATURE OF ADDICTION: WHY THE FENTANYL CRISIS SHOULD FORCE COURTS TO REEVALUATE THEIR CURRENT POLICIES ON FORCED SOBRIERTTY AND REHABILITATION.

Cole T. Chisholm

Drug free probation conditions and drug courts, which inevitably impose drug free conditions on its participants, are a standard component of the sentencing scheme for drug-related offenses. Introduced as an effort to reduce recidivism rates among drug offenders, courts enacted these conditions to serve as an extra deterrent to continued drug use, reflecting how courts have emphasized rehabilitation as a justification for punishment in recent years. The fentanyl crisis has exposed holes and weaknesses in this so-called rehabilitative system. Grounded in good intentions, these efforts to reduce recidivism rates have had the opposite effect, as courts lack an understanding of the nature of addiction and fail to accept the reality that addicts are facing a losing battle, as the streets are flooded with drugs at a historic rate. The United States government has long attempted to curb substance use since prohibition in the 1920s. Although the Prohibition Amendments were largely enacted as a response to the temperance movement, and not in response to growing recidivism rates, this early government intervention reflects the government's desire to protect its citizenry from the dangers of intoxicating substances.

In California v. Robinson,[1] the Supreme Court ruled that states cannot criminalize an individual for being addicted to narcotics. This decision was an encouraging step forward that demonstrated a conscious desire to protect addicts from adverse consequences from laws that either expressly or de facto criminalize the disease of addiction.[2] Despite the Supreme Court's Robinson holding, the decision in Eldred v. Commonwealth[3] illustrates how courts have since failed to follow the mandate of Robinson in practice, as courts have implemented conditions on addicts to maintain

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[1] *See* 370 U.S. 660 (1962).

[2] *See* Robert B. Thornhill, *Addiction and Mental Illness, and the Benefits of Recovery*, 74 ALA. LAW. 332, 333 (2013) ("Addiction is a chronic, progressive[,] and fatal illness.").

[3] *See* 101 N.E.3d 911 (Mass. 2018).

their sobriety under threat of incarceration, perhaps indicative of how courts have fallen for the fallacy that recovery is linear and relapses can be avoided simply by having a desire to stay sober.[4] *As a result, today, addicts that find themselves in the judicial system for drug offenses are often punished in a two-tier system. First, they are punished for the underlying crime, often stemming from their addiction. Second, they are punished for relapsing, thus violating their drug-free conditions, despite most people in recovery having relapsed at least once on their path to sobriety. This system demonstrates how courts lack an understanding of addiction and have failed to follow the Supreme Court's decision in Robinson by implementing policies and procedures that conflict with the scientific community's understanding of the physical and psychological dependencies that come with addiction. This Note argues that the fentanyl crisis has illustrated that drug free probation conditions and drug courts, which impose drug free conditions, fail to adequately deter drug use, ultimately cause recidivism rather than prevent it, and are the contemporary practice of punishing defendants for having an addiction, comparable to the challenged law in Robinson, guised as a judicial attempt to rehabilitate.*

[4] *See* Kayla Gill, *Is Addiction a Choice? What Experts Say*, RECOVERY.COM, https://recovery.com/resources/is-addiction-a-choice/ (last updated Jul. 24, 2025) ("Addiction isn't simply a matter of willpower. It's characterized by compulsive drug use despite its negative consequences to your health, relationships, finances, and other areas of life. This comes from changes in the brain caused by repeated substance use.").

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I. INTRODUCTION

Probation conditions have long been utilized by courts. Probation serves "[a]s an alternative or supplement to incarceration [and] is 'a legal disposition which allows a criminal offender to remain in the community subject to certain conditions and under the supervision of the court.'"[5] "The two principal goals of probation are rehabilitation of the defendant and protection of the public."[6] Congress has codified the use of drug free probation conditions as mandatory aspects of all probation adjudications.[7] Under a rehabilitative framework, it makes sense that courts would impose drug free conditions on drug offenders. After all, the public's consensus is that illicit drug use is harmful.[8] However, these conditions illustrate a primitive understanding of addiction, and ultimately do not comport with rehabilitative goals, inhibiting recovery rather than promoting it.[9]

In *Commonwealth v. Eldred*, defendant Julie Eldred was placed on probation for stealing $250 worth of jewelry.[10] The court imposed a special condition on her

[5] *Eldred,* 101 N.E.3d at 918.

[6] Commonwealth v. Goodwin, 933 N.E.2d 925, 930 (Mass. 2010).

[7] *See* 18 U.S.C. § 3563 (detailing mandatory conditions of probation. Courts require defendants to "refrain from any unlawful use of a controlled substance and submit to one drug test within [fifteen] days of release on probation and at least [two] periodic drug tests thereafter").

[8] *See* Riggs v. United States, 14 F.2d 5, 6 (1926) (detailing the Probation Act of March 4, 1925 and how it authorizes judges "to place defendants upon probation for such period and upon such terms and conditions as they may deem best[,] . . . and may revoke or modify any condition of probation" for any felony, misdemeanor, or infraction).

[9] *See* Peggy Fulton & John T.A Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 448–49 ("The emergence of these new courts reflects the growing recognition on the part of judges, prosecutors, and defense counsel that the traditional criminal justice methods of incarceration, probation, or supervised parole have not stemmed the tide of drug use among criminals and drug-related crimes in America.").

[10] *See Eldred*, 101 N.E.3d at 911.

probation, mandating her to stay drug-free.[11] She quickly violated the terms of her probation when she tested positive for fentanyl, discovered when her probation officer gave her a random drug test.[12] At her probation revocation hearing, Eldred argued she had been diagnosed with Substance Use Disorder (SUD), that she could not stop herself from doing drugs, and, therefore, she did not commit a willful violation of the drug-free condition to her probation.[13] Eldred "submitted several affidavits from experts in support of her claim; however, no expert testimony was offered at the hearing to opine on SUD or its potential effects on the brain."[14] The Massachusetts Supreme Court sought to decide

> where a person who committed a crime is addicted to illegal drugs, may a judge require that person to abstain from using illegal drugs as a condition of probation? If that person violates the 'drug free' condition by using illegal drugs while on probation, can that person be subject to probation revocation proceedings?[15]

Despite recognizing that, "[f]rom crafting special conditions of probation to determining the appropriate disposition for a defendant who has violated one of those conditions, judges should act with flexibility, sensitivity, and compassion when dealing with people who suffer from drug addiction[,]"[16] the Massachusetts Supreme Court held that such conditions are permissible.[17] The Court reasoned that "[t]he success of probation as a correctional tool depends on

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[11] *See id.* at 916 ("A judge . . . imposed a one-year term of probation with special conditions related to her substance abuse that included requiring her to remain drug free, submit to random drug screens, and attend outpatient substance abuse treatment three times each week.") (footnote omitted).
[12] *See id.* at 915.
[13] *See id.* at 916–17.
[14] *Id.* at 917.
[15] *Id.* at 917–18.
[16] *Id.* at 918.
[17] *See id.*

judges having the flexibility at sentencing to tailor probation conditions to the circumstances of the individual defendant and the crime that . . . she committed."[18] The court upheld these conditions in spite of the express recognition "that relapse is a part of recovery[,]" somehow coming to the conclusion that the threat of incarceration for a routine occurrence in recovery "fosters an environment that enables and encourages recovery."[19]

This reasoning severely minimizes the effect that incarceration can have on successful recovery rates as it fails to acknowledge "many addicted prisoners fail to receive the necessary assistance and support to overcome their addiction while serving their sentence, which significantly increases their likelihood of committing subsequent crimes upon release."[20] Moreover, the recognition that these conditions place addicts at an increased risk of violating their probation and being sent to jail can lead to the rational conclusion that these conditions fail to provide addicts equal protection of the law.[21] Finally, this reasoning fails to account for the historic amount of drugs available to users at the street level, essentially having addicts bear the burden of this country's historic failure with the War on Drugs.[22]

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[18] *Id.* (quoting Commonwealth v. Goodwin, 933 N.E.2d 925, 925 (Mass. 2010).

[19] *Eldred*, 101 N.E.3d at 918.

[20] *The Intersection of Addiction and Criminal Justice: The Impact of Incarceration on Recovery*, DISCOVER RECOVERY, https://discoverrecovery.com/blog/the-intersection-of-addiction-and-criminal-justice-the-impact-of-incarceration-on-recovery (last visited Oct. 11, 2024) (citing Dwayne D. Simpson et al,. *Treatment Retention and Follow-Up Outcomes in the Drug Abuse Treatment Outcome Study (DATOS)*, APA PSYCHNET (1997), https://psychnet.apa.org/record/1997-43757-007).

[21] *See The Americans with Disabilities Act and the Opioid Crisis: Combating Discrimination Against People in Treatment or Recovery*, U.S. DEP'T. JUST. C.R. DIV. (Apr. 5, 2022), https://archive.ada.gov/opioid_guidance.pdf ("The ADA is a federal law that gives civil rights protections to individuals with disabilities in many areas of life. . . . Drug addiction is considered a physical or mental impairment under the ADA.").

[22] *See* Chris Battiloro, Note, *Fentanyl: How China's Pharmaceutical Loopholes Are Fueling the United States' Opioid Crisis*, 46 SYRACUSE J. INT'L L. & COM. 343, 349 (2019) ("In August and September of 2017,

Law enforcement has continually failed to stop traffickers from transporting drugs into the country, thus leaving addicts as the scapegoat for law enforcement to illustrate they are tough on crime to help keep the public's mind at ease.[23]

Ultimately, illegal drugs available to everyday users can be accessed more easily than ever.[24] As such, drug offenses and addiction levels continue to rise.[25] Courts' current sentencing schemes, including drug free probation conditions and drug courts, that focus on reducing recidivism rates for drug offenders are simply not effective to combat addiction and this historic level of illegal fentanyl importation and ultimately punish addicts in a two-tier system mostly for just having an addiction to drugs or

federal officials seized about 200 pounds of fentanyl and fentanyl-laced heroin in two separate New York City raids. This seizure alone contained enough fentanyl to kill more than [thirty-two] million people and had a street value worth well over $ 30 million.") (footnotes omitted).

