Beyond Bars: Rethinking Substance Use Criminalization in Federal Supervised Release

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INTRODUCTION

If criminal defendants relapse from substance use disorders while on community supervision, should they be sent back to prison? In 2018, the Massachusetts Supreme Judicial Court unanimously ruled that a judge can require defendants on probation for substance use disorder to abstain from drugs and face incarceration for violations, including a relapse.

Julie A. Eldred challenged this probation requirement under the cruel and unusual punishment clause of the Eighth Amendment. Ms. Eldred, a 30-year-old woman driven by the need to fund her heroin addiction, stole jewelry, ultimately landing her a larceny conviction. In 2016, a district court judge in Massachusetts sentenced her to a year of probation, facing up to an additional 30-month sentence for violating a condition of her probation, namely drug use. As part of the mandated probation programming, the judge ordered her to begin outpatient substance abuse treatment three times each week and remain drug-free. Ms. Eldred enrolled in a court program and began taking Suboxone, a medication used to minimize withdrawal symptoms.

Within 11 days of beginning probation, Ms. Eldred tested positive for fentanyl — an illegal and highly addictive drug — during a random drug screening. Her probation officer alerted the court, and during a detention hearing, the judge ordered Ms. Eldred to attend inpatient treatment. However, no inpatient facility was immediately available. Ms. Eldred tried to explain to the judge that she was “just getting back on [her] feet” and

5. See Eldred, 101 N.E.3d at 916.
7. Eldred, 101 N.E.3d at 916.
8. Id. at 917.
9. Id. at 916.
pled for another chance at outpatient programming. The judge discretionarily denied Ms. Eldred’s request to remain in the community for drug programming and sent her to a medium-security prison until her lawyer could find an available inpatient program. After ten days passed, and thanks to the advocacy of her attorney, she was finally able to enter a treatment program where she remained for nearly eight months. During the ten days she was remanded to custody, Ms. Eldred underwent withdrawal without any drug counseling or treatment. Ms. Eldred’s drug use began when she was only 15 years old, and her first attempt at detox was almost ten years later. Between the age of 25 and her incarceration at the medium-security prison at the center of this controversy, she attempted various forms of substance use treatment. Ms. Eldred says that part of her addiction was fueled by avoiding withdrawal systems, which include “sweats, shakes, aches, and stomach cramps.” Achieving a sense of normalcy and coping with the physical and psychological effects of withdrawal can contribute to continued substance use.

In an amicus brief prepared to support her case, an addiction medicine expert supports Ms. Eldred’s argument that the judge’s decision to jail her would not stop her addiction: “a person suffering from SUD cannot simply be ordered into remission.” The brief affirms that “incarceration of those with SUDs who relapse does not have the intended deterrent effect” because “incarcerating individuals suffering from a health condition tends to worsen the preexisting condition, especially in the case of addiction.”


15. See Hoffman, supra note 4.
16. See Eldred YouTube Video, supra note 10; Hoffman, supra note 4.
17. See Eldred YouTube Video, supra note 10.
active addiction, the brain undergoes substantial changes making relapse a predictable hurdle—a signifying active addiction rather than an intentional disregard for court mandates. There has been a notable shift in acceptance of the brain-disease model posited by Ms. Eldred. However, the brain-disease model of addiction is still being updated to reflect evolving scientific understanding. Ms. Eldred’s amici presents the prevailing perspective despite criticism within certain medical circles.

In Ms. Eldred’s appeal, the questions before the court included: (1) where a person who committed a crime is addicted to illegal drugs, whether a judge may require as a condition of probation that a person abstain from illegal drug use; and (2) “at a detention hearing, if there is probable cause to believe that a person with a ‘drug free’ condition of probation has violated that condition by using an illegal drug, may that person be held in custody while awaiting admission into an inpatient treatment facility, pending a probation violation hearing.” Ms. Eldred ultimately lost her appeal, but the case probes several critical issues about the status of addiction criminalization.

Following eight months in an inpatient facility, Ms. Eldred has remained sober for six years. On the surface, it might seem reasonable to conclude that Ms. Eldred’s probation violation and her time in jail led her to a semblance of stability and successful treatment for her addiction. However, her attorney argues that the court’s path was counterproductive and harmful, contending that ‘she’s in recovery because of sustained treatment with medication and family support, which is what the court interrupted by jailing her.’ The detrimental impact of jailing someone like Ms. Eldred, who inevitably underwent withdrawal inside, cannot be understated. As Justice Stewart noted, “imprisonment for ninety days is not, in the abstract, a

25. See, e.g., id.
26. See Brief on Behalf of the Massachusetts Medical Society, supra note 20, at 46.
28. See id. at 915.
29. See Hoffman, supra note 4.
30. Interview with Lisa Newman-Polk, Ms. Eldred’s attorney (Dec. 19, 2023) (on file with author). It is important to note that Julie, who suffered greatly because of this experience, is a white middle-class woman with familial support and societal benefits associated with her status. Discrepancies exist along race, gender, and class lines for those going through the legal system. Id.
31. See Hoffman, supra note 4.
punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.\textsuperscript{32} Rather than allowing Ms. Eldred to pursue ongoing outpatient treatment with an understanding that relapses are a common part of the recovery process, the judge revoked her liberties and her from the community after the first failed drug test, opting for detention before beginning inpatient treatment.

Ms. Eldred’s legal involvement took place in the state system, but her experience as someone using drugs is not unusual and presents similarities between those on community supervision who are cycling through federal and state facilities. Judges frequently grapple with the dilemma of either sending individuals to prison when they fail drug conditions of supervision or holding onto the hope that sustained treatment and community networks will work to overcome the power of addiction.

Supervised release is the federal system’s version of community supervision.\textsuperscript{33} This sentencing option is frequently paired with custody time in federal sentencing practice.\textsuperscript{34} The consequences for violating supervised release are significant, often resulting in additional incarceration that can exceed an original sentence.\textsuperscript{35} Individuals on supervised release typically face strict drug-related conditions like testing and mandated treatment.\textsuperscript{36}

Under 18 U.S.C. §3583(d), “the court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least two periodic drug tests thereafter.”\textsuperscript{37} Failing to follow these guidelines can result in a technical violation — a violation of supervision but not an activity that constitutes a

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\textsuperscript{32} Robinson v. California, 370 U.S. 660, 667 (1962) (holding that the Eighth Amendment of the Constitution prohibits criminalization of particular acts or conduct, namely drug addiction).
\textsuperscript{34} See id.
\textsuperscript{35} See Just the Facts: Revocations for Failure to Comply with Supervision Conditions and Sentencing Outcomes, U.S. Cts. (June 14, 2022), https://www.uscourts.gov/news/2022/06/14/just-facts-revocations-failure-comply-supervision-conditions-and-sentencing-outcomes [https://perma.cc/99XD-94Q7] (“When a person under supervision fails to comply with release conditions, which in the community corrections context is labelled a technical violation, that person can be sent back to federal prison.”).
\textsuperscript{36} See U.S. Sent’g Comm’n, Federal Probation and Supervised Release Violations 6 (July 2020). People on supervision most frequently violated their conditions with a drug related offense. Id. at 3.
\textsuperscript{37} 18 U.S.C. § 3583(d).
\end{flushleft}
criminal charge. Despite these measures, technical violations remain a key reason for supervision termination. Approximately 350,000 people, representing one-third of the population under supervision, are sent back to prison for condition violations. Individuals caught violating supervised release for drug-related violations may be “revoked” and sent back to prison. Court programs like those discussed in Part III are necessary steps currently utilized to tackle the intersection of addiction and supervised release.

The need to address our federal drug policies is immediate. This urgency stems from the dramatic rise in drug use: substance and overdose deaths are shattering all previous records. The crisis is fueled by the lasting impacts of the COVID-19 pandemic and the widespread availability of potent synthetic opioids. In 2022, there were more than 100,000 drug-involved overdose deaths — a 250% increase since the end of the century. Pandemic research reveals a rise in substance use, particularly among those with anxiety, depression, and COVID-19 stress. Practitioners, judges, and the court may feel inclined to use prison as the stopgap in handling the intersection of drug use and criminal activity. Ms. Eldred’s case, along with others, shows that the prison bandage does not address the bleeding wound of addiction criminalization. In fact, it often aggravates the problem. Faced with a drug crisis, the United States needs federal law to adapt and embrace proven solutions to addiction, such as evidence-based interventions and harm reduction programming, to move forward successfully.

This Note focuses on the American legal system’s use of statutory prohibition on drug usage as a proactive solution to solving potential drug abuse concerns among those on federal supervised release. Revoking supervised release based on a technical violation, such as drug use or

38. 18 U.S.C. § 3583(g); see also U.S. Sent’g Comm’n, supra note 36, at 10–11.
39. See U.S. Sent’g Comm’n, supra note 36, at 11, 31 (“Grade C violations that do not constitute criminal offenses are considered ‘technical’ violations.”).
41. Harm Reduction, Substance Abuse & Mental Health Servs. Admin. (Apr. 24, 2023), https://www.samhsa.gov/find-help/harm-reduction [https://perma.cc/5AL4-XJXP] [hereinafter SAMHSA Harm Reduction]. A dangerous expansion of synthetic drugs laced with fentanyl are appearing in other illicit substances, including fake prescription pills. Id.
42. See id.
43. See id.
possession, unrelated to the underlying charge fuels mass incarceration and is an unproductive use of resources. Supervised release is frequently considered a wholly beneficial tool to help incarcerated people re-enter society. Yet, it rarely functions as such for people with SUD. The federal supervised release statute sends individuals caught using or possessing drugs back to prison facilities where treatment options are limited or unavailable, essentially placing recovery journeys back to square one. The supervised release drug policy further punishes people by failing to embrace an approach rooted in human-centered and evidence-based techniques to successfully implement methods of combating drug use.

Part I of this Note will explore the history of supervised release, focusing on the drafters’ intent of the Supervised Release Act of 1984. Supervised release was established to serve as the rehabilitative part of a federal sentence, but today the system has evolved into a complex system scrutinizing and disciplining drug activity. Part I will explain how supervised release was developed with the vision of implementing a rehabilitative program but does not adhere to its mandate by revoking individuals’ supervision and sending people back to prison for drug-related technical violations. Part II will address the legal shortcomings of the supervised release statutory requirements that demand judges revoke individuals for possession of controlled substances or failing drug tests rather than address underlying causes of drug use. Part III of this Note considers solutions to addressing the crisis of drug revocations. The field of addiction treatment is in a constant state of evolution, adapting to the shifting landscape of drug use and emerging substances. Instead of punitive methods, treatment requires centering personalized needs and incorporating empirical research to sustain recovery. Part III also evaluates the inconsistency between the criminal legal system’s approach to substance use through the lens of the supervised release program and the solutions suggested to tackle addiction through evidence-based interventions.

