

NOTE

COMMONWEALTH V. ELDRED: DENYING A MEDICAL REALITY*

I. INTRODUCTION

The medical community has long settled that substance use disorder (SUD) is a medical issue, not a moral one.¹ The U.S. Surgeon General, supported by multiple medical societies, defines SUD as a neurologically based chronic condition.² Accordingly, the National Institute on Drug Abuse,³ public health departments,⁴ and specialty professional organizations have all recognized relapse as an expected part of recovery from SUD.⁵ That is not to say that nothing can be done to support individuals in recovery who continue to use; rather, it should spur thoughtful, patient-centered care.⁶ Opioid use disorder (OUD), a subset of SUD, describes individuals who have developed such regular patterns of compulsive opioid use that users plan daily activities around

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1. See Honora Englander et al., “*We’ve Learned It’s a Medical Illness, Not a Moral Choice*”: *Qualitative Study of the Effects of a Multicomponent Addiction Intervention on Hospital Providers’ Attitudes and Experiences*, 13 J. HOSP. MED. E1, E3 (2018).

2. Brief on Behalf of the Massachusetts Medical Society et al. as Amici Curiae Supporting Defendant at 19–20, *Commonwealth v. Eldred*, 101 N.E.3d 911 (Mass. 2018) (No. SJC-12279).

3. NAT’L INST. ON DRUG ABUSE, PRINCIPLES OF DRUG ADDICTION TREATMENT: A RESEARCH-BASED GUIDE 5–8 (3d ed. 2018), <http://www.drugabuse.gov/node/pdf/675/principles-of-drug-addiction-treatment-a-research-based-guide-third-edition> [<https://perma.cc/G6ST-MVKF>].

4. MASS. DEP’T OF PUB. HEALTH, BUREAU OF SUBSTANCE ADDICTION SERVS., PRACTICE GUIDANCE: RESPONDING TO RELAPSE 1 (2013), www.mass.gov/cohhs/docs/dph/substance-abuse/care-principles/care-principles-guidance-responding-to-relapses.pdf [<https://perma.cc/9S43-9497>].

5. See AM. SOC’Y OF ADDICTION MED., NATIONAL PRACTICE GUIDELINE FOR THE USE OF MEDICATIONS IN THE TREATMENT OF ADDICTION INVOLVING OPIOID USE 7 (2015), http://www.asam.org/docs/default-source/practice-support/guidelines-and-consensus-docs/asam-national-practice-guideline-supplement.pdf?sfvrsn=96df6fc2_24 [<https://perma.cc/RZZ8-6Z34>] (“Strategies directed at relapse prevention are an important part of comprehensive addiction treatment and should be included in any plan of care . . .”). This Note intentionally avoids using the term “relapse” after this mention. For more discussion on this choice, see *infra* notes 177–82.

6. Stephen A. Martin et al., *The Next Stage of Buprenorphine Care for Opioid Use Disorder*, 169 ANNALS INTERNAL MED. 628, 630 (2018).

obtaining and administering the drug.⁷ As a chronic disease, SUD reduces an individual's self-control through physical changes in parts of the brain that dictate judgment, decisionmaking, learning, memory, and behavior.⁸ It goes beyond recreationally passing a joint around.

In 2017 the U.S. Department of Health and Human Services declared a public health emergency to address the national opioid crisis.⁹ According to the Centers for Disease Control and Prevention, 70,237 drug overdose deaths occurred in the United States in 2017.¹⁰ Opioids were involved in 47,600 of those deaths—67.8%—and, as such, are the main driver of overdose deaths.¹¹ In connection to this epidemic, defendants who are incarcerated have a high prevalence of SUD, including OUD.¹² Staggeringly, an estimated fifty percent of all incarcerated persons meet the criteria for diagnosis of SUD.¹³ State trial court judges sit at the threshold of the opioid epidemic and the developing science surrounding SUD that comes with it.¹⁴ Using their immense discretion, judges must wrestle with deciding the proper protocol for sentencing defendants with SUD.¹⁵

In the face of this medical reality, *Commonwealth v. Eldred*,¹⁶ decided by the Massachusetts Supreme Judicial Court in July 2018, held that a judge may require a defendant with SUD to remain drug-free as a condition of her probation.¹⁷ Additionally, the court found that the defendant's action constituted a willful violation of such a condition.¹⁸ Courts traditionally punish probation violators with incarceration or more

7. AM. PSYCHIATRIC ASS'N, OPIOID USE DISORDER DIAGNOSTIC CRITERIA 3 (2013), <http://www.aoaam.org/resources/Documents/Clinical%20Tools/DSM-V%20Criteria%20for%20opioid%20use%20disorder%20.pdf> [<https://perma.cc/DFM9-YANV>].

8. *The Science of Drug Use: Discussion Points*, NAT'L INST. ON DRUG ABUSE (Feb. 2017), <http://www.drugabuse.gov/related-topics/criminal-justice/science-drug-use-discussion-points> [<https://perma.cc/THM3-RCDT>].

9. Press Release, U.S. Dep't of Health & Human Servs., HHS Acting Secretary Declares Public Health Emergency To Address National Opioid Crisis (Oct. 26, 2017), <http://www.hhs.gov/about/news/2017/10/26/hhs-acting-secretary-declares-public-health-emergency-address-national-opioid-crisis.html> [<https://perma.cc/ZZS2-TT4V>].

10. *Drug Overdose Deaths*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/drugoverdose/data/statedeaths.html> [<https://perma.cc/95NN-DSDZ>] (last updated June 27, 2019).

11. *Id.*

12. Beth Connolly, *How States Address Opioid Use Disorder in Prisons*, PEW (May 13, 2019), <http://www.pewtrusts.org/en/research-and-analysis/articles/2019/05/13/how-states-address-opioid-use-disorder-in-prisons> [<https://perma.cc/PT2N-LGWJ>].