[23] *See* Molly K. Webster, Note, *Alternative Courts and Drug Treatment: Finding a Rehabilitative Solution for Addicts in a Retributive System*, 84 FORDHAM L. REV. 855, 865–66 (2015) ("In the Anti-Drug Abuse Act of 1986, Congress tied drugs to drug traffickers and terrorists, calling for strict sentences. These sentencing parameters were echoed throughout the states and led to an increase in the prison population as a direct result of drug arrests.") (footnotes omitted).

[24] *See* Preeti Vankar, *Number of Americans Who Used Illicit Drugs in Past Year 2023, by Drug Type*, STATISTA (Nov. 1, 2024), https://www.statista.com/statistics/611152/illicit-drug-users-number-past-year-in-the-us-by-drug/ ("The epidemic stems from misleading information from pharmaceutical companies concerning the dangers of opioids such as oxycontin, overprescribing of opioids from physicians, and an influx of easily accessible heroin and highly potent synthetic opioids. In 2022, there were around 81,806 deaths from opioid overdose in the United States.").

[25] *See Drug Related Crime Statistics*, NAT'L CTR. FOR DRUG ABUSE STAT'S, https://drugabusestatistics.org/drug-related-crime-statistics/ (last visited Jan. 14, 2025) (detailing how 1.16 million Americans are arrested annually for drug related offenses, with around 244,000 people sent to prison annually for drug related offenses); *see also* Timothy Moore et al., *Drug, Substance Abuse, and Addiction Statistics*, USA TODAY, (Mar. 28, 2024, 12:25 AM) https://www.usatoday,com/money/blueprint/health-insurance/addiction-statistics/ (detailing how nearly fifty million Americans dealt with a substance use disorder within the past year).

alcohol in the first place.[26] The opioid crisis has persisted for decades, further evidencing the failure of the courts' current rehabilitative and sentencing schemes, and this fentanyl wave is the current chapter to said crisis.[27] Courts need to expand the scope of their current approved treatment efforts as an effort to truly address the opioid and fentanyl crisis, addiction, and recidivism rates.[28] Additionally, while courts may never have a perfect understanding of addiction, courts should still attempt to better understand it.[29] Instead of expecting addicts to overcome their physical and psychological dependencies[30] through

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[26] *See* Alexandra Pickering, Note, *Substance-Free Probation Conditions for Drug-Addicted Criminals: Reformation or Criminalization*, 53 SUFFOLK U.L. REV. 21, 30 (2020) (Courts have long held broad authority to impose probation conditions, with judges and commentators "reason[ing] that the rehabilitative goals of probation encourage and require judges to take an individualized approach, which at times includes enforcing these drug-free conditions." Jurisdictions have long upheld these conditions, despite many defendants claiming "that relapse is a symptom of addiction, and therefore the legal system should treat it that way.") (footnotes omitted).

[27] *See* JOHNATHAN H. DUFF ET AL., CONG. RSCH. SERV., IF2260, THE OPIOID CRISIS IN THE UNITED States: A BRIEF HISTORY (2022) (describing how the opioid crisis began in the 1990s and how fentanyl became the leading driver behind the persisting opioid crisis beginning in 2016).

[28] *See* Olivia Lanagan, *A Failing System: The Opioid Crisis, Recidivism, and the Desperate Need for Prison Reform*, 53 SUFFOLK U.L REV. 373, 387 (2020) ("In light of the opioid crisis, recent legislation at both the federal and state levels has reintroduced rehabilitation as a sentencing goal. The First Step Act . . . mandated that the Bureau of Prisons reconsider its ability to reduce recidivism through vocational and educational programs.") (footnotes omitted).

[29] *See id.* at 388 ("Modern rehabilitation models focus on changing offender behavior rather than character.") (footnote omitted).

[30] *See* Linda C. Fentiman, *Rethinking Addiction: Drugs, Deterrence, and the Neuroscience Revolution*, 14 U. PA. J.L. & SOC. CHANGE 233, 234 (2011) ("Most physicians and addiction specialists assert that addiction is a 'chronic, relapsing, brain disease,' and that drug addicts are essentially choiceless victims of their illness.") (quoting Gene M. Heyman, *Addiction: A Disorder of Choice vii* (2009)); *see also* Fentiman, *supra* note 25, at 242 ("That drug reward circuits are centered in the limbic area, a more 'primitive' portion of the brain, suggests that they may be harder to change than neurological circuits found in parts of the brain devoted to higher order reasoning and speech.").

utilization of drug courts and drug free probation conditions, courts need to explore non-abstinence-based treatment programs, such as medical marijuana or ketamine treatment programs, to find an actual solution to the opioid and fentanyl crisis and to better protect its constituents against the mass importation of illegal drugs into the community.[31] The fentanyl crisis has changed how courts should adjudicate addicts. Drug free sentencing conditions do not affect addicts the same way these same conditions affect nonaddicts.[32] Nonaddicts do not have to change their behavior the same way addicts do to comport with their probation.[33] Relapse is a real danger to every person in recovery, and the temptation to do drugs is not identical between addicts and nonaddicts.[34] Nonaddicts are far less likely to willfully violate their probation under these grounds, suggesting that courts disproportionately find addicts in violation of their probation or drug court conditions due to an addiction they cannot control.[35]

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[31] *See* Corey Davis & Amy Judd Lieberman, *Breaking Free from the "War on Drugs": Examples from Three Leader States*, 52 J.L. MED. & ETHICS 22, 22 (2024) ("[T]he 12-month period ending June 2023 was one of the deadliest on record, with approximately 110,000 lives lost in the U.S. due to drug-related overdoses.") (footnote omitted); *see also id.* ("Since the 1970s, the United States has . . . pursued a 'War on Drugs' that directs the power of the state not toward reducing drug-related harm[,] but to the criminalization and stigmatization of people who use certain drugs.") (footnote omitted).

[32] *See* Pickering, *supra* note 26, at 24 ("Experts . . . have long debated the question of voluntariness as it relates to drug addicts' continued substance abuse. These experts generally agree, however, that the initial decision to take drugs is voluntary, but the continued use of drugs at least impairs an individual's ability to exert self-control.") (footnotes omitted).

[33] *See* Corinne Zucker, Note, Commonwealth v. Eldred: *Denying a Medical Reality*, 92 TEMP. L. REV. 673, 673 (2020) ("[T]he National Institute on Drug Abuse, public health departments, and specialty professional organizations have all recognized relapse as an expected part of recovery from [substance use disorder].") (footnotes omitted).

[34] *See id.* at 674 ("As a chronic disease, [substance use disorder] reduces an individual's self-control through physical changes in parts of the brain that dictate judgment, decisionmaking [sic], learning, memory, and behavior. It goes beyond recreationally passing a joint around.") (footnote omitted).

[35] *See id.* at 697 ("Data indicate[s] that those struggling with [opiate use disorder] continue to use for an average of five to six times before ever reaching complete sobriety.") (footnote omitted).

Part II of this Note will explore general justifications for punishment, including how courts have gradually begun to emphasize rehabilitation for defendants with a substance use disorder. Part III will overview the history of the War on Drugs and explore why the government focused (and arguably continues to focus) so heavily on punishing drug users. Part IV of this Note will examine the history of supervised release conditions, highlighting the emphasis courts have placed on abstinence-based methods when dealing with defendants with a substance use disorder. Then, Part V will overview the emergence of drug courts, exploring the rationale behind these courts and observing how these therapeutic courts have affected recidivism rates. Part VI will review scholarship on the criticisms of drug courts and explore how these criticisms align with a more retributive theory of punishment. Part VII will explore the history of the opioid crisis and explore how and why fentanyl became so prevalent in the United States during the COVID-19 pandemic, while illustrating how fentanyl has influenced the adjudication of addicts, exploring the prevalence of drug offenses both before and after COVID, especially for fentanyl-related offenses. Finally, Part VIII will argue for courts to sponsor alternative treatment methods, arguing that an abstinence-based approach is not a reasonable or effective course of treatment for most addicts, and that other methods, like marijuana treatment or ketamine treatment, may actually be a more effective way to reduce recidivism rates.

II. ANALYSIS

A. WHY REHABILITATE?

Why do courts punish offenders? Ask ten different judges and they will likely give a myriad of answers. Retributivists believe that "criminal law is justified by the moral demand to punish culpable offenders in accord with moral desert."[36] Essentially, "[r]etributivism posits that punishment is necessary because society must engage in

[36] Darryl K. Brown, *Criminal Law Theory and Criminal Justice Practice*, 49 AM. CRIM. L. REV. 73, 73 (2012).

some form of retribution against those who violate its laws."[37] Utilitarians believe that "punishment should only be administered if it results in an overall benefit to society. Only when punishment leads to more aggregate pleasure than aggregate pain is punishment justified."[38] Utilitarians place much more emphasis on rehabilitation. "[R]ehabilitation . . . may be pursued, but only to the extent that [it is] needed in a given case."[39] This presupposes that rehabilitation ultimately is for the greater good, for both the general public and the offender, at least compared to the more punitive measures of punishment.