I. THE BACKGROUND OF FEDERAL SUPERVISED RELEASE

This Section provides background on the cultural and legal framework that produced supervised release and transformed how community supervision functioned. Approximately 4.5 million individuals in federal

47. My exploration of Federal Supervised Release was largely informed by Professor Jacob Schuman’s invaluable insights and research, which has significantly shaped the final outcome of this project. See generally Jacob Schuman, Drug Supervision, 19 OHIO ST. J. CRIM. L. 431 (2022) [hereinafter Drug Supervision]; Aliza Hochman Bloom & Jacob Schuman, It Is Time to Reform Federal Supervised Release, AM. CONST. SOC’Y EXPERT F. (Nov. 30, 2022), https://www.acslaw.org/expertforum/it-is-time-to-reform-supervised-
and state systems are subject to community supervision. Probation and supervised release are the two forms of supervision that exist in the federal system. The Probation and Pretrial Services Office within the judicial branch oversees both.

Probation can serve as the replacement for prison time. On the other hand, supervised release is a term of supervision after custodial time and encompasses the vast majority (90%) of the people under federal supervision. Federal sentencing practice data shows supervised release is imposed in 99.1% of all cases. Yet, community supervision is correlated with higher recidivism rates by trapping individuals in a cycle of surveillance and control. The more court restrictions people face, the higher the risk of police interaction, raising questions about its effectiveness as a diversionary measure rather than as “part of the continuum of excessive penal control.” As Fiona Doherty suggests, “the phenomenon of hypersupervision outside of prisons deserves to be scrutinized in a manner commensurate with its dominant role in the U.S. criminal justice system.”

After people leave correctional institutions, they are permanently scarred, and “[the penal institution] continues to follow them” to the point in which “surveillance that was once de jure and which is today de facto.” The supervision system acts as if designed to predispose people to failure. This Section will trace the development of supervised release as a replacement for federal-release/; Jacob Schuman, Supervised Release Is Not Parole, 53 LOY. L.A. L. REV. 587 (2020) [hereinafter Supervised Release Is Not Parole].

See Probation and Parole Systems Marked by High Stakes, Missed Opportunities, supra note 40, at 6.

See generally ADMIN. OFF. U.S. CTS. PROB. & PRETRIAL SERVS. OFF., supra note 33; see also Drug Supervision, supra note 47, at 3.

U.S. SENT’G GUIDELINES MANUAL § 5B1.1. (U.S. SENT’G COMM’N 2018); see also Burns v. United States, 287 U.S. 216, 220–21 (1932) (discussing how probation serves as a replacement for prison).


See Drug Supervision, supra note 47, at 3–4.

U.S. SENT’G COMM’N, supra note 46, at 3 n.17.


See id.

Fiona Doherty, Obey All Laws and Be Good: Probation and the Meaning of Recidivism, 104 GEO. L.J. 291, 354 (2016) (arguing that while probation is often seen as an alternative to incarceration, it remains a form of community supervision that involves restrictions and monitoring, raising questions about its effectiveness in addressing the root causes of crime); Drug Supervision, supra note 47, at 4.

Doherty, supra note 56, at 354.

See generally Liam Martin, Reentry Within the Carceral: Foucault, Race and Prisoner Reentry, 21 CRITICAL CRIM. 496 (2013).
parole and probation and explore the legislative background of the statute responsible for creating federal supervision.

A. The Federal Parole System

Early reformers began advocating in the 18th century for rehabilitation by awarding early release from forms of supervision. This hope for reform led to the London Society for the Improvement of Prison Discipline sending Alexander Maconochie in 1836 to investigate the treatment of detainees in the Australian penal colony. His report exposed the colony’s extreme neglect of convicts and sparked a shift towards a more humane approach to the treatment of prisoners. Maconochie suggested a new method labeled the “mark system” based on earning release through good behavior. The system advocated for a “theory of correction . . . [that] emphasized training and performance as the chief mechanisms of criminal reformation.” In a wave of reforms in the late nineteenth century, 20 states in the U.S. enacted laws mimicking the mark system and enabling early release based on good behavior. Drawing inspiration from the state parole programs, the federal government initiated its system in 1910, focusing on rehabilitation rather than retribution.

Releasing incarcerated people to parole rested solely with the federal parole boards assigned to each federal penitentiary. The board comprised three members and had sole discretion over parole approvals and terms of parole release. Decades saw federal courts removed from parole oversight, rejecting legal challenges like habeas corpus petitions. Parolees remained legally under the warden’s authority until the end of their sentence.

63. See Doherty, supra note 61, at 967.
67. See Doherty, supra note 61, at 976.
68. See Doherty, supra note 61, at 985.
69. See Doherty, supra note 61, at 985.
70. See Doherty, supra note 61, at 988.
71. See Doherty, supra note 61, at 988; see also Underhill & Powell, supra note 66, at 299; Parole Act, ch. 387, §§ 3, 36 Stat. 819 (1910).
system’s benefit was allowing custodial time outside prison walls, but this
did not change the original sentence length.\textsuperscript{72}

The century-old parole system eventually faced mounting criticism for
unchecked decision-making authority.\textsuperscript{73} Parole was classified as
indeterminate sentencing, which allowed judges to select sentences within
congressional ranges, and the parole board determined, within that range, the
prisoner’s readiness for release.\textsuperscript{74} Critics questioned the consequences of
the board’s vast discretionary powers, particularly on minority and low-
income communities.\textsuperscript{75} Other critics advocating for stronger criminal laws
viewed the indeterminacy of parole sentencing as undue leniency on
offenders and undermining crime deterrence.\textsuperscript{76} Reformers on all sides
pushed for a more determinate approach to sentencing.\textsuperscript{77} Following years of
debate, the Sentencing Reform Act of 1984 (SRA) marked the elimination
of the federal parole system in the United States.\textsuperscript{78}

\textbf{B. The Supervised Release Act of 1984}

The SRA replaced federal parole and introduced supervised release as a
way to track individuals post-incarceration.\textsuperscript{79} In the new system, the entire
prison sentence must be completed before transitioning to supervised release
in the community.\textsuperscript{80} Judges were now empowered at sentencing to
determine the duration of incarceration a defendant served and the conditions
of supervised release following custody.\textsuperscript{81}

The SRA sought to guide judges in emphasizing that a sentence of
incarceration is not imposed to achieve rehabilitation goals.\textsuperscript{82} However,

\begin{footnotesize}
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\item \textsuperscript{72} See Underhill & Powell, supra note 66, at 299.
\item \textsuperscript{73} See Supervised Release Is Not Parole, supra note 47, at 600.
\item \textsuperscript{74} See Supervised Release Is Not Parole, supra note 47, at 600.
\item \textsuperscript{75} See Doherty, supra note 61, at 991; Supervised Release Is Not Parole, supra note 47, at 593.
\item \textsuperscript{76} See Doherty, supra note 61, at 991.
\item \textsuperscript{77} See Supervised Release Is Not Parole, supra note 47, at 600.
\item \textsuperscript{80} See Doherty, supra note 61, at 997.
\item \textsuperscript{81} See Supervised Release Is Not Parole, supra note 47, at 603. The Senate Report for
the SRA established, “[T]he court, in imposing a term of imprisonment for a felony or a
misdemeanor, [may] include as part of the sentence a requirement that the defendant serve a
term of supervised release after he has served the term of imprisonment . . . The term of
supervised release would be a separate part of the defendant’s sentence, rather than being the
end of the term of imprisonment.” S. Rep. No. 98-225, at 123 (1983); see also Underhill &
Powell, supra note 66, at 305.
\item \textsuperscript{82} See Doherty, supra note 61, at 997.
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supervised release embraced a rehabilitative focus — reflecting the idea that the punitive part of the sentence was completed during imprisonment. The SRA Senate report outlined two distinct applications for supervised release. For long sentences following serious offenses, the priority was easing reintegration into the community. For shorter sentences, the focus shifted to rehabilitation through post-release training and programs. The guidelines allowed judges to create further conditions for supervised release, provided they had a demonstrably reasonable connection to deterrence or rehabilitation. This discretion was constrained by not imposing restrictions that would constitute a deprivation of liberty greater than necessary. The one non-negotiable condition was that defendants on supervised release could not “commit another Federal, State, or local crime” while on supervision.

The SRA allowed judicial discretion in setting conditions but lacked a tool to revoke supervised release for noncompliance. Accordingly, the court did not have the authority to re-incarcerate someone for violating their conditions. The sponsors of the SRA wanted serious violations to be treated as new offenses and minor violations not to be impacted by the potential for rehabilitation. Without a revocation mechanism, all alleged supervised release violations triggered full criminal due process protections. Thus, unless a violation of supervised release rose to the level of a new crime, violations could not be punishable with prison because supervised release was not a sentencing substitute for prison.

C. The Intersection of Supervised Release and Drug Use

President Ronald Reagan won the presidency with a tough-on-crime platform and implemented drug policies responding to increasing concern

83. See Underhill & Powell, supra note 66, at 305.
85. See Doherty, supra note 61, at 998–99.
86. See Doherty, supra note 61, at 998–99.
87. See Doherty, supra note 61, at 999.
89. See Doherty, supra note 61, at 999; see also Paul Biderman & Jon Sands, A Prescribed Failure: The Lost Potential of Supervised Release, 6 FED. SENT. R. 204, 204 (1994).
92. See Supervised Release Is Not Parole, supra note 47, at 604; see also Doherty, supra note 61, at 1000; Underhill & Powell, supra note 66, at 305.
over drug quantities on city streets.  

During his presidency, the Anti-Drug Abuse Act (ADAA) of 1986 went into effect — right before the SRA — and was Congress’s effort to intensify penalties for specific drug crimes, including mandatory minimum sentences for people dealing drugs, specific drug sentencing disparities, and increasing the drug enforcement spending cap by $1.7 billion. The bill passed easily, with broad bipartisan support, and was viewed as political opportunism for both parties.