13. Redonna K. Chandler et al., *Treating Drug Abuse and Addiction in the Criminal Justice System: Improving Public Health and Safety*, 301 JAMA 183, 183 (2009).

14. See NAT'L JUDICIAL OPIOID TASK FORCE, CONVENING, COLLABORATING, CONNECTING: COURTS AS LEADERS IN THE CRISIS OF ADDICTION 9 (2019); see also Recent Case, *Criminal Law — Sentencing — Massachusetts Supreme Judicial Court Holds Drug-Free Probation Requirement Enforceable for Defendant with Substance Use Disorder. — Commonwealth v. Eldred*, 101 N.E.3d 911 (Mass. 2018), 132 HARV. L. REV. 2074, 2074 (2019).

15. Recent Case, *supra* note 14, at 2074.

16. 101 N.E.3d 911 (Mass. 2018).

17. *Eldred*, 101 N.E.3d at 925.

18. *Id.* at 924–25.

probation.¹⁹ This Note argues that *Eldred* disregards Massachusetts precedent and violates the Eighth Amendment by imposing probation conditions that defendants with SUD are fundamentally unable to comply with. Moreover, this decision contributes two horrendous social consequences. First, incarcerating a defendant for continued drug use harms her recovery process.²⁰ Second, the decision perpetuates the dysfunctional way our criminal justice system treats those suffering from SUD by punishing them instead of seeking to rehabilitate them.²¹ While judges maintain immense discretion in imposing conditions of probation, bounds do exist.²² A judge should not, and constitutionally does not, have the power to impose a drug-free condition of probation on defendants who have SUD.²³

II. FACTS AND PROCEDURAL HISTORY

Julie Eldred struggled with drugs for nearly half of her life, and by age thirty doctors had diagnosed her with SUD.²⁴ On August 22, 2016, Eldred faced a Massachusetts district court judge after she was charged with stealing \$250 worth of jewelry from her dog-walking client.²⁵ She admitted to stealing the jewelry to pay for opioids.²⁶ The judge imposed a one-year term of probation with the special conditions that she remain drug-free, submit to random drug screenings, and attend outpatient treatment three times a week.²⁷ Eldred neither objected to the conditions nor expressed that her SUD medical diagnosis rendered her incapable of remaining drug-free.²⁸

On August 29, 2016, Eldred began outpatient treatment for SUD at a hospital.²⁹ While there, a specialist prescribed her a daily dose of Suboxone, a medication used to quell opiate cravings.³⁰ Some days later, she used her drug of choice, fentanyl.³¹ She asked her doctor for a stronger dose of Suboxone.³² She stayed clean the following two

19. See Jan Hoffman, *She Went to Jail for a Drug Relapse. Tough Love or Too Harsh?*, N.Y. TIMES (June 4, 2018), <http://www.nytimes.com/2018/06/04/health/drug-addict-relapse-opioids.html> [https://perma.cc/4ABK-WN7V].

20. See Christian S. Hendershot et al., *Relapse Prevention for Addictive Behaviors*, SUBSTANCE ABUSE TREATMENT PREVENTION & POL'Y, July 2011, at 14, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3163190/pdf/1747-597X-6-17.pdf> [https://perma.cc/CQU2-PNH5] (“[I]t is imperative that policy makers support adoption of treatments that incorporate a *continuing care approach*, such that addictions treatment is considered from a chronic (rather than acute) care perspective. Broad implementation of a *continuing care approach* will require policy change at numerous levels . . .” (emphasis added)).

21. See CTR. FOR SUBSTANCE ABUSE TREATMENT, U.S. DEP’T HEALTH AND HUMAN SERVS., SUBSTANCE ABUSE TREATMENT FOR ADULTS IN THE CRIMINAL JUSTICE SYSTEM 142 (2005) (ebook).

22. See *infra* notes 85–104 for a discussion of three limits to judges’ discretion when imposing probation conditions.

23. See *infra* Part V.C; see also Recent Case, *supra* note 14, at 2081.

24. See Hoffman, *supra* note 19.

25. *Eldred*, 101 N.E.3d 911, 915–16 (Mass. 2018).

26. *Id.* at 916.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*; see also Hoffman, *supra* note 19.

31. *Eldred*, 101 N.E.3d at 916; see also Hoffman, *supra* note 19.

32. Hoffman, *supra* note 19.

days.³³ On September 2, 2016, eleven days after the court had imposed probation, Eldred tested positive for fentanyl during a random drug test that her probation officer administered.³⁴ The probation officer filed a Notice of Probation Detention Hearing with the district court that same day.³⁵

The district court found that because Eldred tested positive for fentanyl, she violated the probation condition that required her to abstain from using illegal drugs.³⁶ The judge ordered a modification to her original probation conditions, requiring her to submit to inpatient treatment for SUD.³⁷ However, the judge ordered Eldred to a medium-security prison until her lawyer could find a placement at an inpatient treatment facility.³⁸ While in prison, Eldred did not receive any drug counseling or Suboxone.³⁹

On November 22, 2016, Eldred stood before a different district court judge and contested whether she violated the terms of her probation.⁴⁰ She argued that because of her SUD diagnosis, she was incapable of remaining drug-free while on probation.⁴¹ Eldred further claimed that her drug use did not constitute a willful violation of the probation condition.⁴²

The judge held that Eldred had the capacity to make a willful decision, and thus, she violated the drug-free condition when she tested positive for fentanyl.⁴³ Eldred appealed that finding.⁴⁴ She questioned whether the imposition of a drug-free probation condition is permissible for a defendant with SUD and whether that person can be held in custody while awaiting admission into an inpatient treatment facility pending a probation violation hearing.⁴⁵

On July 16, 2018, the Massachusetts Supreme Judicial Court affirmed the lower court's decision.⁴⁶ The court held: (1) the requirement that the defendant remain drug-free was a permissible probation condition, (2) the district court was able to order detention pending a final hearing on probation violation, (3) the defendant's violation of probation was willful, and (4) the district court accurately modified the defendant's probation to require inpatient treatment.⁴⁷

33. *Id.*

34. *Eldred*, 101 N.E.3d at 916.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*; see also Hoffman, *supra* note 19.