Since the turn of the Twenty-First Century, the public adopted a more restorative justice framework as "research indicates a significant shift in public sentiment away from punitive measures and towards prevention, rehabilitation, and reintegration as the primary goals of corrections policy."[40] The public recognized "that ninety-five percent of the people sentenced to prison would be coming home someday [which] provided an opening for liberals and conservatives to come together to support the shared goals of skills development needed to improve prospects for reentry."[41] Courts adopted a more rehabilitative approach "once research in the 1980s and '90s demonstrated that a carefully implemented rehabilitation program could reduce recidivism."[42] Legislative actions likewise have reflected this shift to an increased focus on rehabilitation, especially in the context of drug offenses. "Many federal district courts around the country, with the support of the Department of Justice (DOJ), have begun creating specialized

[37] Matthew Haist, Comment, *Deterrence in a Sea of "Just Deserts": Are Utilitarian Goals Achievable in a World of "Limiting Retributivism"?*, 99 J. CRIM. L. & CRIMINOLOGY 789,793 (2009) (footnote omitted).
[38] *Id.* (footnotes omitted).
[39] Richard S. Frase, *Punishment Purposes*, STAN. L. REV. 67, 77 (2005).
[40] *A New Dawn in Law Enforcement: The Shift from Punishment to Rehabilitation*, RED (Oct. 11, 2023), https://stoprecidivism.org/justice-reform/a-new-dawn-in-law-enforcement-the-shift-from-punishment-to-rehabilitation/.
[41] Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, UMKC L. REV. 113, 115 (2018).
[42] Thomas J. Bernard & Ian David Edge, *Rehabilitation*, BRITANNICA, https://www.britannica.com/topic/punishment/Rehabilitation (last updated Feb 19, 2025).

court programs to increase the use of alternatives to incarceration for certain types of offenders, most commonly for those with substance use disorders."[43] Likewise, every State has followed suit.[44] Courts have implemented these alternative sentencing procedures in recognition that incarceration and the strict retributivist justification for punishment do not decrease recidivism rates, with certain studies positing that increased magnitudes of punishment, largely implemented under a retributivist theory of punishment, may actually have the opposite effect to the desired goal of reducing recidivism rates.[45]

In the context of drug offenses, rehabilitation is especially pertinent.[46] A retributivist punishment framework does little to help drug addicts that find themselves at the mercy of the courts overcome their physical and psychological dependencies.[47] In 2005 alone, about seven million people were under the supervision of the criminal justice system, with

> eighty percent of adults incarcerated for felonies . . . categorized in one or more of the

[43] U.S. SENT'G COMM'N, *Federal Alternative-to-Incarceration Court Programs* (2017), https://www.ussc.gov/research/research-reports/federal-alternative-incarceration-court-programs.pdf.

[44] *See* Lizett Martinez Schreiber, *Sentencing to Drug Court: Tailoring the Program to the Participant Through Judicial Education and Oversight*, 34 FED. SENT. R. 63, 63 (2021) (discussing how there are over 3,000 drug courts in all fifty States as of 2014).

[45] *See* M. Keith Chen & Jesse M. Shapiro, *Do Harsher Prison Conditions Reduce Recidivism? A Discontinuity-based Approach*, AMER. L. & ECON. REV. 1, 3 (2007).

[46] *See* Leslie E. Scott, *Drug Decriminalization, Addiction, and Mass Incarceration: A Theories of Punishment Framework for Ending the "War on Drugs",* 48 N. KY. L. REV. 267, 288 (2021) ("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.") (footnote omitted).

[47] *See id.* at 297 ("[R]etribution 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 though drug use poses a greater harm to herself than others.").

> following ways: 1. were regular alcohol or other drug abusers; 2. had been convicted of an alcohol or other drug violation; 3. were under the influence of alcohol or other drugs at the time of their crime; 4. committed a crime to support their drug use; or, 5. exhibited one or more elements of any of these categories.[48]

In *Robinson v. California*, the Supreme Court invalidated a California law that made it a crime to be addicted to narcotics, expressly recognizing that the statute aimed to criminalize addiction, not cure it.[49] The Supreme Court emphasized the importance of rehabilitation for drug offenders specifically, noting that the State may "establish a program of compulsory treatment for those addicted to narcotics."[50] The Court further advised against the needless incarceration of addicts, noting that, "[a]fter the withdrawal period, vocational activities, recreation, and some kind of psychotherapy have a major role in the treatment program, which ideally lasts for six months."[51] With this understanding, courts have routinely implemented drug free probation conditions and utilized drug courts—which inevitably impose drug free conditions on participants—as an effort to treat addiction, the underlying cause for most drug offenses, and to reduce recidivism rates among drug offenders by placing an extra deterrent to drug use.[52]

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[48] Peggy Fulton Hora, *Drug Treatment Courts in the Twenty-First Century: The Evolution of the Revolution in Problem Solving Courts*, 42 GA. L. REV. 717, 720 (2008) (footnote omitted).

[49] *See* 370 U.S. 660, 676–77 (1962) (Douglas, J., concurring) ("The purpose of § 11721 is not to cure, but to penalize. Were the purpose to cure, there would be no need for a mandatory jail term of not less than [ninety] days.").

[50] *Id.* at 665.

[51] *Id.* at 673 (citing Charles Winick, *Narcotics Addiction and its Treatment*, 22 L. & CONTEMP. PROB. 23–24 (1957)).

[52] *See* Zucker, *supra* note 33, at 679 ("A judge possesses the discretion and flexibility at the time of sentencing to tailor probation conditions to the unique circumstances of the defendant and the crime she

However, complete abstinence-based carceral conditions reflect a lack of recognition of the nature of addiction, the timeline of recovery, and the status of the illicit drug trade. With carceral penalties for relapsing, a system aimed at rehabilitation can quickly become the vehicle for retributive justice.

B. THE WAR ON DRUGS AND THE HISTORICAL APPROACH TO PUNISHING DRUG OFFENDERS

Government efforts to provide punitive punishment to drug users existed before the War on Drugs officially began. "Congress enacted the Narcotic Control Act of 1956[53], which mandated imprisonment for all persons convicted of narcotics possession and increased the sentence imposed on a first-time offender from 2-5 years to 2-10 years."[54]

In 1971, President Richard Nixon officially declared narcotics to be America's "public enemy number one," officially marking the beginning of the War on Drugs.[55] This statement reflected the government's sentiment at the time: "identify drug abuse and the drug offender as dangerous foes to the law-abiding public and mandate military-like tactics to contain and defeat them."[56] Nixon's inception of the War on Drugs led to "increased federal funding for drug-control agencies and proposed strict measures, such as mandatory prison sentencing, for drug crimes."[57] The government's sentiment was clear enough, identify and view "the addict as criminal."[58] Court decisions and harsh

committed. In other words, a judge considers conditions based on the idiosyncratic needs of the criminal defendant and her particular situation.").

[53] Narcotic Control Act of 1956, Pub. L. No. 728, § 103, 70 Stat. 567 (repealed 1970).

[54] Jennifer D. Olivia & Taleed El-Sabawi, *The "New" Drug War*, 110 VA. L. REV. 1103, 1117–18 (2024); *see also* Act of Nov. 2, 1951, Pub. L. No. 255, ch. 666, 65 Stat. 767 (repealed 1970) (establishing mandatory minimum sentences for drug possession).

[55] Jelani Jefferson Exum, *Reconstruction Sentencing: Reimagining Drug Sentencing in the Aftermath of the War on Drugs*, AM. CRIM. L. REV. 1685, 1686 (2021).

[56] *Id.*

[57] *War on Drugs*, HISTORY, https://www.history.com/topics/crime/the-war-on-drugs#section_1 (Feb. 27, 2025).

[58] Webster, *supra* note 23, at 859.

penalties for drug offenders indicated that "[c]riminal sentencing would come to be the weapon of choice used" in this "war" effort.[59]

For example, in *United States v. Ortiz*, the Second Circuit Court of Appeals affirmed the defendant's ten-year prison sentence for selling $60 worth of heroin to an undercover officer.[60] Police arrested the defendant both for possession and distribution of heroin.[61] The defendant was eighteen years-old, addicted to heroin, and only had a prior criminal history of a conviction for loitering.[62] The defendant argued that a ten-year prison sentence violated the Eighth's Amendment's prohibition against cruel and unusual punishment due to "the quantity of drugs sold, his addition, [sic] and the nonviolent nature of his actions."[63] The Second Circuit dismissed this argument, reasoning that his "status as an addict [did not] vitiate the gravity of his offense," emphasizing his role as a "longtime street peddler."[64] It is hard to argue with this logic, considering $60 transactions are essentially the lynchpin of kingpin-like activities. The Second Circuit emphasized what "could" happen when large amounts of narcotics are present, specifically noting the "violence typically associated with narcotics operations."[65] Sentences like this were typical for drug offenders in the 1970s and 80s[66] as "[p]olicymakers claimed that a punitive approach to drug crimes would deter not

[59] Exum, *supra* note 55.
[60] *See* United States v. Ortiz 742 F.2d 712, 713 (2d Cir. 1984) ("Ortiz, an addict and himself a victim as well as a perpetrator of the narcotics traffic, pleaded guilty to selling an undercover agent six glassine envelopes of heroin in a 'street sale.' The price was $60.") (footnote omitted).
[61] *See id.*
[62] *See id.* at 714.
[63] *Id.* at 715.
[64] *Id.*
[65] *Id.*
[66] *See* Hutto v. Davis, 454 U.S. 370 (1982) (reinstating the defendant's two consecutive twenty-year sentences for police finding nine ounces of marijuana and drug paraphernalia inside his home, leaning on legislative deference such that reconsideration of sentences should be exceedingly rare).

only would be drug offenders but also those who were sanctioned."[67]

President Ronald Reagan continued this effort, leading the effort to pass the Anti-Drug Abuse Act of 1986,[68] which "prescribed a variety of mandatory minimum sentences applicable to federal drug offenders based on the amount and type of drug involved in the underlying offense."[69] Moreover, in the 1980s, Regan and his wife, Nancy Regan launched the "Just Say No" campaign in response to the growing crack epidemic.[70] This campaign, coupled with strong public sentiment against drug use and harsher penalties for possessing drugs, contributed to a wave of mass incarceration. "The number of people behind bars for nonviolent drug law offenses increased from 50,000 in 1980 to over 400,000 by 1997."[71] Moreover, the "Just Say No" campaign produced a progeny of "zero-tolerance polices implemented in the mid-to-late 1980s."[72] "A host of the people enforcing these policies, including former Los Angeles Police Chief Daryl Gates, . . . believed that 'casual drug users should be taken out and shot.'"[73]

Even in the early days of the heightened enforcement period for the War on Drugs, law enforcement's efforts had very little impact, with the Justice Department "admit[ting] that drugs remained widely available," finding that "the availability and purity of cocaine have increased while the price has dropped."[74] On the

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[67] Ojmarrh Mitchell et al., *The Effectiveness of Prison for Reducing Drug Offender Recidivism: A Regression Discontinuity Analysis*, J. EXPERIMENTAL CRIMINOLOGY 1, 4 (2017).

[68] *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 21 U.S.C. §§ 841–904 (2012)).

[69] Ben Fabens-Lassen, *A Cracked Remedy: The Anti-Drug Abusee Act of 1986 and Retroactive Application of the Fair Sentencing Act of 2010*, TEMP. L. REV. 645, 651 (2015) (footnote omitted).

[70] *See War on Drugs*, *supra* note 57.