Experts at the time raised concerns that public officials and legislation addressing drug concerns relied on “vague or poorly defined information,” to address political hysteria. The ADAA was no exception and implemented a “technical amendment” to the SRA, granting courts the authority to sentence individuals directly to prison after revocation. Following the procedure in the Federal Rules of Criminal Procedure 32.1, a court could revoke a defendant “if it [found] by a preponderance of the evidence that the person violated a condition of supervised release.” The amendment also allowed the court to “require the person to serve in prison all or part of the term of supervised release without credit for time previously served on postrelease supervision.”

The amendment’s passage marks a significant shift in federal sentencing philosophy and the SRA’s function toward a punishment mechanism. The Sentencing Reform Act sought to reduce reliance on incarceration as a sentencing tool, but the amendment stands at odds with that aim by emphasizing punishment through prison time.

Congress continued to toughen penalties for supervised release drug violations following the enactment of the SRA and the ADAA. The Violent


94. See Doherty, supra note 61, at 1000.

95. See Intlekofer, supra note 93.

96. See Intlekofer, supra note 93.


99. Underhill & Powell, supra note 66, at 305.


101. See Doherty, supra note 61, at 1001.

102. Underhill & Powell, supra note 66, at 306.
Crime Control and Law Enforcement Act of 1994 called for supervised release conditions to require a defendant to “refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days” and “at least 2 periodic drug tests.” 103 In 2002, the system grew even harsher — mandating revocation and a prison sentence for someone failing three drug tests in a single year. 104 Those changes still guide sentencing practices in consequential ways.

Years before coming home from prison, a supervisee receives their supervision conditions as part of the sentence. 105 District court judges impose conditions without detailed justifications for their choices and offer little explanation for risk assessments or specific needs. 106 As Jacob Schuman suggests, “the judge must ‘guess . . . what conditions are likely to make sense in what may be the distant future.’” 107 Most consequentially, nearly every sentence includes a term of supervised release, 108 and eight of ten supervision violation hearings result in a prison sentence. 109 That being so, technical violations do not always prove an individual is struggling with reintegration. 110 Instead, the violations are a byproduct of imposing conditions pre-incarceration and pre-release. Conditions often fail to account for the real-time individualized needs and challenges someone encounters when re-entering the community.

The consequences of the ADAA are traced in recent reports on supervisees and drug use. Approximately 26,000 supervisees, or 20%, are enrolled in judiciary-funded substance abuse treatment. 111 Ultimately, the intersection of supervision and drug policies presents a complex set of considerations and implications. The following section discusses scientifically proven approaches to addressing SUD, including evidence-based interventions and associated treatments.

105. 18 U.S.C. § 3583(a) (“The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment . . . .”).
106. Id. at 626 (quoting Christine S. Scott-Hayward, Shadow Sentencing: The Imposition of Federal Supervised Release — A Judicial Function, 6 FED. SENT’G REP. 190, 183, 216 (1994)).
107. Supervised Release is Not Parole, supra note 47, at 625 (quoting United States v. Thompson, 777 F. 3d 368, 374 (7th Cir. 2015)).
110. Supervised Release is Not Parole, supra note 47, at 626.
II. THE MECHANISMS FOR DRUG-RELATED TECHNICAL VIOLATIONS

Federal supervised release includes a revocation feature, and a violation by a mere “preponderance of the evidence” can result in substantial time in prison.112 This diminished standard of proof eliminates the jury trial requirements.113 The supervised release statute, 18 U.S.C. § 3583, requires revocation and imprisonment if the supervisee possesses a controlled substance, “refuses to comply with drug testing imposed as a condition of supervised release; or . . . tests positive for illegal controlled substances more than [three] times over the course of [one] year.”114 But court-ordered treatment presents a unique challenge for providers who must balance therapeutic care with ensuring adherence to court directives.115 This dynamic can create barriers to trust and collaboration, hindering positive treatment outcomes.116 Without adequate support that lacks the threat of prison and the utilization of proven treatment strategies, people with SUD are trapped in a revolving door between prison and supervision.

In Section II.A, this Note addresses the constitutional concerns of supervised release in a recent Supreme Court case. Section II.B transitions into an analysis of the deficiencies in using prisons as treatment centers, including data on the accessibility of drugs inside prisons that undermines the notion of prisons as centers of drug abstinence. Part II ultimately deals with the landscape of drug exposure in prison and the limitations on treatment opportunities inside facilities.

A. Constitutional Questions

Section § 3583(g) is the part of the supervised release statute that deals with mandatory revocation for possession of controlled substances or refusal to comply with drug testing.117 Only one other federal law required prison for specific parole violations:118 18 U.S.C. § 3583(k), explicitly sentencing registered repeat sex offenders committing another sex offense to a five-year minimum sentence. In 2019, the Supreme Court in United States v. Haymond addressed the constitutionality of 18 U.S.C. § 3583(k) in requiring mandatory minimums for sex offenses.119 Andre Haymond was convicted

112. 18 U.S.C. § 3583(e)(3).
113. Id.; FED. R. CRIM. P. 32.1.
114. 18 U.S.C. § 3583(d).
115. See Henning Hachtel et al., Mandating Treatment and Its Impact on Therapeutic Process and Outcome Factors, 10 FRONTIERS PSYCH. 1, 1 (2019).
116. Id.
117. 18 U.S.C. § 3583(g).
118. Drug Supervision, supra note 47, at 24.
119. See generally 139 S. Ct. 2369, 2378 (2019) (holding that the application of § 3583(k) violated Mr. Haymond’s right to a trial by jury).
by a jury of one count of possession and attempted possession of child pornography and sentenced to a 38-month prison term and ten years of supervised release.\textsuperscript{120} After serving his prison sentence, but under supervised release conditions, Haymond was “again found with what appeared to be child pornography.”\textsuperscript{121} In addition to terminating his supervised release, the government wanted to impose a separate prison sentence. The Court struck down the provision that allowed mandatory revocation for a sex crime and sentencing that exceeds the maximum for the original offense as violating the defendant’s right to a jury trial.\textsuperscript{122}

\textit{Haymond} is a landmark Supreme Court decision addressing the legal certainty of supervised release provisions. The case divided the Court into 4–1–4 votes without a majority opinion. Justice Neil Gorsuch wrote a plurality opinion on behalf of Justice Ginsburg, Justice Kagan, and Justice Sotomayor, affirming that “only a jury, acting on proof beyond a reasonable doubt, may take a person’s liberty.”\textsuperscript{123} Section 3583(k), as applied in this case, raises questions under \textit{Apprendi v. New Jersey}\textsuperscript{124} because a defendant is sentenced to a “prison term well beyond that authorized by the jury’s verdict — all based on facts found by a judge by a mere preponderance of evidence.”\textsuperscript{125} This contradicts the jury feature of the U.S. legal system intended to “exercise supervisory authority in the judicial function by limiting the judge’s power to punish.”\textsuperscript{126} Put differently, the judge’s authority to revoke someone’s liberties by sending them back to prison is not unconstrained.

Justice Gorsuch emphasized in \textit{Haymond} that the purpose of parole was to substitute prison, but supervised release’s purpose is to “encourage rehabilitation after the completion of [the] prison term.”\textsuperscript{127} Yet, revocations act as punishment for violations while under supervision. Deviating from a rehabilitation-focused model of supervision, Justice Breyer’s concurrence in \textit{Haymond} highlights the punitive character of the system: “The consequences that flow from a violation of the conditions of supervised release are first and foremost considered \textit{sanctions} for the defendant’s . . . ‘failure to follow the court-imposed conditions.’”\textsuperscript{128} Similar guidance is offered in the United

\begin{itemize}
\item \textsuperscript{120} Id. at 2373.
\item \textsuperscript{121} Id. at 2374.
\item \textsuperscript{122} Id. at 2375.
\item \textsuperscript{123} Id. at 2373.
\item \textsuperscript{124} See generally 530 U.S. 466 (2000).
\item \textsuperscript{125} \textit{Haymond}, 139 S. Ct. at 2382.
\item \textsuperscript{126} Id. at 2376.
\item \textsuperscript{127} Id. at 2382.
\item \textsuperscript{128} See id. at 2386 (emphasis added); see also \textit{Supervised Release Is Not Parole}, supra note 47, at 628.
\end{itemize}
States Sentencing Guidelines permitting revocations as a way to “sanction primarily the defendant’s breach of trust.” The punitive character of supervised release revocation starkly contrasts the rehabilitative logic underlying the statute’s original mandate. Today, that system operates to harm individuals with SUDs who inevitably find themselves continuously tied up in the legal system without meaningful support.

B. Evidence-Based Psychosocial Interventions in Substance Use

The following Section discusses evidence-based psychosocial interventions for substance use disorder. Evidence-based psychosocial interventions in substance use encompass a range of therapeutic approaches supported by empirical research. These interventions aim to address the complex nature of substance use disorder. They are highlighted in this Section to contrast against the criminal legal system’s approach to drug usage in supervised release. This Section should not be regarded as exhaustive but as relevant context for understanding several available evidence-based psychosocial interventions.

Addiction is a complex health issue characterized by a range of biological, psychological, and social factors that prisons are not adequately positioned to address. Addiction is a chronic brain disease “in which a person regularly finds and uses drugs despite the negative consequences associated with that behavior.” It qualifies as a brain disease because of its capacity to alter the brain’s functioning, detrimentally affecting a person’s physical and mental health. Addiction can change how someone thinks and feels. Reentry after prison or jail presents significant

131. See Mark McGovern & Kathleen Carroll, Evidence-Based Practices for Substance Use Disorders, 26 PSYCHIATRIC CLINIC N. AM. 991, 992 (2003) (“[Potential treatment research] can be guided by rigorous scientific and experimental methods to enhance the validity of inferences about the intervention, and to assist members of the research, academic, and clinical policy communities to determine if the intervention merits further support. This kind of evidence, by virtue of the use of rigorous empirical standards, is arguably less subjectively biased and more objective and systematic in its acquisition.”).
133. See AM. SOC’Y OF ADDICTION MED., OPIOID ADDICTION TREATMENT 2 (2020).
135. See id.
challenges to those with SUD, including barriers to “behavioral health treatment, stable and safe housing, meaningful employment, and other recovery support services.” Effective reentry requires comprehensive, scientific treatment to ensure adequate support.