39. Hoffman, *supra* note 19.

40. *Eldred*, 101 N.E.3d at 916.

41. *Id.*

42. *Id.* at 916–17.

43. See *id.* at 917.

44. *Id.*

45. *Id.* at 917–18.

46. *Id.* at 925.

47. *Id.* at 920, 922, 924–25.

III. PRIOR LAW

To understand how the *Eldred* decision rejects public policy and fails constitutionally, one must first appreciate the considerations surrounding probation and science on SUD. This Section discusses the current legal landscape of punishment and probation and how these landscapes relate to defendants struggling with SUD. Part III.A explores why the criminal justice system emphasizes punishment by focusing on its rudimentary principles. Part III.B examines the function and purpose of probation, a frequent step in criminal punishment. Part III.C describes how the courts handle punishment and probation with regard to defendants struggling with SUD. Part III.D discusses the requirements for criminal proceedings. Part III.E explains the medical community's perspective regarding SUD as a disease and then focuses on punishment as it relates to defendants with SUD. Lastly, Part III.F demonstrates how adjudication and sentencing differ depending on which jurisdiction and judge the convicted defendant struggling with SUD faces.

A. Principles of Punishment

Criminal law emphasizes four main purposes of criminal punishment: retribution,⁴⁸ deterrence,⁴⁹ incapacitation,⁵⁰ and rehabilitation.⁵¹ In 1962 the Model Penal Code endorsed this list of purposes but declared retribution as only a limiting principle.⁵² Prior to the Model Penal Code, rehabilitative goals remained dominant for decades.⁵³ Professor Francis Allen described it as:

[T]he notion that a primary purpose of penal treatment is to effect changes in the characters, attitudes, and behavior of convicted offenders, so as to strengthen the social defense against unwanted behavior

. . . .

. . . Twentieth-century expressions of the rehabilitative ideal . . . may be seen as part of a modern faith in therapeutic interventions, often with purposes

48. "Retribution" is defined as "1. Punishment imposed for a serious offense; requital. 2. Severe punishment for bad behavior. 3. In a more neutral sense, something justly deserved." *Retribution*, BLACK'S LAW DICTIONARY (11th ed. 2019).

49. "Deterrence" is defined as "[t]he act or process of discouraging certain behavior, particularly by fear; especially, as a goal of criminal law, the prevention of criminal behavior by fear of punishment." *Deterrence*, BLACK'S LAW DICTIONARY (11th ed. 2019).

50. "Incapacitation" is defined as "[t]he action of disabling or depriving of legal capacity. . . . '[O]bstacles are interposed to impede the person from carrying out whatever criminal inclinations he or she may have. Usually the obstacles are prison walls'" *Incapacitation*, BLACK'S LAW DICTIONARY (11th ed. 2019) (quoting Anthony Bottoms & Andrew von Hirsch, *The Crime-Preventive Impact of Penal Sanctions*, in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 96, 113–14 (Peter Cane & Herbert M. Kritzer eds., 2010)).

51. "Rehabilitation" is defined as "[t]he process of seeking to improve a criminal's character and outlook so that he or she can function in society without committing other crimes." *Rehabilitation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

52. See Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1, 6 (2003); see also MODEL PENAL CODE § 1.02 (AM. LAW INST., Proposed Official Draft 1962).

53. See Alschuler, *supra* note 52, at 3–4.

extending far beyond penological treatment and encompassing the health and happiness of society generally.⁵⁴

However, in the 1970s and 1980s, the sentencing reform movement motivated the United States to reconsider its penal goals.⁵⁵

By the twentieth century, criminal courts highlighted incapacitation and deterrence as their primary goals.⁵⁶ Thus, rehabilitation has significantly declined as a modern justification for criminal punishment, and criminal sanctions have encompassed a more punitive nature.⁵⁷ The retributive theory bolsters this focus on punishment, for it seeks to punish offenders simply because they deserve to be punished.⁵⁸ This past-oriented theory contemplates the extent of blameworthiness attributable to the underlying crime and then seeks a punishment of equitable proportion.⁵⁹ Today, the U.S. criminal justice system has become the most punitive in the world, as its prison population balloons.⁶⁰

Despite—or maybe because of—its punitive focus, reform advocates have raised certain other principles that seek to limit criminal punishment. For example, the principle of proportionality posits that punishment should be comparable to the offense.⁶¹ This works as a check on retributivism by suggesting that there is a limit on the extent that someone “deserves” to be punished.⁶² Additionally, the utilitarian theory seeks to punish offenders not merely based on what they deserve but also to discourage and deter future wrongdoing.⁶³ Under this future-oriented policy, the law and its subsequent punishment consider how communities will benefit and what society gains from punishment.⁶⁴ Although such reform efforts exist, when considering the purpose of punishment, courts still emphasize punitive measures over rehabilitation.⁶⁵

B. *The Function and Purpose of Probation*

Probation is frequently used in the U.S. criminal justice system.⁶⁶ Probation is a court-ordered sentence dictating a period of community supervision as a penalty for a

54. FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* 2–5 (1981).

55. Alschuler, *supra* note 52, at 9.

56. *Id.* at 11.

57. See Michelle S. Phelps, *Rehabilitation in the Punitive Era: The Gap Between Rhetoric and Reality in U.S. Prison Programs*, 45 *LAW & SOC'Y REV.* 33, 34 (2011).