[71] Jag Davies, *A Brief History of the Drug War*, DRUG POL'Y ALL. 1, 2 (May 17, 2017), https://www.psymposia.com/magazine/brief-history-drug-war/.

[72] *Id.*

[73] *Id.*

[74] Doug Bandow, *War on Drugs or War on America?*, 3 STAN. L. & POL'Y REV. 242, 244 (1991).

international scale, even when "Colombia launched its crackdown on the cocaine trade, in 1989, federal officials complained that smuggling was back to normal levels" after only a period of six weeks.[75] In the 1980s alone, the period where the government adamantly attempted to crack down on illicit drug use, the drug regulation and criminalization scheme "demonstrated the failure of the Drug War to reduce the supply and use of drugs."[76] Moreover, the War on Drugs refuses to accept the reality that no judicial deterrent will stop the importation of illicit drugs.[77] Even when public concern peaked for the War on Drugs in the 1980s, "[w]orld production of virtually all illicit substances [was] higher than ever."[78] Congressional findings found that "most of the drug products shipped to the U.S. evade[d] interdiction efforts . . . [as] [t]he Coast Guard estimate[d] that the government successfully intercept[ed] just 5 to 7% of incoming drug shipments."[79] Overall, the very beginning of the War on Drugs had "demonstrated the failure . . . to reduce the supply and use of drugs."[80] Thus, the underlying policy behind the War on Drugs that increased prohibition of illicit substances ultimately deters drug use has never been actualized in practice, with the results of drug use only worsening.

C. HISTORY OF PROBATION CONDITIONS

Probation conditions have long been utilized by courts.[81] Probation serves "[a]s an alternative or supplement to incarceration [and] is 'a legal disposition which

[75] *Id.* (footnote omitted).
[76] *Id.*
[77] *See* Olivia & El-Sabawi, *supra* note 54, at 1124 ("[P]rohibition – and prohibition enforcement – creates and sustains illicit markets that are lucrative and highly profitable . . . the narcotic laws shut off any legitimate sources of drugs for a market with an uncontrollable craving.").
[78] Bandow, *supra* note 74.
[79] *Id.* (footnote omitted).
[80] *Id.*
[81] *See History of Probation/Pretrial Services*, U.S. PRETRIAL SERVS. S. DIST. CAL., https://www.caspt.uscourts.gov/history-probationpretrial-services (last visited Jan. 13, 2025) ("The Probation Act of 1925 . . . provided for a probation system in the federal courts . . . . It gave the courts the power to suspend the imposition or execution of sentence and place defendants on probation for such period and on such terms and conditions as they deemed best.").

allows a criminal offender to remain in the community subject to certain conditions and under the supervision of the court.'"[82] Courts have held that the justifications in support of probation conditions "are twofold: rehabilitation of the defendant and protection of the public from the defendant's potential recidivism."[83] Courts have justified discretionary judgements in doling out probation conditions because "[t]he success of probation as a correctional tool depends on judges having the flexibility at sentencing to tailor probation conditions to the circumstances of the individual defendant and the crime that he . . . committed.'"[84] In simpler terms, "[t]he two principal goals of probation are rehabilitation of the defendant and protection of the public."[85] Federal courts have codified the use of drug free probation conditions as mandatory probation conditions.[86]

Under rehabilitative reasoning, it makes sense, in theory, that drug free conditions are placed on drug offenders. After all, the public's consensus is that illicit drug use is harmful, and, if the defendant cannot use drugs, then that promotes the ultimate goal of lawful, drug-free behavior.[87] However, placing restrictions on defendants with the end goal in mind, without much leniency for slip-ups, severely minimizes the struggle most addicts have on their road to recovery and instills the fear of incapacitation if one is not able to overcome their psychological and physical

[82] Commonwealth v. Eldred, 101 N.E.3d 911, 918 (Mass. 2018) (quoting Commonwealth v. Durling, 551 N.E.2d 1193, 1195 (Mass. 1990)).
[83] *Id.*
[84] *Id.* (quoting Commonwealth v. Goodwin, 933 N.E.2d 925, 930 (Mass. 2010)).
[85] *Goodwin*, 933 N.E.2d at 930.
[86] *See* 18 U.S.C. § 3563 (detailing mandatory conditions of probation. Courts may require defendants to "refrain from any unlawful use of a controlled substance and submit to one drug test within [fifteen days] of release on probation and at least [two] periodic drugs test thereafter.").
[87] *See* Riggs v. United States, 14 F.2d 5, 6 (4th Cir.1926) (detailing the Probation Act of March 4, 1925 and how it authorizes judges "to place the defendant upon probation for such period and upon such terms and conditions as they may deem best[,] . . . and may revoke or modify any condition of probation" for any felony, misdemeanor, or infraction).

dependencies without any external help.[88] This leads to the reasonable inference that these abstinence-based carceral conditions further perpetuate the arrest cycle of addicts as courts scramble to treat a symptom, and not the underlying cause, of addiction.

D. EMERGENCE OF DRUG COURTS AS AN ALTERNATE SENTENCING METHOD

Amidst the public's heightened concerns over illicit drug use, Drug Treatment Courts (DTCs) emerged as an alternate sentencing method as opposed to jail or prison for drug offenders.[89] "Drug courts originated in Florida in 1989 as a response to courts observing the same defendants repeatedly commit drug-related crimes."[90] Understanding the context of its historical failure, "drug courts were founded as a reaction to retributive sanctions used to fight the War on Drugs.'"[91] DTCs attempted to reduce recidivism rates for drug offenses by "combin[ing] the traditional methods of drug rehabilitation and mental health assistance with the rigid structure and requirements of the court system."[92] DTC programs proliferated around the country as an increasing number of jurisdictions placed "[n]ew emphasis on using therapeutic approaches to ending drug addiction, including twelve-step models that can fruitfully utilize therapy combined with frequent 'checking in' with an authority figure."[93] DTCs can be summed up as "program[s] of incentives and sanctions to assist participants in both finding recovery from drug addiction and

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[88] *See* Zucker, *supra* note 33, at 687 ("The Massachusetts Medical Society provided data showing how 'punishing relapse without considering the clinical course of [substance use disorder] . . . will not effectively accomplish the goal of deterrence.' The risk of substance use persists throughout the course of treatment and even afterwards.") (footnotes omitted).

[89] Katie Smith, Note*, Fifty-Six Percent Success Is Still a Failing Grade: Reducing Recidivism and Ensuring Due Process Rights in Drug Courts*, 35 LA VERNE L. REV. 315, 319 (2014) (footnote omitted).

[90] *Id.* (footnote omitted).

[91] Webster, *supra* note 23, at 857.

[92] Smith, *supra* note 89.

[93] Candace McCoy, *Community Courts and Community Justice: Commentary: The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 AM. CRIM. L. REV. 1513, 1518 (2003).

ceasing criminal behavior associated with drug use and drug addiction."[94]

Generally, judges have discretion to send defendants to drug court, as admission into these programs is not a right for drug related offenses.[95] Judges evaluate several criteria to assess the eligibility of drug offenders for DTC. "Generally, courts look to the severity of the charges, the type of charges, the defendant's criminal history, and previous probation violations."[96] A defendant must have "an established alcohol or drug dependency," and histories of certain categories of offenses, such as violent crimes, automatically exclude prospective participants.[97] DTCs "require[] participants to stay clean and sober[,] . . . gain[] employment and abid[e] by the laws.

Participants are tested frequently for drug and alcohol use and are required to appear in court as often as weekly."[98] Defendants can expect to "spend an average of twelve to eighteen months in drug treatment."[99] Participants are only eligible for graduation from a DTC when a judge finds they had "continuous[ly] abst[ained] from drugs and alcohol. If an individual fails a random drug test, she will be sanctioned, [often] resulting in jail or community service."[100] Moreover, expulsion from the program is possible "if the court determines that she is not benefitting from treatment or if she commits another crime while enrolled."[101]

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[94] Michael Panaretos Fullerton, Comment, *Failing to Protect Participants' Fundamental Rights in Drug Treatment Court*, 74 MONT. L. REV. 375, 381–82 (2013) (footnote omitted).

[95] *See* Fern L. Kletter, *Due Process Afforded in Drug Court Proceedings*, 78 A.L.R.6TH 1, 5 (2024) ("The decision to find a defendant eligible to admit him to a drug-court program being discretionary . . . .").

[96] Webster, *supra* note 23, at 869–70.

[97] *Id.* at 870 (footnotes omitted); *see also* People v. Brown, 641 N.E.2d 948 (Ill. App. Ct. 1994) (holding defense counsel's statements at the sentencing hearing that the defendant used cocaine and marijuana habitually were sufficient to trigger the need for a court to order a drug use evaluation to see if the defendant qualified for drug court).

[98] Smith, *supra* note 89, at 321.

[99] Webster, *supra* note 23, at 870. (footnote omitted).

[100] *Id.* (footnotes omitted).

[101] *Id.* (footnote omitted).