In recent years, there have been notable developments in treating SUDs with evidence-based practices (EBPs). Evidence-based practice bases treatment decisions on scientific research and proven methods to help overcome addiction. For example, Medication-assisted treatment (MAT) uses medication, behavioral therapy, and counseling to support harm reduction principles. Among the various evidence-based strategies proposed to address the opioid epidemic, MAT plays a crucial role in addressing the challenges of the opioid crisis. MAT medications can significantly reduce withdrawal symptoms. Common MAT medications used to treat opioid use disorders include buprenorphine, methadone, and naltrexone, and are approved by the Food and Drug Administration (FDA) for periods that may be as long as a lifetime. The medications work by interfering with the brain’s reward system. The success of MAT is in minimizing physiological cravings and normalizing body functions without the harmful and euphoric effects of the substance used. Medicare coverage includes treatment programs delivering MAT, particularly for opioid-use patients.

Cognitive behavioral therapy (CBT) is a common psychotherapy used to manage mental health by identifying harmful thought patterns and

139. See McClernon, supra note 137.
142. See McClernon, supra note 137.
143. See McClernon, supra note 137.
behaviors. CBT focuses on actionable changes instead of evaluating past experiences. CBT was developed in the 1960s by psychiatrist Aaron Beck based on his recognition of cognition as central to mood and substance disorders. Underlying core beliefs can impact someone’s life and be the foundation for automatic thinking. Negative thought patterns like “overgeneralizing, catastrophizing, and personalizing situations” can distort thinking. CBT aims to address the negative patterns of thinking and subsequent behaviors to shift the quality of health, thinking, and ways to emot and behave independently.

CBT offers a targeted approach to preventing relapse by equipping individuals with skills to manage triggers and develop healthier coping mechanisms. Recovery from SUDs hinges on healthier coping mechanisms that CBT fosters through “psychoeducation, skills training, and behavioral strategies to avoid triggers.” The therapist and client work together to recognize negative thought patterns and transform behaviors; it is a “solution-based form of therapy” focusing on the present.

Eye Movement Desensitization and Reprocessing (EMDR) is a form of therapy focused on treating core traumatic memories. The treatment has historically been utilized to address post-traumatic stress disorder (PTSD), which “presents with a complex and diverse set of symptoms involving a mixture of social, biological, and psychological processes,” including substance use disorder. Substance abuse in people with PTSD “has shown to be as high as 40%.” Trauma is a significant risk factor for developing

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145. See Cognitive Behavioral Therapy, MAYO CLINIC, https://www.mayoclinic.org/tests-procedures/cognitive-behavioral-therapy/about/pac-20384610 [https://perma.cc/ZMU8-8C8Y] (last visited Dec. 13, 2023) (“CBT can be a very helpful tool — either alone or in combination with other therapies — in treating mental health disorders” and be a helpful tool to aid people in better managing stressful life situations.).
146. See id.
148. See id.
149. See Cognitive Behavioral Therapy, supra note 145.
150. See Cognitive Behavioral Therapy, supra note 145.
151. See Webster, supra note 147.
152. Webster, supra note 147.
154. Id. at 273.
155. Id. at 276.
a SUD, and substance use can be used as a form of “self-medicating” for underlying symptoms. EDMR uses bilateral eye movements to facilitate the reprocessing of negative memories — it is intended to help the brain “heal.” The therapy works by looking at how unprocessed trauma leads to incomplete processing and negative emotions. Lack of proper processing can lead to negative beliefs about self and the world around us. EDMR is a potential pathway to recovery for individuals with SUDs by addressing underlying trauma and triggers. By examining a traumatic event’s past, present, and future implications, individuals can move forward with greater emotional well-being in 8 to 12 structured sessions.

C. Prisons Are Not Treatment Centers

Drug violations are a major driver of community supervision revocations. One of several factors contributing to revocations is personal drug use. Part of the complication lies in that the reach of drug-related supervision extends beyond those convicted of drug offenses and can include drug restrictions for people convicted of a non-drug offense but a suspected SUD. The problem is partly driven by higher rates of substance use among those on supervision, which is nearly double that of the general population. Statistics as staggering as those call into question the efficacy of statutory punishment for drug usage in supporting supervisees. Strained budgets and systemic barriers create a treatment gap, leaving many on supervision without critical resources and ultimately back in prison or jail.

157. See McGuire et al., supra note 153, at 276 (internal citations omitted).
158. See Eye Movement Desensitization and Reprocessing Therapy, supra note 156.
159. See McGuire et al., supra note 153, at 278.
160. See generally McGuire et al., supra note 153.
161. See McGuire et al., supra note 153, at 280.
162. Eye Movement Desensitization and Reprocessing Therapy, supra note 156.
164. Id.
165. See Probation and Parole Systems Marked by High Stakes, Missed Opportunities, supra note 40; 18 U.S.C. § 3583(d).
166. See Probation and Parole Systems Marked by High Stakes, Missed Opportunities, supra note 40; Revoked, supra note 163, at n.739.
167. See Probation and Parole Systems Marked by High Stakes, Missed Opportunities, supra note 40.
The criminal legal system is operating as the country’s “single largest referral source for public drug treatment, as punitive perspectives on substance use are overlaid on therapeutic ones.”

Subjecting individuals with SUD to supervision and then revoking them for violations creates a revolving prison door and serves the limited purpose of deterring drug activity. The process of actual revocation can be complex and includes treatment interventions before ultimately incarcerating someone. However, individual drug use is similarly complicated. Even when someone is willing to engage in evidence-based interventions, the road to recovery frequently consists of a relapse. A relapse in addiction recovery occurs when someone returns to alcohol or drug use after a span of abstaining or limiting use. While attempting recovery, individuals with SUD can average five to six relapses. Using prison to address relapses is “anti-therapeutic” because it separates the individual from treatment, and when prison treatment is available, it “is often not evidence-based.” The criminal justice system condones ‘strong-arm rehab’ and close surveillance in the name of facilitating recovery.

The Substance Abuse and Mental Health Services Administration identifies eight criminogenic risk and need factors that increase an individual’s likelihood of re-offending but through apt services can be minimized. One of the identified factors “associated with a static risk and changeable need” that should be addressed through treatment is substance use. Effective addiction treatment requires a multidimensional strategy, including counseling, therapy, medical intervention, and support groups. Successful addiction treatment often requires ongoing support, and prisons

168. Martin, supra note 58, at 498.
169. 28 U.S.C. § 994(d) (“The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment . . . shall consider whether the following matters, among others, have any relevance . . . of an appropriate sentence . . . (5) physical condition, including drug dependence; (10) criminal history.”).
170. DEPT VETERAN AFFS. & DEPT DEF., CLINICAL PRACTICE GUIDELINE FOR THE MANAGEMENT OF SUBSTANCE USE DISORDERS 9 (2015) (“It is common for a person to relapse, even if his or her condition is being managed, and he or she is amenable to treatment.”).
172. See The Editorial Board, supra note 1.
173. Revoked, supra note 163, at nn.762–64.
174. Martin, supra note 58, at 498 (internal citations omitted).
175. See SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., supra note 136, at 2 (“Criminogenic risk [is the] likelihood that an individual will engage in future illegal behavior in the form of a new crime or because of failure to comply with probation/parole conditions.”).
176. See SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., supra note 136, at 3.
177. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., supra note 136, at 3.
178. See generally Hilton & Pilkonis, supra note 132.
do not have sufficient resources to help maintain recovery during incarceration.

Moreover, many people returning home post-incarceration restart drug use after prison and “are much more likely to overdose and die upon release.”179 For example, a study from North Carolina reported that “the risk of death from overdose among formerly incarcerated people was 20.2 times higher than for the general population at one year post-release; the relative risk is even higher, at 50.3 during the two weeks after release.”180 Part of the reason is that prison can be “iatrogenic, that is, it can make people worse, exacerbating the drivers of illegal behavior that lead to incarceration in the first place.”181 The Administrative Office of the United States Courts suggests that correction interventions “may increase the probability of recidivism by disrupting prosocial activities and exposing defendants to antisocial associates.”182 In simpler terms, prisons have a distinct culture that is conducive to antisocial behavior, and incarcerated people may adopt attitudes or behaviors as a means of survival or adaptation.183 Thus, prisons undermine safety, support, and positive social connections, which are key factors in drug treatment.

Contrary to the intended goal of reducing drug use, incarceration can exacerbate pre-existing psychological trauma, a known risk factor for addiction. The prison environment itself is stressful and prisons are designed as punitive institutions,184 where there is an “increased risk of coercion, isolation, sexual and physical violence, and intimidation.”185 The prevalence of trauma among incarcerated individuals raises serious concerns about further traumatization once inside correctional facilities.186 Individuals with SUD are already marginalized, but their vulnerability is further exploited in

179. Revoked, supra note 163, at n.767.
180. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., supra note 136, at 1.
185. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., supra note 136, at 5.
186. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., supra note 136, at 4.
prisons and jails, where they are disproportionately targeted for victimization and exploitation, exacerbating the harshness of imprisonment. The detrimental effects of incarceration on mental health, combined with limited access to comprehensive behavioral health services, emphasize how imprisonment should not be used to address drug use. If the underlying issues contributing to addiction cannot be addressed during incarceration, the risks of relapse and recidivism remain high once an individual begins a term of supervised release.

1. Substance Use Treatment Inside Federal Bureau of Prisons

The criminal legal system too often functions as the de facto public health strategy in addressing substance-use disorder. The Bureau of Prisons (BOP) is a federal agency within the Department of Justice responsible for operating and supervising the federal prison system. The BOP is responsible for the “custody and care” of federal offenders, including their confinement, rehabilitation, and re-entry into society. For the Fiscal Year 2022, the BOP requested $3.8 billion for drug treatment and to support further “expansion of Medication-Assisted Treatment for incarcerated individuals with opioid disorder, in an effort to improve health outcomes and reduce recidivism.” The BOP’s strategy for addressing substance use has ostensibly changed as advances in treatment programming and effective evidence-based practices become more widely accepted, including incorporating mental health practitioners into programs inside facilities.

There are only three substantial programs advertised by the BOP to address substance use in federal facilities. The Nonresidential Drug Abuse Treatment Program (NR-DAP) is a psychoeducational-therapeutic...

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187. **Substance Abuse & Mental Health Servs. Admin.**, *supra* note 136, at 5.
192. BOP indicates on their website that their treatment strategy will continue to evolve to “treatment methods in an ongoing effort to improve treatment outcomes.” *Id.*
193. See *id.*
group for people who have struggled with substance use in the past. NR-DAP is available at every BOP facility and is a 12-week CBT treatment conducted in group settings to accomplish the goal of skill-building and to promote “rational thinking, communication skills, and institution/community adjustment.” The program is open only to those who “have short sentences, may not meet the criteria for the Residential Drug Abuse Program (RDAP), are awaiting RDAP placement, are transitioning to the community, or have had a positive urinalysis test.” The BOP website provides limited information about this program.