58. See Abhishek Mohanty, *Retributive Theory of Punishment: A Critical Analysis*, *ACADEMIKE* (Jan. 15, 2015), <http://www.lawctopus.com/academike/retributive-theory-of-punishment-a-critical-analysis/> [https://perma.cc/93DP-GDME].

59. *Id.*

60. See Mike C. Materni, *Criminal Punishment and the Pursuit of Justice*, 2 *BRIT. J. AM. LEG. STUD.* 263, 264 (2013).

61. See Roozbeh (Rudy) B. Baker, *Proportionality in the Criminal Law: The Differing American Versus Canadian Approaches to Punishment*, 39 *U. MIAMI INTER-AM. L. REV.* 483, 487 (2008).

62. See *id.* at 487.

63. See, e.g., Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 *AM. CRIM. L. REV.* 1313, 1316 (2000).

64. See *id.*

65. See Alschuler, *supra* note 52, at 9–10.

66. See Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 *GEO. L.J.* 291, 292 (2016).

crime.⁶⁷ During probation sentencing, a court imposes conditions intended to regulate a defendant's behavior for the set period of time.⁶⁸ Probation officers supervise probationers for compliance with imposed conditions.⁶⁹ A judge can sentence a criminal defendant to probation as an independent sentence.⁷⁰ Courts can also sentence a defendant to incarceration with subsequent probation.⁷¹ With the oversight of a probation officer, a judge retains jurisdiction during the period of the probation sentence.⁷²

A judge will order probation in a criminal proceeding “when the circumstances and seriousness of the crime suggest that the defendant is not a threat to society and that incarceration is not an appropriate punishment.”⁷³ Massachusetts courts agree that probation has two goals: (1) to rehabilitate the defendant, and (2) to protect the public from the defendant's potential recidivism.⁷⁴ Because probation is subject to strict supervision of the conditions the court imposes, it allows a defendant to remain in the community as an alternative to incarceration.⁷⁵

A judge possesses the discretion and flexibility at the time of sentencing to tailor probation conditions to the unique circumstances of the defendant and the crime she committed.⁷⁶ In other words, a judge considers conditions based on the idiosyncratic needs of the criminal defendant and her particular situation.⁷⁷ A judge may impose conditions so long as they are “‘reasonably related’ to the goals of sentencing and probation.”⁷⁸ Judges are permitted such latitude “as long as the sentence imposed is within the limits provided by the statute under which the defendant is convicted.”⁷⁹

Even if a condition of probation affects a defendant's fundamental rights guaranteed by the Constitution, courts have generally held that the condition is enforceable as long as it is reasonably related to the goals of sentencing and probation.⁸⁰

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *See id.* Probation is distinguishable from parole in that parole constitutes the release of a prisoner temporarily or permanently before the completion of a sentence subject to good behavior. *See What Is the Difference Between Probation and Parole?*, BUREAU JUST. STAT., <http://www.bjs.gov/index.cfm?ty=qa&iid=324> [<https://perma.cc/LCM6-V2A3>] (last visited Apr. 1, 2020).

72. Doherty, *supra* note 66, at 292.

73. *Parole and Probation*, JUSTIA, <http://www.justia.com/criminal/parole-and-probation/> [<https://perma.cc/W6HN-DUT7>] (last updated Apr. 2018).

74. *Commonwealth v. Goodwin*, 933 N.E.2d 925, 930 (Mass. 2010); *Commonwealth v. Lapointe*, 759 N.E.2d 294, 298 (Mass. 2001).

75. *Commonwealth v. Durling*, 551 N.E.2d 1193, 1195 (Mass. 1990).

76. *See Goodwin*, 933 N.E.2d at 930–31.

77. *See SUPERIOR COURT WORKING GRP. ON SENTENCING BEST PRACTICES*, SUPERIOR COURT OF MASS., CRIMINAL SENTENCING IN THE SUPERIOR COURT: BEST PRACTICES FOR INDIVIDUALIZED EVIDENCE-BASED SENTENCING 2 (2019), <http://www.mass.gov/doc/criminal-sentencing-in-the-superior-court-best-practices-for-individualized-evidence-based/download> [<https://perma.cc/52SD-XJWP>] (“Special conditions of probation should be narrowly tailored to the criminogenic needs of the defendant/probationer while providing for the protection of the public and any victim.”).

78. *Commonwealth v. Obi*, 58 N.E.3d 1014, 1020 (Mass. 2016) (quoting *Lapointe*, 759 N.E.2d at 298).

79. *Commonwealth v. Power*, 650 N.E.2d 87, 89 (Mass. 1995) (citing *Goodwin*, 933 N.E.2d at 930).

80. *United States v. Tolla*, 781 F.2d 29, 32–34 (2d Cir. 1986); *Power*, 650 N.E.2d at 89; *Commonwealth v. Koren*, 646 A.2d 1205, 1209 (Pa. Super. Ct. 1994).

The First Circuit stated that “[a] sentencing court is authorized to impose any condition of supervised release that is reasonably related to one or more of the permissible goals of sentencing.”⁸¹ For example, although common probation conditions, such as random drug and alcohol testing, constitute a search and seizure under the Fourth Amendment and article XIV of the Massachusetts Declaration of Rights, such testing remains permissible as long as the condition of probation is reasonably related to the goals of probation.⁸² A defendant’s liberty is limited while on probation, as it is restricted depending on her compliance with the court’s imposed conditions.⁸³ As long as she agrees to the probation conditions, a defendant automatically subjects themselves to probation revocation for noncompliance.⁸⁴

While a judge maintains broad discretion in implementing conditions of probation, limits do exist. First, conditions must be uniquely tailored to both the probationer and the offense.⁸⁵ To align with the goals of probation, conditions should sufficiently address the specific characteristics of the defendant and the underlying crime.⁸⁶ In *United States v. Del Valle-Cruz*,⁸⁷ the First Circuit held the condition prohibiting contact with minors invalid because the defendant’s crime of failing to register as a sex offender did not involve sexual conduct, the underlying sex offense was temporally remote, and no evidence suggested a propensity to commit a future sex offense.⁸⁸ In *United States v. Heckman*,⁸⁹ the Third Circuit held that even though the defendant was a sex offender, his criminal history alone did not justify the condition banning internet access.⁹⁰ Even when faced with a notorious sex offender, the court “recognized the draconian nature” of the condition, concluded that “special conditions still must be tailored to the underlying

81. *United States v. Mercado*, 777 F.3d 532, 537 (1st Cir. 2015).