> Drug treatment courts may use a pre- or post-adjudication model. Pre-plea drug treatment courts operate as diversion programs in which the defendant is given the opportunity to participate without entering a plea of guilty or going through the trial process. The end result of successful participation is dismissal of the criminal charges. Post-plea courts require a finding of guilt, often by way of a guilty plea. In the post-plea model, the program is imposed as a condition of probation, and any sentence is suspended pending completion of the program.[102]

Since their inception, certain jurisdictions have spoken favorably of DTCs. In *State v. Meyer*, the New Jersey Supreme Court expanded the scope of the possible avenues for admission into a drug court program, stressing that these programs "address the unique problems and needs posed by non-violent, drug-dependent offenders who, through intensive supervision and treatment, have the high potential for recovery and building a productive life."[103] The New Jersey Supreme Court raved about its DTC program, stating that its "[d]rug [c]ourts have proven successful in maximizing the rehabilitative prospects of addicted offenders, reducing the cycle of recidivism, and yielding cost-savings to [the] overburdened criminal justice system."[104]

In *State v. Mauer*, The New Jersey court forced the State to consider a defendant with a prior weapons conviction for admission into the DTC despite such a conviction making the defendant statutory ineligible for the

[102] Hora, *supra* note 48, at 725–26.
[103] 930 A.2d 428, 430 (N.J. 2004).
[104] *Id.*

program.[105] The court reasoned that the State Legislature intended to expand the scope of the program with recent statutory amendments to the Drug Court Statute, authorizing the court "to permit additional offenders who may benefit from the program to be diverted into the program instead of being sentenced to a term of incarceration . . . . [by giving] [the] court . . . greater discretion to place the person on special probation, even if one or more of the enumerated discretionary factors was not met by the particular defendant."[106] The court expressed a favorable opinion of the DTC, noting that

> [d]rug courts have achieved notable success. Within three years of finishing a [D]rug [C]ourt program, only fourteen percent of [D]rug [C]ourt graduates were arrested for new indictable crimes. In comparison, a fifteen-state study found that 67.5 percent of offenders released in 1994 had been rearrested within three years of release. Ninety-five percent of drug tests taken by New Jersey program participants produced negative results, and at the time of graduation, ninety-three percent of the participants were employed.[107]

Overall, DTCs have had their share of advocates since their introduction into the court system, the rationale being that

> addiction is a lifelong struggle, [and] the solution must be one

[105] *See* 105 A.3d 637, 640 (N.J. Super. Ct. App. Div. 2014) ("[T]he court also found '[t]his defendant was previously convicted of the crime of possession of a handgun, and is therefore ineligible for the Drug Court program.").

[106] *Id.* at 644.

[107] *Id.* at 641 (footnote omitted) (citing *Meyer*, 930 A.2d at 433).

> that provides offenders with the tools to continue to live a drug-free life beyond the purview of the court system. If the goal is truly rehabilitation, the only way to accomplish it is to ensure that the underlying reason for which an individual is committing crimes - addiction - is addressed on a therapeutic and long-lasting level.[108]

Without addressing the underlying cure, any measure that courts adopt to address the recidivism rates of addicts will produce the same arrest cycle that addicts already deal with.

E. CRITICISMS OF DRUG TREATMENT COURTS

DTCs and drug-free probation conditions operate under the assumption that carceral conditions of sobriety are sufficient to overcome the physical and psychological dependencies to drugs and alcohol that addicts are faced with on a daily basis.[109] According to the National Institute on Drug Abuse, "an estimated [forty] to [sixty] percent of people trying to quit use of drugs, and [fifty] to [ninety] percent of those trying to quit alcohol, experience at least one slip up in their first four years of recovery."[110] Critics note that "[d]rug [c]ourts have adopted the disease model of addiction but continue to penalize relapse with incarceration and ultimately to eject from the program those who are not able to abstain from drug use for a[n] [arbitrary] period of time deemed sufficient by the judge."[111] "[S]ome drug court participants spend more days in jail while in drug court

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[108] Webster, *supra* note 23, at 902–03.

[109] *See* Hora, *supra* note 48, at 744 ("[D]rug treatment courts do not consider defendants to be without volition.").

[110] *Recovery from Addiction*, PSYCH. TODAY, https://www.psychologytoday.com/us/basics/addiction/recovery-addiction (last visited Oct. 25, 2024).

[111] *Drug Courts Are Not the Answer: Toward a Health-Centered Approach to Drug Use,* DRUG POL'Y ALL. 1, 2 (Mar. 21, 2011), https://drugpolicy.org/resource/drug-courts-are-not-the-answer-toward-a-health-centered-approach-to-drug-use/.

than if they had been conventionally sentenced . . . ."[112] Moreover, "participants deemed 'failures' may actually face longer sentences than those who did not enter drug court in the first place (often because they lost the opportunity to plead to a lesser charge)."[113] As such, drug courts reflect a misguided attempt at helping addicts by placing them in a program that is increasingly difficult to complete. Studies finding positive correlations between DTCs and recidivism rates have often proved to be unreliable as these studies "employed convenience samples or compare drug court participants with drug court failures, in effect stacking the deck to ensure the study finds a positive effect of drug courts."[114] These studies severely minimize the psychological and practical effects that carceral conditions impose on the recovery process.

> Incarceration sanctions have been associated with a higher likelihood of re-arrest and a lower probability of program completion. A person's sense of autonomy and motivation . . . can be undermined if they feel they are being sanctioned unfairly. Moreover, for days or weeks at a time, an incarceration sanction places a person who may be struggling with drugs into a stressful, violent, and humiliating environment, where drugs are often available.[115]

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[112] *Id.*

[113] *Id.*; *see also* Barbara Fedders, *Opioid Policing*, 94 IND. L.J. 389, 418 (2019) ("For those drug-court participants who fail, the jail or prison sentence that is imposed is typically longer than the sentence that was offered pursuant to a proposed plea deal at the outset of the criminal proceedings.") (footnote omitted).

[114] DRUG POL'Y ALL., *supra* note 106.

[115] *Id.*

"With drug courts reporting completion rates ranging from [thirty] to [seventy] percent, the number of participants affected is significant."[116]

Moreover, probation conditions "have had little impact [on recidivism]. . . . Approximately 50 to 70 percent of probationers and parolees [for drug offenses] fail to comply with their release conditions, including drug testing, attendance at drug treatment, and avoidance of criminal activity."[117] In fiscal years 2013-2017, drug offenses had the highest frequency of recidivism among defendants as compared to those convicted of crimes involving firearms, immigration, violence, fraud, etc., and the primary reason probationers violated the terms of their supervision had to do with drugs, either through rearrest for possession or for failing a random drug test.[118] These statistics have provide fuel to the doubters of the efficacy of DTCs, citing these statistics as proving that DTCs are nothing more than another failed attempt to try and address the nation's opioid crisis.

F. THE OPIOID CRISIS MEETS THE COVID-19 PANDEMIC: ASSESSING THEIR IMPACTS ON ADJUDICATIONS OF DRUG OFFENDERS

As previously noted, the War on Drugs failed to deter illicit drug use, evidenced by the various "epidemics" that have come and gone.[119] These drug use "epidemics" are not

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[116] *Id.*

[117] Douglas B. Marlowe, *Integrating Substance Abuse Treat and Criminal Justice Supervision,* NAT'L LIBR. MED. (Aug. 21, 2003), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2851043/#B35-SPP-02-1-4 (noting the study was conducted in 2003, prior to the increased importation of illicit drugs into the country in the mid-2010s through COVID).

[118] *See* U.S. SENT'G COMM'N, *Federal Probation and Supervised Release Violations*, (July 2020).

[119] *See A Social History of America's Most Popular Drugs*, PBS, https://www.pbs.org/wgbh/pages/frontline/shows/drugs/buyers/socialhistory.html (last visited Sep. 25, 2024) (The "popularity of crystal methamphetamine . . . began to increase in the United States" during the 1990s." In 1998, 3.8 million Americans reported to have used cocaine. The crack epidemic raged throughout the 1980s. LSD usage "made a resurgence in the 1990s, particularly in the rave subculture." Marijuana use was and remains popular, with active legislation legalizing the recreational use of marijuana).

exclusive to illicit drugs.[120] Legal prescription medications have been and continue to be abused.[121] For example, "[b]enzodiazepines[,] [medications consisting of Xanax, Valium, Klonopin, etc.,] are prescribed to over 5% of the U.S. adult population and use is growing," with a staggering "5.3 million [people confessing to] misus[ing]" their prescriptions.[122]

However, opiates have played a particular pivotal role in facilitating addiction among its patients. "Opioids were initially designed to make life bearable for those living with chronic pain."[123] Opioids describe a category of medications "that mimic the pain reducing properties of opium by binding to opioid receptors in areas of the brain the control pain and emotion. Once bound to these receptors, opioids trigger the release of dopamine in the brain's reward area, resulting in a euphoric 'high' feeling."[124] The brain begins to crave this euphoria and, "[o]ver time, the brain becomes accustomed to this feeling and requires more of the opioid to trigger the same level of pain relief."[125] As opiate use intensifies, "[t]his increase in tolerance results from the user's dependence upon the opioid to satisfy the feelings of withdrawal, which occur when the euphoric feeling wears off."[126] "In moderate doses, opioids 'dull[] the

[120] *See* Alex Berezow, *A Brief History of the Opioid Epidemic*, AM. COUNCIL ON SCI. & HEALTH (Aug. 22, 2018), https://www.acsh.org/news/2018/08/22/brief-history-opioid-epidemic-13346 ("Prescriptions for opioids tripled between 1991 and 2011.").

[121] *See* Miranda Hitti, *Commonly Abused Prescription and OTC Drugs*, WEBMD, (Aug. 22, 2023), https://www.webmd.com/mental-health/addiction/ss/slideshow-commonly-abused-drugs ("Drug use isn't just about street drugs. Besides marijuana, legal medicines are the most commonly abused drugs in the U.S.").

[122] Donavan T. Maust et al., *Benzodiazepine Use and Misuse Among Adults in the United States*, 70 PSYCHIATRIC SERVS. 97 (Dec. 17, 2018), https://pmc.ncbi.nlm.nih.gov/articles/PMC6358464/.

[123] James Ray, *Deception and Dependency: The Effects and Consequences of Profiting Off Lies and Doctors' Sympathy*, 10 WAKE FOREST J.L. & POL'Y S.S. 77, 77 (2020).

[124] Battiloro, *supra* note 22, at 346 (footnotes omitted).

[125] *Id.* (footnote omitted).