The “RDAP is the [BOP’s] most intensive treatment program,” utilizing CBT to support those individuals living in a prosocial community. Individuals involved in this program live in a housing unit in prison separate from the general population housing units and “participate in half-day programming and half-day work, school, or vocational activities” for a period of nine months. The RDAP currently operates in 71 federal facilities out of 122 prisons located throughout the nation. The BOP and National Institute on Drug Abuse analyzed the RDAP and found that participants are “significantly less likely to recidivate and less likely to relapse to drug use than non-participants.”

Community Treatment Services (CTS) is a BOP function focused on reentry. The program ensures support for people transitioning into Residential Reentry Centers (RRCs) and assigned to home

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195. Substance Abuse Treatment, supra note 191.
196. Substance Abuse Treatment, supra note 191.
197. Substance Abuse Treatment, supra note 191.
198. Substance Abuse Treatment, supra note 191.
199. Substance Abuse Treatment, supra note 191. Prosocial behaviors are defined as behaviors that are “generally beneficial to other people [and] are shaped by both cognitive and affective processes.” John F. Dovidio, Adulthood: Prosocial Behavior and Empathy, INT’L ENCYC. SOC. & BEHAV. SCI. 159, 159 (2001).
200. See Substance Abuse Treatment, supra note 191.
203. Substance Abuse Treatment, supra note 191; see also U.S. SENT’G COMM’N, RECIDIVISM AND FEDERAL BUREAU OF PRISONS PROGRAMS: DRUG PROGRAM PARTICIPANTS RELEASED IN 2010 1, 5 (May 17, 2022).
204. Substance Abuse Treatment, supra note 191. Residential Reentry Centers are colloquially referred to as halfway houses to offer support to someone during transitions back
The program involves a “comprehensive network of contracted community-based treatment providers” nationwide, consisting of licensed treatment providers including, but not limited to, counselors, psychologists, psychiatrists, social workers, and professional counselors. CTS administrators collaborate with the U.S. Probation Office to provide a seamless transition of ongoing support as individuals leave Bureau custody and move to supervised release. The U.S. Probation Office receives discharge reports about in-custody treatment to ensure a smooth transition.

2. Rampant Exposure to Drugs in Prison

Despite increased substance-use treatment within facilities, prisons and jails are increasingly places with drugs easily accessible. Data indicates an increase in prison deaths due to drug and alcohol intoxication compared to all other causes. State and federal prison deaths by drug and alcohol intoxication soared by more than 600%. In 2001, there were 35 reported deaths from drug and alcohol intoxication in state and federal prisons. In 2018, there were 249 — a 611% change from 2001, and the highest number of prison deaths on record since data collection began in 2001. Over this nearly twenty-year span between 2001 and 2015, deaths remained relatively stagnant until 2016, when the number rose to 104. One reason for increased overdose fatalities is because drugs are not only widely available but also “uniquely dangerous.” Forced isolation within prisons may push people to self-medicate to tend to neglected mental and physical health into society.


205. Id.
206. Id.
207. Id.
208. Id.
209. Revoked, supra note 163, at n.765.
211. See id.
212. Id.
213. See id.
214. In 2001, there were 35 drug or alcohol related deaths. Id. By 2016, the number of deaths reached 104. Id.
problems.216 People in prison using drugs may be “reluctant to call for help if there’s a problem,” and “[e]ven if they do seek help, medical care is often scarce and subpar.”217 Tolerance levels may also fluctuate when people are using the only drugs they can find, when they can find it, making overdoses more likely218 than when people are using outside prison walls.

Limited information is available about the types of drugs available inside facilities.219 However, interviews with incarcerated and recently released people in state and federal systems suggest that opioids, methamphetamine, and K2 are the primary drivers of the dramatic increase in substance use inside facilities.220 In a recent report from The Marshall Project, an incarcerated individual discussed his experience inside a federal prison and described the facility as “flooded with drugs.”221 The individual, referred to only as John, said he went to prison approximately a decade ago without ever using hard drugs.222 Now, while still inside, he says he gets high almost every day and has tried a range of drugs, from meth to heroin.223

To address the overdose crisis behind bars, prison administrators attempt to use drug and contraband detection.224 Prisons are imposing costly restrictions on mail and visitation225 that can serve as the only lifeline for incarcerated people to their communities. However, data also indicates that correctional staff play a significant role in fueling drug contraband.226 Though COVID-19 protocols significantly restricted in-person contact with
family, lawyers, and educational volunteers, positive tests for drug use continued.227 One recently released individual reported that correctional officers take part in drug trafficking at higher rates where their pay is less.228 Friends and family on the outside can wire money to correctional officers, who can earn additional money for bringing drug packages into the facility.229 Consequently, correctional officers serve a role in perpetuating the influx of drugs into prisons.230

By mandating revocation for drug use in supervised release, the law overlooks the need to handle the root causes of addiction and the failures of prison as the primary answer. The law focuses solely on drug use punishments — by way of incarceration — and misses the opportunity to tackle the societal factors driving addiction and perpetuating recidivism. The following section proposes solutions to address this shortcoming.

III. HOW TO MOVE FORWARD IN A SYSTEM THAT RELIES ON PRISONS

The Supreme Court reiterates that supervised release has goals different than incarceration and is intended to serve rehabilitative purposes.231 Yet, after release, individuals are pursued, controlled, and “channeled back to prison” in what Foucault describes as a “closed milieu of delinquency, a social space characterized by exclusion and close surveillance.”232 By requiring drug conditions and prisons for failure to adhere, the current operations of revocations for drug-related violations reinforce the notion that people battling addiction deserve punishment instead of support. The solution lies in recognizing that treatment is not static but a dynamic process that must change to individual needs and incorporate the latest research and methodologies, offering hope for those seeking recovery.

To realize the SRA’s mandate and to maintain the Supreme Court’s preservation of supervised release as a nonpunitive system, the supervised release system needs to integrate proven solutions that aid SUD and divert away from incarceration as the ultimate treatment option. Prisons are “death-making institutions”233 for people with SUD. Re-entry planning and support

227. Schwartzapfel & Jenkins, supra note 215.
228. Schwartzapfel & Jenkins, supra note 215.
229. Schwartzapfel & Jenkins, supra note 215.
230. See Russo et al., supra note 225 (“The shutdown of the mailroom pipeline will not reduce inmate demand for drugs; therefore, pressure on other common contraband pathways (e.g., smuggling by staff and visitors . . . ) could increase.”).
232. Martin, supra note 58, at 496.
Section III.A begins by evaluating progressive and successful judicial interventions that utilize human-centered principles rather than blame, shame, and punishment to support supervisees. In particular, the program created by Judge Richard Berman of the Southern District of New York is recommended as a framework for other members of the judiciary to utilize in their courtrooms. Section III.B looks at the Supervised Release Act of 2023 by suggesting that proposed legislation incorporate social science research and harm reduction principles to make the law more effective in achieving its rehabilitation mandate and supporting people returning home. Finally, Section III.C suggests ways in which harm reduction principles can be integrated into supervised release to support addiction treatment. In responding to addiction, the criminal legal system should not prioritize a short-term solution for one that has lasting impacts to aid a recovery journey.

A. Judicial Interventions

Across the nation, federal district court judges are establishing novel approaches to supervised release by acknowledging supervisees as people beyond their status as offenders. As research and risks associated with marijuana use evolve, it becomes evident that a similar resistance to incarceration can be extended to individuals using other substances. There is a growing consensus that addressing drug-related behaviors requires a nuanced approach that considers the complex factors influencing drug-related behaviors instead of solely punitive measures. In this broader context, addressing the root causes of substance use and implementing comprehensive strategies for intervention becomes crucial to generating positive outcomes for individuals grappling with drug-related challenges.

In 2018, Judge Jack Weinstein of the Eastern District of New York squarely confronted the injustices of sentencing and the supervised release system in the case of *United States v. Trotter*. The 22-year-old defendant,
Tyran Trotter, was described as trying to lead a productive life but held back by a “chronic . . . marijuana addiction.”²³⁵ According to the United States Probation Department report, Trotter violated his supervised release because he did not attend mandated drug treatment and used marijuana.²³⁶ Probation recommended that Trotter serve four months of incarceration, and two years extra of supervised release.²³⁷ Trotter pled not guilty to the violation charges.²³⁸

Despite the understandable use of cannabis to deal with the trauma Trotter experienced in his childhood, drug use violates a mandatory condition of his federal supervised release, risking mandatory incarceration.²³⁹ In these cases, courts must decide between either imprisonment or ending supervision with the hope that a supervisee can concentrate on rehabilitation independently. Judge Posner, writing for the Seventh Circuit Court of Appeals, questioned the appropriateness of imprisonment punishment for marijuana use:

> The defendant’s problem is marijuana . . . we have our doubts that imprisonment is an appropriate treatment for a marijuana habit . . . The 29 months that he served in prison beginning in 2009 did not break him of his habit; what is the basis for thinking that 14 more months in prison will? . . . The fact that he’s impressed his employers suggests that he can function even with the habit, in which event it might have been better had the judge not imposed a prison sentence but instead had ordered a stricter regimen of treatment . . .²⁴⁰

The statute requires courts to imprison people on supervised release who possess drugs or test positive for drugs.²⁴¹ The result is the criminalization of addiction: judges send supervisees back to prison for SUD, notwithstanding substantial steps taken towards healthier lifestyles. In a 2014 survey conducted by the United States Sentencing Commission, 59% of district court judges surveyed believed that the United States Sentencing Commission should make changes to the supervised release guidelines in order to allow for alternative solutions for violations that do not require cases where continuing supervision presents such a burden as to reduce the probability of rehabilitation.” Id. at 339.

²³⁵. Id. at 341.
²³⁶. Id. at 342. At the time of the hearing, marijuana was classified as a Schedule I drug, “meaning it has alleged potential for abuse and no accepted medical purpose.” See id.
²³⁷. Id.
²³⁸. Id.
²³⁹. Id. at 341.
²⁴⁰. See United States v. Smith, 770 F.3d 653, 655–56 (7th Cir. 2014).
²⁴¹. 18 U.S.C. § 3565b (requiring courts to revoke supervised release and impose a term of imprisonment for defendants who violate conditions by possessing controlled substances).
Sentencing should center on the potential of supervised release to either hinder or help someone’s rehabilitation. Judge Weinstein’s ruling is a critique of the flawed mechanism of requiring conditions of supervision or mandating revocation when individuals are struggling with addiction, particularly marijuana.