82. *Commonwealth v. Eldred*, 101 N.E.3d 911, 919 (Mass. 2018) (citing *Commonwealth v. Gomes*, 903 N.E.2d 234, 236–37 (Mass. App. Ct. 2009)); see also *Robinson v. California*, 370 U.S. 661, 664–65 (1962) (“[A] state might establish a program of compulsory treatment for those addicted to narcotics. Such a program of treatment might require periods of involuntary confinement. And penal sanctions might be imposed for failure to comply with established compulsory treatment procedures.” (footnote omitted)); *Commonwealth v. Williams*, 801 N.E.2d 804, 805–06 (Mass. App. Ct. 2004) (finding an alcohol-free condition of probation is permissible when reasonably related to characteristics of the defendant and the underlying crime).

83. *Commonwealth v. Wilcox*, 841 N.E.2d 1240, 1245 (Mass. 2006).

84. *Commonwealth v. Vargas*, 55 N.E.3d 923, 929 (Mass. 2016) (holding that by agreeing to the probation conditions of abstaining from marijuana, the defendant agreed to be subject to probation revocation for noncompliance).

85. *Commonwealth v. Pike*, 701 N.E.2d 951, 959 (Mass. 1998).

86. *Id.* at 960 (“The majority of jurisdictions to have considered the matter hold that a probation condition banishing a defendant from a State is invalid and unenforceable because it infringes on his constitutional right to interstate travel and is not reasonably related to the goals of probation. Not all probation conditions restricting an individual’s movement are invalid; conditions barring probationers from certain small geographic areas have been upheld in several States when they served the goals of probation.”). *But see Williams*, 801 N.E.2d at 805–06 (holding that the condition not to “consume or possess any alcohol” was valid even though alcohol was not connected to the offense because most judges are familiar with the overlap of anger, violence, and alcohol consumption).

87. 785 F.3d 48 (1st Cir. 2015).

88. *Del Valle-Cruz*, 785 F.3d at 60.

89. 592 F.3d 400 (3d Cir. 2010).

90. *Heckman*, 592 F.3d at 408.

conduct at issue in the given case,⁹¹ and demanded “alternative, less restrictive, means of controlling [the defendant’s] . . . behavior.”⁹²

Second, probation conditions must be achievable. In *Bearden v. Georgia*,⁹³ the U.S. Supreme Court held that an indigent, unemployed probationer could not be ordered to pay \$750 in restitution and fines as a condition of probation because the defendant lacked the means to fulfill the condition.⁹⁴ The Court reasoned,

[I]f the probationer has made all reasonable efforts to pay the fine or restitution, and yet cannot do so through no fault of his own, it is fundamentally unfair to revoke probation automatically without considering whether adequate alternative methods of punishing the probationer are available.⁹⁵

Similarly, in *Commonwealth v. Henry*,⁹⁶ the Massachusetts Supreme Judicial Court held that a judge must consider the financial resources and obligations of the defendant when determining whether to require restitution as a condition of probation.⁹⁷

Third, probation conditions must be tailored to meet the goals of probation.⁹⁸ In *United States v. Medina*,⁹⁹ the First Circuit vacated the condition banning pornography for a defendant who failed to register as a sex offender where the district court did not justify the condition in terms of deterrence, protection of the public, or rehabilitation.¹⁰⁰ In *United States v. Turner*,¹⁰¹ the Tenth Circuit found that probation conditions are persistently upheld if they “bear a reasonable relationship to the goals of probation.”¹⁰² In *Turner*, the court determined that prohibiting picketing or harassment as a condition of probation for abortion protestors was not an abuse of discretion.¹⁰³ Similarly, the Ninth Circuit upheld probation conditions after finding a “reasonable nexus between the probation conditions and the goals of probation.”¹⁰⁴

91. *Id.*

92. *Id.* at 409.

93. 461 U.S. 660 (1983).

94. *Bearden*, 461 U.S. at 667–68 (“[I]f the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it.” (citing *Williams v. Illinois*, 399 U.S. 235, 242 (1970); then citing *Tate v. Short*, 401 U.S. 395, 398 (1971))).

95. *Id.* at 668–69 (footnote omitted); see also *Commonwealth v. Poirier*, 935 N.E.2d 1273, 1276 (Mass. 2010) (holding that the condition requiring GPS monitoring could not be fulfilled because the GPS device was unavailable).

96. 55 N.E.3d 943 (Mass. 2016).

97. *Henry*, 55 N.E.3d at 950.

98. See Andrew Horwitz, *Coercion, Pop-Psychology, and Judicial Moralizing: Some Proposals for Curbing Judicial Abuse of Probation Conditions*, 57 WASH. & LEE L. REV. 75, 91–92 (2000) (“Perhaps the most common formulation of the reasonableness standard flowed in large part from early editions of the American Bar Association’s Standards for Criminal Justice. It focuses on whether the condition is ‘reasonably related’ to the underlying purpose of probation.”).

99. 779 F.3d 55 (1st Cir. 2015).

100. *Medina*, 779 F.3d at 72.