[126] *Id.* (footnote omitted).

senses, relieve[] pain, and induce[] profound sleep but in excessive doses cause[] stupor, coma, or convulsions."[127]

Despite the relatively recent onslaught of opioid use over the last thirty years, physicians were not blissfully unaware of the dangers of excessive opiate use prior to the 1990s. "After his discovery of morphine in the 1800s, the German pharmacist Friedrich Serturner feared how this pain-relieving breakthrough would be utilized in the future."[128] These concerns seemed to fall on deaf ears as soon "his miracle drug was prescribed for common ailments and pains. [Moreover,] [t]hese blanket prescribing practices for everyday pains showed no signs of slowing down."[129] Similar to the past few decades of the opioid crisis, "[t]he resulting morphine abuse wreaked havoc for decades, and doctors and pharmacists became wary of prescribing such powerful pain killers to their patients."[130] Pharmaceutical companies were aware of this history and understood that doctors were aware as well, "[h]owever, these concerns were alleviated by assurances . . . claiming that there was little to no potential danger that patients would become addicted to opioids."[131]

Opioid usage began to rise in the 1990s, as "the intensified marketing of newly reformulated prescription opioid medications (e.g., OxyContin) and an influential pain advocacy campaign that encouraged greater pain management led to a precipitous rise in opioid use in the United States."[132] Purdue Pharma can largely wear the badge of honor for initiating the early stages of the opioid crisis.[133] Purdue Pharma advertised the highly addictive

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[127] Caitlyn Edgell, Comment, *It's Time to Finish What They Started: How Purdue Pharma and the Sackler Family Can Help End the Opioid Epidemic*, 125 PENN. ST. L. REV. 255, 261 (2020).
[128] Ray, *supra* note 123 at 78–79 (footnote omitted).
[129] *Id.* at 79 (footnotes omitted).
[130] *Id.* (footnote omitted).
[131] *Id.* (footnote omitted).
[132] DUFF ET AL., *supra* note 27.
[133] *See* Alanna Durkin & Geoff Mulvihill, *Purdue Pharma Family Sought to Profit off Opioid Crisis, Filing Alleges*, PBS, (Feb. 1, 2019 3:48 PM), https://www.pbs.org/newshour/nation/purdue-pharma-family-sought-to-profit-off-opioid-crisis-filing-alleges/ ("The family behind OxyContin raked in billions of dollars as it pushed to keep patients on

prescription painkiller/opioid "OxyContin as a non-addictive medication essential for pain management."[134] Purdue "relied heavily on an unprecedented and rigorously financed promotional and marketing campaign for the new drug."[135] The company offered doctors personal incentives to ensure that they prescribed OxyContin to their patients, even in times where it was not necessary, while at the same time ignoring the symptoms of addiction that their patients were demonstrating right in front of them.[136] Hopelessly gullible and neglecting to confirm for themselves, doctors fell for these sales pitches, which "led to eighty-six percent of opioid patients being prescribed opioids for non-cancer related pains in 1999."[137] "Between 1999 and 2010, the rate of opioid-involved overdose deaths in the United States doubled from 2.9 to 6.8 deaths per 100,000 people. This initial rise in opioid-related deaths is often referred to as the *first wave* of the recent opioid crisis."[138]

Purdue Pharma was taken to court in multiple states for its role in this wave of the opioid crisis through is misleading branding of OxyContin, with "allegations that drug makers fraudulently and negligently marketed their drugs as substantially less addictive, thus leading to addiction

the powerful painkiller longer despite evidence that the drug was helping fuel the nation's deadly opioid crisis.").

[134] *Edgell*, *supra* note 127, at 255.

[135] Ashley Duckworth, Note*, Fighting America's Best-Selling Product: An Analysis of and Solution to the Opioid Crisis*, 26 WASH. & LEE J. C.R & SOC. JUST. 237, 257 (2019) (footnote omitted).

[136] *See id.* at 257–58 ("Thousands of doctors were treated to all-expenses-paid pain management conferences in resort communities . . . . [Additionally,] [t]he company sent out mass mailings of promotional materials to physicians and paid lucrative incentives to its sales representatives . . . . [C]oupons for OxyContin were made available for doctors to give their patients.").

[137] Ray, *supra* note 123, at 79.

[138] DUFF ET AL., *supra* note 27.

and overuse."[139] Courts[140] ultimately found that "Purdue supervisors and employees intentionally deceived doctors about OxyContin's addictive properties in the previous six years."[141] Notably, Purdue "admitted that it marketed and sold its dangerous opioid products to healthcare providers, even though it had reason to believe those providers were diverting them to abusers."[142] Additionally, Purdue acknowledged that it "lied to the Drug Enforcement Administration about steps it had taken to prevent such diversion, fraudulently increasing the amount of its products it was permitted to sell. Purdue also [admitted to paying] kickbacks to providers to encourage them to prescribe even more of its products."[143] A U.S. Attorney for the District of Vermont noted that Purdue's admissions demonstrated that "Purdue put opioid profits ahead of people and corrupted the sacred doctor-patient relationship."[144] Under the plea agreement "Purdue agreed to the imposition of the largest penalties ever levied against a pharmaceutical manufacturer, including a criminal fine of $3.544 billion and an additional $2 billion in criminal forfeiture."[145]

To make matters worse, cheap heroin, an opiate, started to flood the United States around 2010 as "the predominant source of heroin in the United States shifted from South America to Mexico. Increases in Mexican

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[139] Abbe R. Gluck et al., Symposium, *Law and the Opioid Crisis: Civil Litigation and the Opioid Epidemic: The Role of Courts in a National Health Crisis*, 46 J.L. MED. & ETHICS 351, 353 (2018) (footnote omitted).

[140] *See* Koenig v. Purdue Pharma Co., 435 F. Supp. 2d 551, 553 (N.D. Tex. 2006); Foister v. Purdue Pharma L.P., 2002 WL 1008608, at *1 (E.D. Ky. Feb. 26, 2002); Wethington v. Purdue Pharma L.P., 218 F.R.D. 577, 589 (S.D. Ohio 2003) (overviewing how not all courts found for the plaintiffs in these cases, finding a lack of a causal connection between the injuries and Purdue's misleading branding of OxyContin).

[141] Commonwealth v. Purdue Pharma, L.P., No. 143398, 2019 Mass. Super. LEXIS 589, at *2 (Suffolk Cnty. Super. Ct. Sept. 16, 2019).

[142] OFF. OF PUB. AFF'S, Press Release, *Opioid Manufacturer Purdue Pharma Pleads Guilty to Fraud and Kickback Conspiracies*, (Nov. 24, 2020), https://www.justice.gov/opa/pr/opioid-manufacturer-purdue-pharma-pleads-guilty-fraud-and-kickback-conspiracies.

[143] *Id.*

[144] *Id.*

[145] *Id.*

production ensured a reliable supply of low-cost heroin."[146] In 2015, heroin "surpassed prescription medication as the leading opioid involved in overdose deaths."[147] This is understood as the "*second wave*" in the opioid crisis.[148] Around 2013 is when the United States saw a dramatic increase in the amount of synthetic opioid-related deaths, dominated by fentanyl overdoses. "Beginning in 2013, the number of deaths involving synthetic opioids increased 625% between 2013 and 2016."[149] By 2016 "synthetic opioids—led by fentanyl—surpassed heroin and prescription drugs as the leading type of opioids involved in U.S. overdose deaths." This is known as the "*third wave*" to the opioid crisis.[150]

The danger of mortality is especially pertinent when considering the detrimental effects of synthetic opioid use, such as fentanyl, as fentanyl's potency is "a hundred times that of morphine and forty times that of heroin."[151] "A lethal dose of fentanyl . . . is approximately the size of four grains of salt."[152] "In 2022, the head of the U.S. Drug Enforcement Administration (DEA), Anne Milgram, said that 'fentanyl is the single deadliest drug threat our nation has ever encountered.'"[153] Users are especially attracted to the allures of fentanyl for its "rapid and intense euphoric effect it elicits. Fentanyl works and binds the same way as all other opioids, but it crosses the blood-brain barrier quicker than other substances, resulting in a stronger high."[154] The early supply of illicit fentanyl largely consisted of fentanyl

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[146] DUFF ET AL., *supra* note 27.
[147] *Id.*
[148] *Id.*
[149] JOHNATHAN H. DUFF & LISA N. SACCO, CONG. RSCH. SERV., IN10914, INCREASE IN ILLICIT FENTANYL OVERDOSE DEATHS (2018).
[150] DUFF ET AL., *supra* note 27.
[151] Daniel Ciccarone, *No Moral Panic: Public Health Responses to Illicit Fentanyls*, 70 DEPAUL L. Rev. 229, 232 (2021).
[152] Christine Minhee & Steve Calandrillo, *The Cure for America's Opioid Crisis? End the War on Drugs*, 42 HARV. J.L. & PUB. POL'Y 547, 563 (2019); *see also* Battiloro, *supra* note 22, at 347 ("Fentanyl is so potent that just touching an amount the 'size of a few grains of sand' is enough to kill a person.").
[153] Claire Klobucista & Mariel Ferragamo, *Fentanyl and the U.S. Opioid Epidemic*, COUNCIL ON FOREIGN REL'S (Dec. 22, 2023), https://www.cfr.org/backgrounder/fentanyl-and-us-opioid-epidemic.
[154] Minhee & Calandrillo, *supra* note 152 (footnote omitted).

users "extract[ing] the chemical from pharmaceutical patches and either inject[ing] it or press[ing] it into pills. Presently, fentanyl sold on the street is largely synthetically manufactured in China and shipped to the United States and Mexico."[155] "Compared to heroin, fentanyl is much simpler to make and results in higher profits for manufacturers."[156] Moreover, traffickers can ship fentanyl across the border with less fear of government detection of the product because "its potency permits smaller volume shipments."[157] This ability to ship in smaller quantities allows for fentanyl to "commonly [be] transported in the mail directly from China . . . and smuggled across the southwest border from Mexico."[158]

Many fentanyl users are not even aware of the fact that they are using fentanyl. "[F]entanyl is increasingly used as a cutting agent with heroin and other potent drugs . . . . Illicitly manufactured fentanyl is often sold as counterfeit prescription pills, such as oxycodone or Xanax, containing deadly amounts of fentanyl."[159] The scale of the fentanyl crisis is especially concerning as "[o]verdosages involving synthetic opioids, primarily fentanyl, are the leading cause of U.S. deaths in people ages eighteen to forty-five. In 2021, the overall death toll surged to 80,411, more than ten times the number of U.S. military service members killed in the post-9/11 wars in Iraq and Afghanistan."[160] Deaths attributed to fentanyl "alone nearly tripled from 2016 to 2021."[161] In a twelve-month period ending in April 2021, the CDC found that "for the first time ever, the number of Americans who fatally overdosed over the course of a year surpassed 100,000[,]" with "[f]entanyl and

[155] *Id.* at 348.
[156] *Id.*; *see also id.* ("[I]t costs about $ 810 to create enough fentanyl to make up to $800,000 worth of pills on the black market.").
[157] *Id.*
[158] DUFF & SACCO, *supra* note 149.
[159] Katherine H. Krouse & Lauren R. Light, *Crime and Offenses: Crimes Against the Person*, 34 GA. ST. U. L. REV. 61, 64–65 (2017).
[160] Klobucista & Ferragamo, *supra* note 153.
[161] *Id.*

fentanyl analogs [being] responsible for almost two-thirds" of those deaths.[162]