The conversation about changes to supervised release drug conditions has centered around habitual marijuana users. In part, this is because the majority of states now recognize the medicinal benefit of marijuana, permit recreational use, and public opinion is increasingly leaning in favor of legalization. Before marijuana legalization in New York State, political efforts to stop the New York City Police Department from making marijuana arrests were widespread and consistent. A 2018 Pew Research Center study revealed that two-thirds of Americans favored marijuana legalization. By comparison, opioid use disorder and opioid addiction are at epidemic levels in the United States. Nearly two million Americans

244. See id. at 339 (“I, like other trial judges, have provided unnecessary conditions of supervised release and unjustifiably punished supervisees for their marijuana addiction, even though marijuana is widely use in the community and is an almost unbreakable addiction or habit for some.”).
245. See Zachary J. Weiner, Revoking Supervised Release in the Age of Legal Cannabis, 94 ST. JOHN’S L. REV. 231, 231 (2020) (discussing the increasingly “serious questions of penological philosophy when [judges are] asked to punish those engaged in cannabis use sanctioned by state law but proscribed by federal law”).
battled opioid use disorder in 2018.\textsuperscript{250} It is estimated that only one-third of individuals with opioid use disorder have received any treatment despite effective, evidence-based treatments.\textsuperscript{251} Even as sentiment and research shift around the dangers of marijuana use, the same attitude of resisting incarceration should be applied to individuals using other drugs.

Judge Weinstein’s extensive and powerful holding also provides guidelines for evaluating supervised release and supervisees.\textsuperscript{252} Those guidelines include: (1) imposing shorter terms of supervised release as needed; (2) giving greater consideration to the appropriateness of conditions; (3) providing for earlier termination where indicated; and (4) avoiding violations of supervised release and punishment by incarceration merely for habitual marijuana use.\textsuperscript{253} At the trial level, this approach challenges the unspoken rule within federal sentencing that automatically imposes supervised release without recognizing the consequences on the other end upon release, offering judges an alternative.

Critics argue that supervised release requires a system of control over supervisees, questioning if it can be effective without the threat of prison.\textsuperscript{254} Yet, the supervised release statute stops judges from considering punishment during the process of imposing or revoking supervision.\textsuperscript{255} The court can consider whether the exceptions to the United States Sentencing Commission guidelines from the rules of section 3583(g) warrant appropriate alternatives.\textsuperscript{256} For example, supervised release may be terminated early, after the completion of one year of supervision.\textsuperscript{257} The court may do so as statutorily outlined in 18 U.S.C. § 3583(e)(1) if it is satisfied by the conduct of the defendant released.\textsuperscript{258} The decision-making


\textsuperscript{251} \textit{Id.}


\textsuperscript{253} \textit{Id.} In his long holding, Judge Weinstein created and documented his own guidelines for evaluating supervisees on supervised release. \textit{Id.}

\textsuperscript{254} \textit{Id.} at 346.

\textsuperscript{255} \textit{See} U.S. SENT’G GUIDELINES MANUAL ANNOTATED ch. 7, § 3(b) (U.S. SENT’G COMM’N 2021) (“While the nature of the conduct leading to the revocation would be considered in measuring the extent of the breach of trust, imposition of an appropriate punishment for any new criminal conduct would not be the primary goal of a revocation sentence.”); \textit{see also} United States v. Trotter, 321 F. Supp. 3d 337, 346 (E.D.N.Y. 2018).

\textsuperscript{256} 18 U.S.C. § 3583(d) (“The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual’s current or past participation in such programs, warrants an exception in accordance with the United States Sentencing Commission guidelines from the rule of section 3583(g) . . . .”); \textit{see also} United States v. Thornhill, 759 F.3d 299, 306 n.5 (3d Cir. 2014).

\textsuperscript{257} 18 U.S.C. § 3583(e) (2023).

process involves considering several factors, including providing “the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.”

Judge Richard Berman, a Senior Judge in the Southern District of New York (SDNY), is a prominent and leading example of effective judicial intervention to provide comprehensive resources aimed at success, not punishment. He has piloted a program in his court framed to spotlight the humanity of supervisees. The program is focused on people previously sentenced by Judge Berman and integrates him into the supervised release process. The aim is to ensure the defendants have the support they need to transition back into society. To do this, Judge Berman holds regular “supervised release hearings” with various actors, including “the court, the supervisee, the probation officer, defense counsel, the AUSA, and increasingly, therapists and treatment providers.” The hearings are an addition to the responsibilities of the SDNY Probation Department and are open to the public and transcribed. In a conversation with Judge Berman, he shared that his approach tries to avoid punishment and offers early termination to supervision as the ultimate incentive for meeting agreed-upon benchmarks.

In addition to conducting a court-involved supervised release project, Judge Berman collects data and case studies. The study population is made up of “152 people sentenced by [Judge Berman] and who had at least

261. See generally id. Judge Berman actively supports supervisees by centering their voices in hearings, attentively listening to their needs in areas like family, housing, employment, and health. For example, in a February 3, 2022 hearing, Judge Berman described supervised release as moving “beyond punishment and that all of us focus on successful and safe reentry into the community.” Id. at 11.
263. See BERMAN, supra note 260, at 11.
264. See BERMAN, supra note 260, at 1. The hearing can cover the following topics: “case background as described by the Court; actions taken by the Court at the last hearing; compliance with the terms and conditions of supervised release; comments and insights of the supervisees and service providers, including therapists and drug counselors; and applications, including those pertaining to early termination.” BERMAN, supra note 260, at 11.
265. See BERMAN, supra note 260, at 1.
267. See generally BERMAN, supra note 260.
one supervised release hearing during the five years from January 1, 2016, to December 31, 2020.” Judge Berman’s supervised release program welcomes “all defendants sentenced to incarceration before him, irrespective of their criminal history, risk assessment, mental health, substance abuse, employment, or age, among other factors.” The focus of the reports is on repeat offending and the role that “mental health, substance use, housing, employment, and family and community support” contribute. The results from the study are encouraging and demonstrate that judges who become actively involved in supervision can provide impactful support to supervisees to facilitate a safe transition home. The data shows that “rearrest rates over three and five years are 17.1% and 20.4%, respectively; the return to prison rate is 13.2%; and the early termination rate is 46.2%”. Acknowledging that comparisons are at best imprecise, the Administrative Office of the U.S. Courts (“AO”) reports “rearrest rates of 20.8% at three years and 27.7% at five years.”

Early termination is a significant statutorily provided incentive for supervisees who have demonstrated progress during supervision. As noted throughout, termination of supervision acknowledges an individual’s commitment to positive behavior change, helps shed the stigma associated with criminality, and restores rights and liberties that may be restricted under supervision. The court may grant or deny termination on a case-by-case basis. In the study population, 46.2% of supervisees earned early termination of their supervised release. The AO’s early termination rate is 18.8% for 2006–2012. The AO also found that “10.2% of offenders who were granted early termination of their supervision in 2008 were rearrested within three years, compared with 19.2% of those who completed their full

269. See Berman, supra note 261, at 10.
270. Berman, supra note 260, at ii.
271. Berman, supra note 260, at ii.
272. Berman, supra note 260, at ii.
273. Berman, supra note 260, at ii.
274. Berman, supra note 260, at ii.
275. See 18 U.S.C. §3583(e) (“The court may . . . terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release . . . if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice.”)
276. See Berman, supra note 260, at 34.
Among those granted early termination in the study population, 92.6% received mental health counseling, and 79.6% received substance use treatment. Integrated treatment, which is treatment “within a coordinated system [that] allows providers to modify as well as combine treatments for both disorders,” is noted as “enormously helpful.”

One of the explanations for Judge Berman’s high termination rate could be the intimate knowledge of a supervisee’s case provided by the frequent hearings. Under an ordinary set of facts, a judge is not statutorily required to meet with a supervisee unless there is an alleged violation or to address changes to conditions. The supervised release hearings that Judge Berman hosts encourage stakeholders to work together. It upholds the mandate of the SRA by recognizing that the utility of revocations is doubtful because revocations terminate access to treatment, social support networks, and employment. The focus then moves away from the punitive operations of supervised release revocations that harm the supervisee and towards developing a team of practitioners concentrating on an individual’s success. Remarkably, the program acknowledges that a one-size-fits-all approach to supervised release is not productive; supervisees have diverse needs and circumstances that must be tailored and individualized to be more effective. Someone who is receiving treatment for SUD may also require mental health treatment, employment training, or support with familial relationships. The supervised release hearings allow the supervisees a chance to express their needs to the court and enables the court an opportunity to understand the complexities of an individual’s case — a novel feature of supervised release procedures.

Studies indicate that strong judicial leadership and feeling supported by the judge are two important elements of successful reentry. Judge Berman’s program is a successful model of showing a clear commitment to supervisees by a judge. SDNY Magistrate Judge Sarah L. Cave recently began participating in Judge Berman’s supervised release program with a

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279. See Berman, supra note 260, at 43.
282. See Berman, supra note 260, at 23.
283. See Berman, supra note 260, at 1 (“We focus upon outcomes in the context of the vexing problem of repeat offending, and related factors . . . so that [every] Federal supervisee can receive the attention and support necessary to achieve safe and successful reentry.”).
284. See Berman, supra note 260, at 14–15.
Judge Berman’s program supports supervisees with various re-entry obstacles, not exclusively supporting supervisees diagnosed with SUD. But the success of his program in granting early termination and the focus on providing the exact resources supervisees request is crucial. Judge Berman utilizes a positive approach to ensuring that the supervisees’ voices are valued and their expressed needs are addressed. This strategy centers on human connection as a critical component of success. The possibility of scaling up court involvement in supervised release is promising to make sure that supervisees are accessing critical support, leading to a safe return home. Implementing programs similar to Judge Berman’s across the country can ensure that supervisees are closer to succeeding rather than ultimately ending up back in prison.

Judicial interventions serve as the immediately necessary action to help current supervisees dealing with substance-use disorders. Yet, lingering in the background of supervision is the promise of redemption coupled with the threat of punitive action.287 Revocation is “at odds with the objective of helping supervisees to safely and successfully reenter the community,”288 and there is no exact time frame for how long successful re-entry should take. While Judge Berman’s efforts to create supportive court environments are crucial groundwork, structural limitations demand legislative action to bridge the remaining gaps.