101. 44 F.3d 900 (10th Cir. 1995).

102. *Turner*, 44 F.3d at 903.

103. *Id.*

104. *Malone v. United States*, 502 F.2d 554, 556 (9th Cir. 1974).

The Massachusetts Supreme Judicial Court has held that probation violations may not be punished if they are interwoven with the consequences of a condition the probationer cannot control.¹⁰⁵ A trilogy of cases—*Commonwealth v. Canadyan*,¹⁰⁶ *Commonwealth v. Henry*,¹⁰⁷ and *Commonwealth v. Poirier*¹⁰⁸—establish that only willful probation violations may be punished. In *Canadyan*, the court found that the defendant had not met the condition of his probation “through no fault of his own” and therefore determined that “where there [is] no evidence of wilful noncompliance, a finding of violation of the condition . . . was unwarranted.”¹⁰⁹ In *Henry*, the court explained that “[a] defendant can be found in violation of a probationary condition only where the violation was willful, and the failure to make a restitution payment that the probationer is unable to pay is not a willful violation of probation.”¹¹⁰ The judge explained that imposing an unfulfillable condition not only “dooms the defendant to noncompliance” but also wastes the court’s time.¹¹¹ In *Poirier*, the court held that the defendant did not violate the condition where he was not responsible for his inability to comply.¹¹²

States, and even counties within states, handle probation violations in different procedural ways. In Massachusetts a probation officer initiates probation violation proceedings if she has reason to believe that a defendant violated a condition of her probation.¹¹³ A detention hearing is then conducted if the probation department wants the defendant to be held in custody while awaiting her final probation violation hearing.¹¹⁴ The presiding judge decides “whether probable cause exists to believe that the probationer has violated a condition of the probation order, and, if so, whether the probationer should be held in custody.”¹¹⁵ If the judge then determines that probable cause supports the allegation, the judge must consider and weigh the defendant’s unique circumstances with the public safety in order to determine if the defendant should be held in custody pending the final probation violation hearing.¹¹⁶ The judge must weigh the following factors:

- (i) the probationer’s criminal record; (ii) the nature of the offense for which the probationer is on probation; (iii) the nature of the offense or offenses with which the probationer is newly charged, if any; (iv) the nature of any other

105. See, e.g., *Commonwealth v. Poirier*, 935 N.E.2d 1273, 1276 (Mass. 2010).

106. 944 N.E.2d 93 (Mass. 2010).

107. 55 N.E.3d 943 (Mass. 2016).

108. 935 N.E.2d 1273 (Mass. 2010).

109. *Canadyan*, 944 N.E.2d at 96.

110. *Henry*, 55 N.E.3d at 950; see also *Bearden v. Georgia*, 461 U.S. 660, 669 n.10 (1983) (“Numerous decisions by state and federal courts have recognized that basic fairness forbids the revocation of probation when the probationer is without fault in his failure to pay the fine.”).

111. *Henry*, 55 N.E.3d at 950.

112. *Poirier*, 935 N.E.2d at 1276.

113. See MASS. DIST. CT. R. PROB. VIOLATION PROCEEDINGS 4(b), <http://www.mass.gov/files/documents/2018/01/22/DistrictCourtRulesForProbationViolation2015.pdf> [<https://perma.cc/RMQ9-HX77>] (“Violation proceedings shall be commenced by the issuance by the Probation Department of a Notice of Probation Violation and Hearing . . .”).

114. *Id.* 5(a).

115. *Id.*

116. See *id.* 5(c).

pending alleged probation violations; (v) the likelihood of probationer's appearance at the probation violation hearing if not held in custody; and (vi) the likelihood of incarceration if a violation is found following the probation violation hearing.¹¹⁷

Thus, the judge holds considerable discretion in determining the defendant's status while awaiting a final hearing.

The final probation violation hearing consists of two phases: (1) the adjudicatory phase, and (2) the dispositional phase.¹¹⁸ During the adjudicatory phase, the presiding judge determines whether the defendant has violated the conditions of her probation.¹¹⁹ A defendant can be found in violation of probation only where she willfully violated a condition.¹²⁰ Although some debate exists as to the precise definition of "willful" in regard to violating a condition of probation,¹²¹ in this context it means that the defendant knowingly and deliberately violated a court-imposed condition.¹²²

In the dispositional stage, when the defendant is found in violation of a condition of probation, the presiding judge has options: she may revoke the defendant's probation and sentence her to a term of imprisonment for the underlying conviction, or she may return the defendant to probation with new or revised conditions.¹²³ Regardless of the terms of the original sentence, a defendant can be freshly sentenced to the maximum allowable sentence for that offense, without any regard for how much time she has already served.¹²⁴ Courts believe that they are not punishing a defendant for violating a specific condition of probation, but rather, "the defendant is essentially being sentenced anew on his underlying conviction."¹²⁵ The court sees the defendant as having "abused the opportunity given [to] him to avoid incarceration."¹²⁶

117. *Id.*

118. *Id.* 6(b); *see also* Commonwealth v. Joyner, 4 N.E.3d 282, 295 (Mass. 2014).

119. Commonwealth v. Pena, 967 N.E.2d 603, 608 (Mass. 2012) (quoting Commonwealth v. Durling, 551 N.E.2d 1193, 1195 (Mass. 1990)).

120. Commonwealth v. Henry, 55 N.E.3d 943, 950 (Mass. 2016); Commonwealth v. Poirier, 935 N.E.2d 1273, 1276 (Mass. 2010) (holding that defendant was not responsible for her inability to comply with the condition where the probation department failed to provide necessary equipment).

121. *See* Dane C. Miller et al., *Can Probation Be Revoked When Probationers Do Not Willfully Violate the Terms or Conditions of Probation?*, 63 FED. PROB. 23, 29 (1999) (stating that "[w]hat remains to be seen is whether courts will be willing to extend the concept of 'nonwillful' revocations to violations of conditions where the offender poses no" danger to the community).