Moreover, The COVID-19 pandemic may have worsened the illicit fentanyl trade, as drug addiction rates soared during this period and traffickers attempted to capitalize on a bored nation sitting at home with nothing to do. The CDC found that "roughly 13% of people . . . either began using drugs during the pandemic or increased their use of illicit substances."[163] COVID also affected the proliferation of the fentanyl crisis across the nation. Before COVID, "the skyrocketing increase in fentanyl-related overdose deaths in America was mainly affecting the eastern half of the U.S," whereas the entirety of the nation experienced some sort of effects from the fentanyl crisis after COVID's emergence.[164] This geographic distribution could be attributed partly due to the prevalence of powder heroin in the East Coast as opposed to black tar heroin, which is typically seen more in the West Coast, as it "is easier to mix fentanyl with powdered heroin."[165] Likewise, COVID influenced traffickers' reliability on fentanyl to generate profits. Border restrictions arose during the COVID pandemic, making "it harder to move bulkier drugs," leading to increased importations of fentanyl as it "is more potent and easier to transport in small quantities and as pills, making it easier to traffic by mail. This may have helped fentanyl spread to areas that escaped the earlier surge in fentanyl deaths."[166]

Increased legislative actions to address the growing concerns of the fentanyl crisis affected the courts and their adjudications of drug users and possessors. Congress and every state have passed laws to address the growing

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[162] Andrew Kolodny, *Fentanyl Spread Across the US During the Pandemic. This is Why.*, BRANDEISNOW (Nov. 26, 2021), https://www.brandeis.edu/now/2021/november/fentanyl-pandemic-kolodny.html.

[163] Brian Mann, *Overdose Deaths Surged in Pandemic, As More Drugs Were Laced with Fentanyl*, NPR (Apr. 22, 2021), www.npr.org/sections/health/shots/2021/04/22/989833102?overdose-deaths-surged-in-pandemic-as-more-drugs-were-laced-with-fentanyl.

[164] Kolodny, *supra* note 162.

[165] *Id.*

[166] *Id.*

concerns amid the fentanyl crisis, as in 2023, over 600 bills were introduced in State legislatures "and at least 103 laws were enacted."[167] "States introduced bills to change the classification of fentanyl as a controlled substance, and they considered increasing penalties for possession and distribution, drug-induced homicide and drug delivery resulting in death."[168] However, these laws are in direct tension with the nationwide effort to reduce carceral penalties for drug offenses in favor of diversion to treatment. [169] Overall, these laws have had a direct impact on the amount of drug offenders brought before the courts. "From FY [(fiscal year)] 2020 to FY 2021, the number of drug arrests the . . . [DEA] made for fentanyl increased by 36% from 2,305 to 3,138."[170] According to the FBI, federal drug arrests fell from 1,155,610 in 2020 to 907,958 in 2022, however this decrease is likely a reflection on the decreased amount of foot traffic early on in the pandemic.[171] These laws have increased the case loads of courts,[172] increased statutory

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[167] Tammy Hill, *To Combat Overdose Crisis, States Bring Tough New Laws to Fight Against Fentanyl*, NAT'L CONF. OF STATE LEGIS. (Aug. 11, 2023), https://www.ncsl.org/state-legislatures-news/details/to-combat-overdose-crisis-states-bring-tough-new-laws-to-fight-against-fentanyl.

[168] *Id.*

[169] *See* Gabe Stern et al., *State Lawmakers Consider Harsher Penalties for Fentanyl Possession*, PBS (Mar. 20, 2023), https://www.pbs.org/newshour/nation.state-lawmakers-consider-harsher-penalties-for-fentanyl-related-crimes ("Imposing longer prison sentences for possessing smaller amounts of drugs represents a shift in states that in recent years have rolled back possession penalties. Proponents of tougher penalties say this crisis is different and that . . . the stiffer sentences are intended to punish drug dealers, not just users.").

[170] MARK A. MOTIVANS, U.S. DEP'T JUST., HEROIN, FENTANYL, AND OTHER OPIOID OFFENSES IN FEDERAL COURTS, 2021, (2024), https://bjs.org.gov/libraryy/publications/heroin-fentanyl-and-other-opioid-offenses-federal-courts-2021.

[171] *See Annual Number of Arrests for Drug Offenses in the US by Type of Offense*, DRUG POL'Y FACTS, https://drugpolicyfacts.org/table/annual-drug-arrests (last visited Apr. 3, 2025).

[172] *See* KRISTIN M. TENNYSON ET AL., U.S. SENT'G COMM'N, FENTANYL AND FENTANYL ANALOGUES: FEDERAL TRENDS AND TRAFFICKING PATTERNS (2021) ("Offenses involving fentanyl and fentanyl analogues have increased at an alarming rate in recent years. This trend is reflected in the federal caseload where the number of drug trafficking cases involving fentanyl and fentanyl analogues has increased exponentially.").

minimum penalties for possession of fentanyl of a certain weight,[173] increased the amount of people rejected for admission into a DTC due to a lack of program capacity,[174] and are consistent with the old drug war's punitive approach to punishing drug users.[175] Opponents to the laws increasing penalties for fentanyl possessors argue that "the thresholds for longer penalties can sweep up low-level users — not just the dealers the law[s] [are] aimed at. . . . They warn that the state's crime labs test only for the presence of fentanyl, not the exact amount in a mixture of drugs."[176] Evidenced by the growing amount of overdose deaths attributed to synthetic opioids such as fentanyl, addicts are faced with a losing battle in the face of the historic amount of synthetic opioids available at the street level, a fact that the laws enacted to combat the fentanyl crisis seem to ignore, focusing instead on punishing the user rather than focusing on the source of the problem.[177] In the end, the increasing amount of overdose deaths suggest that these laws are ineffective in combating the public health crisis that is the fentanyl crisis, illustrating that increased

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[173] *See id.* ("Trafficking [forty] grams or more, but less than 400 grams, triggers a five-year mandatory minimum with a statutory maximum of [forty] years.").

[174] *See* Fedders, *supra* note 113 ("The pressure on drug courts to show that they are effective in reducing recidivism creates incentives for administrators to select clients likely to successfully complete the program. Yet, . . . these are not necessarily the clients most in need of treatment.") (footnote omitted).

[175] *See* Nicholas Turner & Nazish Dholakia*, In the Fentanyl Crisis, Lawmakers Are Making the Same Mistakes – Harsh Sentencing Doesn't Curb Drug Use or Overdose Deaths*, VERA (Aug. 02, 2023), https://www.vera.org/news/in-the-fentanyl-crisis-lawmakers-are-making-the-same-mistakes ("As we've seen in the past, imposing mandatory minimum sentences will not stop drug use, lower crime rates, or prevent deaths. Instead, it will fuel further incarceration.").

[176] Stern et al., *supra* note 169.

[177] *See* Brian Mann*, Influx of Deadly Street Fentanyl Reaching the U.S. Continues to Grow, Research Shows*, NPR (May 13, 2024), https://www.npr.org/2024/05/13/1251040881/influx-of-deadly-street-fentanyl-reaching-the-u.s.-continues-to-grow-reasearch-shows ("[T]his report found . . . that fentanyl is so cheap and easy to make that the gangs just keep churning out more. The new DEA report found fentanyl is still easy to find. It's easy to buy everywhere in the U.S.").

penalties will not deter future drug use, and will only adding to the recidivist problem in the context of drug offenses.

G. A NON-ABSTINENCE-BASED SOLUTION TO ADDRESSING DRUG ADDICTION THROUGH SENTENCING

Understanding that incarceration sanctions for probationers and drug court participants who relapse amidst the opioid crisis and before the fentanyl crisis did not work to reduce recidivism rates and may have actually made addicts worse off, in conjunction with the present historic levels of drugs, especially fentanyl, available at the street level, it is necessary to explore other, non-abstinence based treatment methods that courts could explore to reflect an understanding that relapse is a part of recovery and to actually give those with a substance use disorder a fighting chance at recovery before they are incarcerated for relapsing. Moreover, a shift to court approved non-abstinence-based treatment methods for addiction could reflect the realization that drug use has never and will not stop, and to stop it is not as simple as to "just say no." Rather, courts should focus on recovery methods that do not align with a total abstinence-based approach, especially in the early days of one's recovery. Studies have suggested that the use of medical marijuana[178] or ketamine,[179] both drugs that will cause a person to fail a drug test and likely be incarcerated for a willful violation of a sentencing condition, are both associated with higher levels of recovery when these drugs are utilized early in one's recovery. Moreover, a shift to a drug like marijuana, as opposed to opioids, could have

[178] *See* Peter Grinspoon, *Access to Medical Marijuana Reduces Opioid Prescriptions*, HARV. HEALTH PUBL'G (Jun. 25, 2019), https://www.health.harvard.edu/blog/access-to-medical-marijuana-reduces-opioid-prescriptions-2018050914509 ("[S]tates that have implemented medical marijuana have seen a 5.88% lower rate of opioid prescribing, and when they implemented adult-use (i.e., recreational use) marijuana laws, there was a 6.38% reduction in opiate prescribing.").
[179] *See* Claire Wilcox, *Can Ketamine Be Used to Treat Addictions?*, PSYCH. TODAY (Mar. 24, 2022), https://www.psychologytoday.com/us/blog/healthy-brain-happy-life/202203/can-ketamine-be-used-treat-addictions (overviewing studies that indicate that "ketamine and similar compounds improve withdrawal symptoms, craving, and drug use.").

a positive overall effect on harm reduction within the community that courts strive for.