B. Substantive Changes to the Law and the Safer Supervision Act of 2023

While judicial interventions can provide an immediate and necessary solution, comprehensive changes in the law can fill in the gaps where court programming faces limitations. Congressional sentiment is rapidly shifting to address the failed mechanism of revoking supervision based on drug violations. A bipartisan group of eight United States Senators, including three Democrats and five Republicans, introduced the Safer Supervision Act of 2023.

286. Berman, supra note 260, at 49.
287. See Nora Demleitner, How to Change the Philosophy and Practice of the Probation and Supervised Release: Data Analytics, Cost Control, Focus on Reentry, and a Clear Mission, 28 FED. SENT’G REP. 231, 235 (2016).
288. See Berman, supra note 260, at 23.
of 2022. Its purpose is to make federal supervised release “more efficient, more effective, and less punitive.” There are two significant changes to begin examining.

First, the Act requires judges at sentencing to conduct an “individualized assessment” to determine an appropriate term of supervision. Judges are currently not required to explain why supervision is necessary for a defendant post-incarceration, but the Act changes that paradigm to encourage judges not to subject every defendant to the conditions of supervision and to provide a reason for imposing or not imposing such a term on the record. In a study produced by the United States Sentencing Commission, approximately 95.1 percent of people sentenced to a term of imprisonment for felony and Class A misdemeanor offenses were also sentenced to terms of supervised release. The nearly automatic imposition of supervised release also contributes to federal probation officers reporting caseloads exceeding 100 people per officer, leaving limited time or resources. In 2018, a United States Probation Office report discussed the challenges associated with data related to parole violations because the circumstances surrounding how a person violated the terms and conditions are not always concrete. One example provided in the report is that a drug use revocation may result after “a supervisee left a residential treatment center and overdosed on heroin.” However, that example underscores the problem with mandating prison for those who relapse on supervision by punishing the addiction recovery journey. In this way, supervised release fails the “rehabilitation” process of combating drug use if a relapse lands someone back in custody, a part of federal sentencing intended to punish, and furthers the narrative of addiction as a moral defect rather than disease.

The proposed legislation also amends the provision of the Federal Supervision statute that requires judges to revoke supervised release and

289. Bloom & Schuman, supra note 47.
290. Bloom & Schuman, supra note 47.
292. Id. (“When determining whether to include a term of supervised release as part of the sentence, and except to the extent that a term of supervised release is required by statute . . . the court shall . . . make an individualized assessment.”).
293. Id. at § 3(2)(B) (“provide the reasons of the court for imposing or not imposing such a term [of supervision] on the record”).
295. Safer Supervision Act, S. 2681, 118th Cong. § 2(3) (2023); Bloom & Schuman, supra note 47.
296. See Sheil et al., supra note 111, at 18.
297. See Sheil et al., supra note 111, at 19.
send supervisees back to prison when caught using drugs, possessing drugs, or failing multiple drug tests. As the statute currently stands, there is a limited exception to incarceration supervisees who fail drug tests: “if the court finds that an offender would benefit or has benefited from appropriate substance abuse treatment programs, the court may provide a substitute solution in accordance with the guidelines.” The exception does not apply if the supervisee was found in possession of illegal drugs, as opposed to testing positive during drug testing. The nuance is critical because it establishes a narrow set of criteria for which only individuals testing positive for drug use can qualify for drug treatment, but someone in drug possession, who may also require treatment support, will face a far more punitive response. The practice does little to address the underlying issues that lead to drug activity. The Safer Supervision Act, however, limits mandatory revocation to only cases involving drug possession with intent to distribute or felony possession — a process that still provides great discretion to judges and may overlook those still struggling with drug dependency. Intent to distribute does not require a drug transaction; prosecutors can demonstrate the allegation with circumstantial evidence to show that someone was in possession of a controlled substance and intended to sell or distribute.

This amendment represents a small step toward allowing judges to have discretion to decide whether prison is the appropriate response to a violation, but Congress needs to go further. The proposed amendment still places judges in a position to expand their roles in assessing whether the individual before them in the courtroom has an addiction. A judge’s role is not to act like a clinician, and wide discretion might create rulings at odds with drug experts’ recommendations. Judges are primarily concerned with enforcing the law and maintaining the justice system’s integrity and are not equipped with the proper knowledge for treatment and assessment. But, the Sentencing Guidelines — a highly influential guide in judicial decision-making — continue to recommend that judges impose supervised release.

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299. U.S. Sent’g Comm’n, supra note 46, at 15.
300. See U.S. Sent’g Comm’n, supra note 46, at 15.
301. Safer Supervision Act, S. 2681, 118th Cong. § 3(5)(B) (2023) (“possess a controlled substance with the intent to distribute . . . the possession of which may be punished by imprisonment for a term exceeding 1 year”).
302. See 21 U.S.C. § 841(a)(1). See generally United States v. Anderson, 747 F.3d 51 (2d Cir. 2014) (holding that to secure a conviction under 21 U.S.C. § 841 for distribution of a controlled substance, the prosecution must establish specific intent to distribute beyond a reasonable doubt and circumstantial evidence may be used to satisfy this burden of proof). The distinction between drug charges for simple possession and drug trafficking can hinge on the quantity of drugs involved. See generally Anderson, 747 F.3d. Drug trafficking is also referred to as intent to distribute and carries harsher penalties. Id.
when the defendant is found to be an “abuser of controlled substances or alcohol.”

Despite recognizing the challenges of addiction, judges are limited in their SUD strategies. Strict sentencing laws restrict judges’ ability to offer options conducive to addiction recovery. Courts are ill-equipped to address addiction, and judges do not typically enter the profession with training in addiction medicine or mental health treatment. While courts can rely on information provided by probation officers with backgrounds in assessing addiction and more intimate knowledge of the supervisee, the decision ultimately lies in the hands of the judge. The integration of drug use and supervised release conditions does not account for this ineffective strategy of using judges as the evaluators of substance use and appropriate treatment options. Congress should instead consider implementing the procedures outlined in Judge Berman’s supervised release program to better integrate specialists and the voices of supervisees in successful reentry. The result would create structures that bring together stakeholders committed to a supervisee’s success.

Congress must also eliminate the requirement of revocation if someone refuses to comply with drug testing as a condition. Although drug testing can offer potential benefits, imposing it as a mandatory condition can increase the risk of violations. Abstinence sets unrealistic expectations and ignores that relapsing is part of recovery. Drug testing can create significant stress and anxiety for individuals in recovery for fear of a positive result and the resulting consequences; the threat of additional penalties like jail time can paradoxically trigger relapse, creating a vicious cycle. Moreover, frequent drug testing may reinforce the stigma associated with addiction that makes individuals feel as if they are presumed guilty and undermines self-

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303. See U.S. SENT’G GUIDELINES MANUAL § 5D1.1 app. 3(C) (U.S. SENT’G COMM’N 2018).


305. Stress is a well-known risk factor in both the development of an addiction and in relapsing. See Brief on Behalf of the Massachusetts Medical Society, supra note 20, at 36–37. See generally R. Sinha, How Does Stress Increase Risk of Drug Abuse and Relapse?, 158 PSYCHOPHARMACOLOGY 343 (2001); see also Drug Test, CLEV. CLINIC https://my.clevelandclinic.org/health/diagnostics/10285-drug-testing [https://perma.cc/YJA6-K5RH] (last visited Jan. 15, 2024) (“Drug testing has a wide range of applications. Though it can be stressful to get a drug test, know that healthcare providers and officials carefully analyze and interpret the results.”).
Finally, testing does not address the underlying issues that contribute to addiction. Drug testing only detects the presence or absence of a drug in a biological sample, but does not have the capacity to address the emotional, psychological, and social factors that contribute to addiction, thus neglecting the development of essential relapse prevention skills and emotional support. The possibility of revocation for a failed drug test makes supervised release indisputably about punishment, oversight, and coercion.

Additionally, the act should eliminate prison as a punishment for failing to comply with supervised release drug requirements. The effectiveness of compulsory detention in reducing drug dependency or supporting rehabilitation remains limited, with some studies suggesting negative consequences. The intense pressure and anxiety associated with navigating supervision conditions can, in some cases, lead people to use drugs and relapse. A majority of people will relapse five to six times before sobriety, meaning incarceration for failure to adhere to a treatment plan or for testing positive for drugs fully stops recovery progress, as this Note endeavors to prove. The overwhelming burden of drug supervision conditions puts people fighting addiction at a constant risk of returning to prison. A more balanced approach emphasizes rehabilitation and does not punish people with SUD by funneling them into prison. Instead, a person violating a condition of supervised release related to drug use, possession, failing a drug test, or relapsing during drug treatment is given a chance to remain in the community to address the symptoms of an underlying drug addiction without the additional trauma of imprisonment.

306. For Julie Eldred, the drug free requirement disincentivized her recovery interests. She stated that “knowing that a relapse leads to a probation violation made it harder for me to talk about my struggles, for fear of being locked up.” Hoffman, supra note 4.
308. See id.
309. See David P. Wilson et al., The Cost-Effectiveness of Harm Reduction, 26 Int’l J. Drug Pol’y 5, S9 (2015) (“Not only is there an ethical imperative to make harm reduction programs universally available, but in stark contrast to compulsory detention, these approaches are globally effective . . . ”). See generally D. Werb et al., The Effectiveness of Compulsory Drug Treatment: A Systematic Review, 28 Int’l J. Drug Pol’y 1 (Feb. 2016) (“Two studies observed negative impacts of compulsory treatment on criminal recidivism.”).
310. Revoked, supra note 163, at 171.
311. See The Editorial Board, supra note 1.
312. See United States v. Trotter, 321 F. Supp. 3d 337, 362 (E.D.N.Y. 2018) (“Not only is there no increase in recidivism rates when low-risk people are not supervised, requiring low-risk people to participate in the treatment and other programs common to post-prison supervision can actually increase the likelihood that they will reoffend.”).
C. Harm Reduction Grant Programs

Harm reduction is an approach created by and for people who use drugs to address addiction and substance abuse that focuses on minimizing the adverse effects associated with drug use rather than solely advocating for abstinence. It is a transformative approach that champions community-driven public health strategies to empower people who use drugs, fostering lasting change. Harm reduction is centered around the lived and living experiences of people who use drugs. At its core, harm reduction recognizes that social factors like socioeconomic status, race, sex-based discrimination, and a history of trauma contribute to both the risk of experiencing drug-related harm and the capacity to navigate it. It works by incorporating a variety of strategies including “safer use, managed use, [and] meeting people who use drugs ‘where they’re at.’”