122. *See* Bearden v. Georgia, 461 U.S. 660, 673 (1983) (holding that the state must assess an indigent probationer's efforts to comply with the financial conditions imposed to determine if they were "willful" before automatically converting a nonprison sentence to a term of incarceration).

123. Commonwealth v. Goodwin, 933 N.E.2d 925, 931 (Mass. 2010); *see also* MASS. DIST. CT. R. PROB. VIOLATION PROCEEDINGS 8(d), 9(b), <http://www.mass.gov/files/documents/2018/01/22/DistrictCourtRulesForProbationViolation2015.pdf> [<https://perma.cc/RMQ9-HX77>].

124. *See* MASS. DIST. CT. R. PROB. VIOLATION PROCEEDINGS 8(d), 9(b).

125. *Goodwin*, 933 N.E.2d at 931; *see also* Commonwealth v. Cory, 911 N.E.2d 187, 192 (Mass. 2009) (finding that penalties for probation revocation are attributed to the original conviction and not to the probation violation).

126. *Rubera v. Commonwealth*, 355 N.E.2d 800, 804 (Mass. 1976).

C. Probation and Punishment Standards in Relation to Drug Offenses

When SUD is an underlying issue in a criminal case, the special conditions imposed “may include, but shall not be limited to, participation by [the defendant] in rehabilitative programs.”¹²⁷ The Massachusetts Supreme Judicial Court Standing Committee created the Standards on Substance Abuse, which established a policy designed to enhance the judiciary’s response to the impact of substance abuse.¹²⁸ These standards seek to encourage judges “to identify and appropriately respond to the indication of substance abuse by any party appearing before [them] in a court of the commonwealth, where substance abuse is a factor in behavior related to the case.”¹²⁹ Per chapter 276, section 87A of the Massachusetts General Laws,

If accredited alcohol and drug free housing is not available, the judge issuing the order may permit the probation officer to refer the person placed on supervised probation to alcohol and substance free housing that is available and that, in the judge’s discretion, appropriately supports the recovery goals of the person.¹³⁰

Judges frequently enforce a drug-free condition of probation when the underlying crime stems from drug use.¹³¹ They also have the ability to order such a condition when drug use was not a factor in the offense.¹³² Courts are permitted to do this as long as they find that the condition furthers either the defendant’s rehabilitation or the public’s need for protection.¹³³

Many states now offer drug courts as an alternative to prison sentences for individuals suffering from SUD.¹³⁴ Drug courts control a defendant’s daily life until she is reoriented with sobriety.¹³⁵ While drug courts vary in target population, services, and program design, they all are based on the same comprehensive model.¹³⁶ Such a model involves screening, assessing risks and needs, requiring judicial interaction, monitoring through drug testing and supervision, imposing sanctions and incentives, and providing

127. MASS. GEN. LAWS ANN. ch. 276, § 87A (West 2020).

128. *Massachusetts Courts Standards on Substance Abuse*, MASS.GOV, <http://www.mass.gov/massachusetts-courts-standards-on-substance-abuse> [<https://perma.cc/MY4A-EEER>] (last visited Apr. 1, 2020).

129. *Standards on Substance Abuse: SJC Policy Statement*, MASS.GOV, <http://www.mass.gov/info-details/standards-on-substance-abuse-sjc-policy-statement> [<https://perma.cc/39ZC-4CN8>] (last visited Apr. 1, 2020).

130. MASS. GEN. LAWS ANN. ch. 276, § 87A.

131. See James C. Weissman, *Constitutional Primer on Modern Probation Conditions*, 8 NEW ENG. J. PRISON L. 367, 371 (1982) (“If the court selects probation, boilerplate and special conditions of supervision are imposed to fulfill the purposes of sentencing. Standard conditions include uncontroversial general injunctions, such as maintaining lawful conduct, regular employment, and faithful reporting habits. Special conditions are individualized, focusing on salient supervision issues such as sobriety, family therapy, and restitution.”).

132. 18 U.S.C. § 3563(a)(5) (2018).

133. See Weissman, *supra* note 131, at 373–74.

134. See, e.g., Juleyka Lantigua-Williams, *Treating Addiction in Court*, ATLANTIC (June 19, 2016), <http://www.theatlantic.com/politics/archive/2016/06/helping-not-punishing-addicts/487706/> [<https://perma.cc/9TYS-W6WJ>].

135. *Id.* (describing the “multiple appointments at the court or with probation officers every week, random inspections and testing at home, [and] occasional overnight stays in jail for violating the requirements”).

136. *Overview of Drug Courts*, NAT’L INST. JUST. (May 14, 2012), <http://www.nij.gov/topics/courts/drug-courts/Pages/welcome.aspx> [<https://perma.cc/CMD8-Z9TY>].

treatment and rehabilitation services.¹³⁷ Typically, nonadversarial and multidisciplinary teams comprised of judges, social workers, treatment service professionals, prosecutors, and defense attorneys manage drug courts.¹³⁸ They encourage support and collaboration with the defendant's family and community through participation in hearings, programming, and events.¹³⁹

D. Requirements for Criminal Proceedings

The Eighth Amendment to the U.S. Constitution reads, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."¹⁴⁰ Succinct yet vague, this Amendment prohibits the federal government from imposing grossly disproportionate punishments on criminal defendants, in regard to both pretrial release and post-conviction.¹⁴¹ The right not to be subjected to excessive sanctions flows from a basic concept of justice: "[P]unishment for crime[s] should be graduated and proportioned."¹⁴²