Once unthinkable, recent scholarship suggests that medical marijuana may be effective in battling addiction, specifically to opiates. A study done by the University of Southern California indicates that "cannabis could help study participants get through some of the most difficult stages of quitting or cutting down on opioids. They described using it to manage withdrawal symptoms, as well as cravings and anxiety during the period following withdrawal."[180] "One participant highlighted its role in easing anxiety during opioid cessation, stating that 'cannabis is a lifesaver.'"[181] However, federal restrictions on marijuana increases the burden on those attempting to conduct such studies.[182]

One possible way to determine whether medical marijuana affects the rate of opiate use is observing states who have implemented both medical and recreational marijuana dispensaries and their corresponding prevalence of opioid mortality and opioid consumption.[183] One such study "indicated that the implementation of medical marijuana

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[180] Hannah Harris Green, *Cannabis Could Help People Cut Down or Stop Opioid Use, Research Shows*, THE GUARDIAN, (Aug. 12, 2024), https://www.theguardian.com/society/article/2024/aug/12/weed-help-cut-opioid-use.

[181] Dario Sabaghi, *Cannabis May Help People Reduce Opioid Use, Study Says*, FORBES (Aug. 13, 2024, 6:00 AM), https://www.forbes.com/sites.dariosabaghi/2024/08/13/cannabis-may-help-people-reduce-opioid-use-study-says/.

[182] *See* Meredith Wadman, *New U.S. Law Promises to Light Up Marijuana Research*, SCIENCE (Dec. 2, 2022, 6:00 PM), https://www.science.org/content/article/new-u-s-law-promises-light-marijuana-research ("Cannabis is classified as a Schedule I drug. . . . That means . . . scientists . . . must obtain permits from the [DEA] and follow strict security rules for storing and handling the drug. But researchers have reported that it took the DEA a year or more to respond to permit applications.").

[183] *See* Neha Bhardwaj, *The Impact of Medical Marijuana on Prescription Opioid Use*, THE ROTHMAN INSTITUTE (Oct. 5, 2023), https://www.rothmanopioid.org/post/the-impact-of-medical-marijuana-on-prescription-opioid-use ("Recent studies have examined the correlation between medical marijuana law implementation and [the] presence of medical dispensaries and their associated potential reduction of opioid mortality/decreased opioid consumption.").

laws decreased the rate of opioid prescribing among Schedule II, III, and V opioids covered by Medicaid."[184] Moreover, "states with legal medical dispensaries demonstrated a significant decrease in the use of opioids, as evidenced by reduced daily doses of controlled substances . . . ."[185] An additional study conducted by David Bradford, a health economist at the University of Georgia found that, "[i]n medical marijuana states, each physician prescribed an average of 1826 fewer doses of conventional pain medication each year . . . . That translates into many millions of doses per year in those states."[186] Overall, "[c]annabis does show promise as an adjunct to or replacement for traditional [medications for opioid use disorder] in pharmacological and animal studies, reducing withdrawal symptoms and diminishing the 'rewarding properties of opioids,' thus potentially preventing relapse."[187] Some courts, like the New Jersey Supreme Court, have recognized that "medical marijuana [can, under certain circumstances,] represent[] . . . reasonable and necessary treatment" for an opioid addiction.[188]

Similar evidence suggests that low doses of ketamine can be effective in combating addiction. Ketamine can help with withdrawal symptoms, cravings, and co-occurring psychological symptoms like depression that are also associated with relapse.[189] Studies have indicated that, "[i]n recently detoxified alcoholics, ketamine treatment increased one-year abstinence rates in alcoholics from 24% in the control [group] to 64% in the ketamine group . . . and reduced cocaine self-administration by 67% relative to

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[184] *Id.*

[185] *Id.*

[186] Greg Miller, *Could Pot Help Solve the U.S. Opioid Epidemic?*, SCIENCE (Nov. 3, 2016), https://www.science.org/contentarticlecould-pot-help-solve-us-opioid-epidemic.

[187] Stacey McKenna, *Can Cannabis Help Solve the Opioid Crisis?*, RSTREET (Sep. 20, 2022), https://www.rstreet.org/research/can-cannabis-help-solve-the-opioid-crisis/.

[188] Hager v. M & K Const., 247 A.3d 864, 870 (N.J. 2021).

[189] Rayne Whitington*, Benefits and Risks of Treating Opioid Use Disorder (OUD) with Ketamine*, HEALTHLINE, (Jun. 3, 2024), https://www.healthline.com/health-news/ketamine-and-psychological-theraapy-may-help-people-with-severe-alcohol-use-disorder ("Ketamine, at the right levels, alongside therapy, can act as an antidepressant and help block out pain or depressive feelings that come with alcohol dependency.").

baseline in non-treatment seeking cocaine users . . . ."[190] Researchers believe that ketamine is effective in combatting addiction in two distinct ways:

> First, ketamine acts on the glutamate system, altering how is binds to the NMDA receptor. Research suggests that changing how this receptor interacts with neurotransmitters like glutamate . . . effectively treats the severe depression associated with substance use disorder. Secondly, ketamine fosters neuroplasticity, which means that ketamine could help an addict's brain break free from habitual and destructive conditioning. In one study, researchers showed that ketamine could help retrain addiction responses in the brain. Helping it move away from constantly being in drug-seeking and pleasure-seeking mode to coping without the problematic addictive substance.[191]

Ketamine "is a Schedule III drug that can technically be prescribed by any licensed physician in the United States."[192] However, "many physicians are hesitant to prescribe ketamine due to its lack of FDA approval for treating mental illness, its reputation as a club drug, and a lack of

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[190] Ivan Ezquerra-Romano et al., *Ketamine for the Treatment of Addiction: Evidence and Potential Mechanisms*, 142 J. NEUROPHARMACOLOGY 72 (2018), https://doi.org/10.1016/j.neuropharm.2018.01.017.

[191] Jennifer Anderson, *Using Ketamine to Overcome Substance Abuse*, KETAMINE.NET, https://www.ketamine-therapy/substances-abuse-treatment/ (last updated Nov. 7, 2022) (footnotes omitted).

[192] Mason Marks, *Psychedelic Medicine for Mental Illness and Substance Use Disorders: Overcoming Social and Legal Obstacles*, 21 N.Y.U. J. LEGIS &PUB. POL'Y 69, 84 (2018).

safety data regarding long-term use."[193] This stigma against ketamine has persisted despite the fact that it "is a well-studied drug used primarily in surgery and pain management. It is thought to be extremely safe at the dosses used in psychiatry, which are many times lower than those used for anesthesia and analgesia."[194]

Ketamine Psychedelic Therapy (KPT) "consist[s] of three stages. The first step was the preparation, during which patients underwent a preliminary psychotherapy session where a psychotherapist discussed with them the content of the psychedelic experience."[195] The psychotherapist then essentially subliminally primes the patients while they are under the influence of ketamine, telling them that "they would view the world symbolically . . . and see the positive sides of sobriety. They were also told that they would become aware of unconscious mental concepts about the negative aspects of their addiction, such as their personal problems and their self-identity."[196] This was done to help patients "accept new life values, purposes and meanings of life" to help overcome their addictions.[197] The second stage is the actual ketamine therapy, in which "ketamine [is] intramuscularly injected and the psychotherapist interact[s] with the patient."[198] This interaction allows for the psychotherapist to "verbally guide[] the patient, with the aim of creating new meaning and purpose in life."[199] In one study, "[a]t moments of highly intense psychedelic experience, the smell of alcohol was introduced to the individuals. The idea was to enhance the negative emotional valence of the thoughts related to alcohol during the session."[200] The last stage comprises of group therapy, in which patients "share[] their experiences with others the day after the ketamine session, with the assistance of a therapist. The aim of this session was to help patients

[193] *Id.* at 84–85.
[194] *Id.* at 98.
[195] Ezquerra-Romano et al., *supra* note 190, at 74.
[196] *Id.*
[197] *Id.*
[198] *Id.*
[199] *Id.*
[200] *Id.*

integrate insights of psychedelic experience into their lives."[201]

Another study manipulated the doses of an intramuscular ketamine injection to detoxing heroin patients.[202] "The higher dose had a larger beneficial effect on craving and drug use, and benefits lasted at least 24 weeks."[203] Another trial compared the effects of three ketamine sessions compared to two, and found that "[t]heir sessions were more effective, with higher abstinence rates (50% compared to 22%) at the one-year follow-up."[204]

III. CONCLUSION

Drug free probation conditions, and drug courts with the same conditions, have long been utilized by courts to combat drug addiction and recidivism rates for drug offenders. This emergence reflected a change to a more rehabilitative punishment sentencing scheme, instead of the retributive one that largely originated out of the War on Drugs. Amidst the opioid crisis, these rehabilitative schemes have failed to make any meaningful effect. Drugs continue to cross the border, people continue to do drugs to the point of addiction, people get arrested for drug offenses and given drug free conditions upon adjudication, and inevitably reoffend when they are unable to overcome their addictions on their own. Courts have affirmed that relapses are a willful violation of probation, despite evidence that most people will relapse at some point in their recovery.

Practical ramifications of this cycle are that drug offenders with a substance use disorder are more likely to reoffend than the average citizen, making their incarceration resemble a retributive sentencing scheme that was present throughout the heightened concern on the War on Drugs. Additionally, the fentanyl crisis has flooded the streets with a historic amount of drugs, making addicts

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[201] *Id.*

[202] *See* Wilcox, *supra* note 179 ("The first trial measured the differences in clinical outcomes between a higher and lower dose of ketamine in seventy detoxified heroin-dependent individuals, the lower dose as a control group.").

[203] *Id.*

[204] *Id.*

more vulnerable to getting arrested for drug offenses and reoffending by violating their sobriety conditions. This reflects a lack of understanding on the courts' part of the reality of the state of the illicit drug trade and suggests that addicts are being used as scapegoats to demonstrate that the government is actively fighting against the illicit drug trade. Moreover, courts assume that maintaining sobriety is as simple as just saying no to drugs, without acknowledgement of the physical and psychological dependencies that addicts face on a daily basis.

Drug courts and drug free probation conditions with incarceration sanctions for relapsing do nothing to help the overall goal of reducing recidivism rates for drug offenders. Courts largely utilize abstinence-based treatment methods that do work for some, but not for most. Courts have an affirmative duty to assess the individual characteristics of each defendant and to give an appropriate punishment upon such consideration. Understanding this, courts need to consider non-abstinence-based treatment methods, like medical marijuana or ketamine, for defendants with substance use disorders in an effort to truly address recidivism rates and reflect an understanding of the reality that the fentanyl crisis has created and the difficulties the crisis has created for defendants with substance use disorders.