President Biden’s 2021 American Rescue Plan allocated $30 million to harm reduction programs to address the overdose crises and support providers in promoting safer substance use. Beyond direct program support, the funding aims to improve the capabilities of harm reduction organizations, ensuring strong integration within the wider care network. Additionally, the Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services recently identified harm reduction services as a key element of re-entry programming for individuals with SUD returning home.

For people hesitant to work with traditional treatment options, harm reduction programs provide a unique pathway to connect with services and support. There is a common misconception that harm reduction encourages

315. See, e.g., Principles of Harm Reduction, Harm Reduction Coal., https://harmreduction.org/about-us/principles-of-harm-reduction/ [https://perma.cc/KCR4-YQA6] (last visited Feb. 13, 2023); SAMHSA Harm Reduction, supra note 41. Harm reduction organizations can fill in the gap by emphasizing “the need for humility and compassion towards people who use drugs” and who may not feel they need treatment. SAMHSA Harm Reduction, supra note 41.
316. Coulson & Hartman, supra note 44.
318. See Substance Abuse & Mental Health Servs. Admin., Best Practices for Successful Reentry from Criminal Justice Settings for People Living with Mental Health Conditions and/or Substance Use Disorders 8 (2023).
people to use drugs by providing sterile syringes, naloxone, and a space to use drugs under supervision.319 Opponents of naloxone distribution claim that it might embolden risky opioid use behaviors by mitigating the fear of an overdose.320 However, there is no evidence of compensatory drug use following naloxone administration.321 An associate research professor at the Johns Hopkins Berman Institute of Bioethics, Travis Rieder, suggests that “people are going to use drugs whether they have the resources or not, and so withholding them doesn’t prevent that use; it just makes it more dangerous.”322 Rieder believes “making an activity more dangerous does not deter people committed to it; it only kills more people.”323 Harm reduction programs promote a philosophy of hope and healing by employing people with lived experience in leadership, planning, implementing, and evaluating of services to foster supportive social networks and promote well-being among people who use drugs.324

Specifically, harm reduction services can include the distribution of medications, like naloxone, to those at risk of overdoing themselves or potentially responding to an overdose in others.325 Naloxone is an example of a medication that acts as an opioid antidote by restarting normal breathing to reverse the life-threatening effects of an overdose. Access to naloxone has dramatically increased.326 The rate of prescriptions filled at retail pharmacies also rose almost twelve times.327 Accordingly, there are 2.5 times the number of overdose reversals, from 10,171 to 26,463.328 Naloxone is increasingly being utilized by laypersons for out-of-hospital settings.329 The distribution of overdose education and Naloxone has also demonstrated an increase in the reversal of potentially fatal overdoses.330

319. Coulson & Hartman, supra note 44.
321. Id.
322. Id.
323. See id.
324. See SAMHSA Harm Reduction, supra note 41.
327. Id.
328. Id.
Overdose prevention centers (OPCs) are another harm reduction intervention aimed at mitigating the drug overdose epidemic. Overdose prevention centers provide a safe and controlled environment for people to use previously obtained illegal drugs. The site administrators are capable of responding appropriately to overdoses and connecting site visitors to substance use and mental health treatment. The first sites originated over three decades ago; now, there are 200 locations in 14 countries around the world. OPCs are linked to less drug use in public and fewer needs for local healthcare and emergency help. November 2021 marked the approval of OPCs in New York City — the first U.S. city to do so. Since opening, 68,000 visits have been made, and almost 850 overdose reversals. The participants visiting these sites could also access additional care, including naloxone, counseling, hepatitis C testing, and other holistic services.

To accommodate the discrepancy in the supervised release program’s current strategy towards drug addiction, all practitioners involved in a supervisee’s care should receive harm reduction training and implement those principles into supervision. One specific way to do so is to require probation officers to be trained in administering naloxone. It is hard to determine the likelihood that a probation officer will encounter a supervisee at the exact time of an opioid overdose. However, probation officers are working with individuals who have a history of substance use, and quick administration of naloxone can reverse the effects of opioid overdose and save lives. Given the prevalence of opioid use, naloxone training equips probation officers with the knowledge and skills to respond to overdoses and prioritizes the preservation of life in potentially critical situations.

332. Id.
333. Id.
334. Facts About Overdose Prevention Centers, DRUG POL’Y ALL. (June 12, 2023), https://drugpolicy.org/wp-content/uploads/2023/06/DPA-OPCs_FactSheet.pdf [https://perma.cc/T3F7-3ZMN]. In evaluating one OPC, the Canadian Supreme Court determined that the site “saves lives.” Id. The court concluded: “its benefits have been proven. There has been no discernable negative impact on Canada’s public safety and health objectives during its eight years of operation.” Id.
335. Id.
337. Facts About Overdose Prevention Centers, supra note 334.
338. See Facts About Overdose Prevention Centers, supra note 334.
acknowledges the reality that not everyone is ready or able to quit drugs and shifts the focus from moral judgments and punitive measures to more compassion.

Additionally, re-entry services can promote harm-reduction principles by connecting supervisees with safe injection sites upon re-entry into the community. Rhode Island was the first state to endorse safe injection sites, and in 2021, New York City opened the first publicly available location.\footnote{340} Courts and stakeholders can support funding additional safe consumption sites as part of a proper rehabilitation approach. Safe consumption sites offer a place where people can receive clean syringes or needles and use drugs obtained elsewhere while being monitored to prevent a fatality.\footnote{341} Data is limited on the effectiveness of safe consumption sites in the United States, but globally, 14 countries successfully operate sites.\footnote{342}

One of the challenges in connecting supervisees with safe consumption sites is limitations in federal law and funding. Under federal law, it is illegal to “manage or control any place” and make it “available for use, with or without compensation . . . for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.”\footnote{343} Federal funding should be allocated to support the establishment of safe injection sites where people can use illegal substances and be saved in the event of an overdose. In Philadelphia, a lawsuit by the Department of Justice during the Trump administration used the statute to try and prevent a nonprofit group from establishing a supervised consumption site.\footnote{344} The Biden Administration has expressed less aversion to safe consumption sites and validated their effectiveness.\footnote{345}

Community activists and legal scholars must continue

\begin{thebibliography}{9}
\footnotetext{342}{Johnson, supra note 340. A study has shown that safe injection sites promoted safer injection conditions and they did not “increase drug injecting, drug trafficking or crime in the surrounding environments.” See Chloé Potier et al., \textit{Supervised Injection Services: What Has Been Demonstrated? A Systematic Literature Review}, 145 Drug & Alcohol Dependence 49, 62–63 (Dec. 2014).}
\footnotetext{343}{21 U.S.C. § 856(a)(2) (2003).}
\footnotetext{344}{A federal appeals court sided with the Justice Department in 2021. Johnson, supra note 340.}
\footnotetext{345}{See Jennifer Peltz & Micheal Balsamo, \textit{Justice Dept. Signals It May Allow Safe Injection Sites}, AP News (Feb. 8, 2022), https://apnews.com/article/business-health-new-york-c4e6d999583d7b7abce2189fa095011 [https://perma.cc/24N4-DFXZ]. The Associated Press questioned the Department of Justice about safe injection sites and the response was that the agencies was “evaluating the facilities and talking to regulators about appropriate guardrails as an overall approach to harm reduction and public safety.” Id.}
\end{thebibliography}
pushing for legislative changes that no longer allow establishing safe consumption sites to be federally prohibited.

Meeting individuals where they are in their drug use journey and addressing immediate harm builds a community of trust between the supervisees, probation officers, judges, and other stakeholders in a way that has never existed. In mimicking these values, supervision can call for non-judgmental support to help people genuinely rehabilitate and recover. For better or for worse, harm reduction accepts that illegal drugs exist as a part of our society and focuses on minimizing the harms associated instead of blaming and shaming those individuals who use them. While this approach may seem idealistic, the harm reduction strategy is aligned with the principles of human rights and social justice, recognizing that people with SUD have the right to health and dignity rather than endless punitive measures. It emphasizes respecting individuals’ autonomy and choices while offering support and resources. Implementing harm reduction as the source of supervised release treatment and eliminating the threat of prison is an undeniably essential step to addressing substance use disorder.

CONCLUSION

The criminal legal system is ill-equipped to handle SUD, despite too often functioning as the main public health strategy. When individuals struggling with addiction are primarily met with punitive measures, prison intensifies rather than alleviates the problem. Substance use disorder is a complex health issue influenced by various factors, including genetic predisposition, trauma, mental health, and socioeconomic disparities. Treating it through criminalization not only stigmatizes those affected but also fails to address the root causes of their addiction, perpetuating a cycle of incarceration and recidivism. Since prisons do not offer enough accessible and comprehensive addiction treatment programs, the environmental stressors inside can exacerbate addiction, and rampant exposure to drugs inside facilities makes prisons an inappropriate response to substance use.

The social attitude toward drug use will not shift to an overwhelming acceptance, but there is room to acknowledge the role that prison does not have in addressing substance use disorder. Instead, the attention should be on immediately implementing court programs similar to that of Judge Berman’s, eliminating the statutory requirement to send people back to prison related to drug use, possession, failing a drug test, or relapsing during drug treatment, and incorporating true harm reduction principles including safer consumption sites and widespread naloxone training that acknowledge the reality of drug use in our world. Using tools of confinement to remove people from their lives for drugs is a devastating practice that harms people
more than helps. This flawed process is unfairly burdensome on supervisees and is an error in the sentencing system.

A fundamental shift in our societal approach must take place to address the structural challenges in addressing substance use. A more compassionate, humane, and public health-centered approach is essential to address the challenges posed by SUD. The prevailing belief that individuals can overcome addiction through willpower and inconsistent systemic support overlooks the web of factors contributing to substance dependence. By acknowledging the underlying systemic issues that contribute to addiction, we can pave the way for a constructive approach that promotes recovery over punishment.
### Appendix A

Department of Justice - Federal Prison System (BOP)

**Dollars in Millions - TOTAL DRUG RESOURCES**

<table>
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<th>Resource Summary</th>
<th>FY 2021 Enacted</th>
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<th>FY 2023 Spring Call</th>
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