The imprecise language of the Eighth Amendment has been subjected to new interpretation over time.¹⁴³ The Supreme Court articulated this in *Trop v. Dulles*,¹⁴⁴ when it stated that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."¹⁴⁵ The Cruel and Unusual Punishment Clause limits state power in addition to federal power, given that the Supreme Court held that it applies to the states through the doctrine of incorporation.¹⁴⁶ In the SUD context, *Robinson v. California*¹⁴⁷ established that laws criminalizing the disease—or "illness"—of SUD inflicted "cruel and unusual punishment" and therefore violated the Eighth and Fourteenth Amendments.¹⁴⁸

Article XXVI of the Massachusetts Constitution includes a similar amendment, which reads: "No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments."¹⁴⁹ To properly make a claim under article XXVI, a defendant must establish that the punishment is "so disproportionate to the crime that it 'shocks the conscience and offends fundamental notions of human dignity.'"¹⁵⁰ In comparison to the U.S. Constitution, the Massachusetts

137. *Id.*

138. *Id.*

139. *Id.*

140. U.S. CONST. amend. VIII.

141. *See id.*; *see also* *Roper v. Simmons*, 543 U.S. 551, 560–61 (2005).

142. *See Simmons*, 543 U.S. at 560 (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)).

143. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

144. 356 U.S. 86 (1958).

145. *Trop*, 356 U.S. at 101.

146. *See Robinson v. California*, 370 U.S. 660, 667 (1962).

147. 370 U.S. 660 (1962).

148. *Robinson v. California*, 370 U.S. at 667 (holding that a state law that made the status of narcotic addiction a criminal offense inflicted cruel and unusual punishment because it criminalized a person for being a "sick person").

149. MASS. CONST. pt. 1, art. XXVI.

150. *Commonwealth v. Jackson*, 344 N.E.2d 166, 170 (Mass. 1976) (quoting *In re Lynch*, 503 P.2d 921, 930 (Cal. 1972) (en banc)).

Constitution has further bolstered the rights of criminal defendants.¹⁵¹ The Massachusetts Declaration of Rights is broader and offers provisions that provide rights beyond what a federal court can or will enforce.¹⁵²

As drug use has exponentially grown, researchers have suggested that those struggling with SUD should be regarded as sick, not criminal.¹⁵³ In accordance with this suggestion, multiple states have enacted statutes that are designed to substitute nonpunitive measures in place of imprisonment.¹⁵⁴

E. Science Surrounding SUD and Legal Prohibitions for Punishing SUD

The medical community has determined SUD is a medical problem.¹⁵⁵ *Eldred* drew several amicus briefs from high-profile organizations addressing whether SUD is a brain disease.¹⁵⁶ The brief submitted on behalf of the Massachusetts Medical Society espoused the strong consensus within the national and international medical and scientific communities: SUD is a neurologically based chronic condition.¹⁵⁷ The 2016 Surgeon General's Report on Alcohol, Drugs, and Health, *Facing Addiction in America*, found that SUD is a chronic neurological disorder and should be treated as such.¹⁵⁸ SUD is classified as a chronic brain disease because "[a]n important characteristic of substance use disorders is an underlying change in brain circuits."¹⁵⁹ It is widely supported that "genetics play a significant role in an individual's risk of developing . . . SUD."¹⁶⁰ Findings also suggest that SUD is "significantly more prevalent in individuals who suffer from another mental illness."¹⁶¹ OUD "has its own unique effect on the brain."¹⁶²

151. See Herbert P. Wilkins, *The Massachusetts Constitution—The Last Thirty Years*, 44 SUFFOLK U. L. REV. 331, 331 (2011). For example, compare search and seizure under the Fourth Amendment, U.S. CONST. amend. IV, with article XIV of the Massachusetts Declaration of Rights, MASS. CONST. pt. 1, art. XIV.

152. See MASS. CONST. pt. 1.

153. B. K. Carpenter, *Validity and Construction of Statutes Providing for Civil Commitment of Arrested Narcotic Addicts*, 98 A.L.R.2d 726, § 1 (1964).

154. *Id.*

155. Brief on Behalf of the Massachusetts Medical Society, *supra* note 2, at 19.

156. *Morse Co-authors Amici Curiae Brief Arguing for the Multifaceted Nature of Addiction*, PENN LAW (Sept. 28, 2017), <http://www.law.upenn.edu/live/news/7393-morse-co-authors-amici-curiae-brief-arguing-for> [<https://perma.cc/VQ8E-VNSK>] ("Eldred's claim is being supported by virtually all the relevant professional groups, such as the American Academy of Addiction Psychiatry.")

157. Brief on Behalf of the Massachusetts Medical Society, *supra* note 2, at 19–20.

158. *Id.*

159. *Id.* at 20, 24 (quoting AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM-5) 483 (5th ed. 2013)) ("Opioids attach to opioid receptors in the brain, which leads to a release of dopamine in the nucleus accumbens, causing euphoria (the high), drowsiness, and slowed breathing, as well as reduced pain signaling (which is why they are frequently prescribed as pain relievers).") (quoting U.S. DEP'T OF HEALTH AND HUMAN SERVS., *FACING ADDICTION IN AMERICA: THE SURGEON GENERAL'S REPORT ON ALCOHOL, DRUGS, AND HEALTH* 19–20 (2016)).

160. *Id.* at 26.

161. *Id.* at 27 (quoting Elie Aoun, *Addiction Training for the General Psychiatrist*, AM. ACAD. ADDICTION PSYCHIATRY SUMMER NEWSL. (Am. Acad. Addiction Psychiatry, East Providence, R.I.), Summer 2015, at 6, <http://custom.event.com/10D3BAE39269457884C1D96DE1DF8D8D/files/b6428f9802174f3ab90176c6b02e4ee6.pdf> [<https://perma.cc/GJ8R-YZ2B>]).

162. *Id.* at 24.

The Massachusetts Medical Society provided data showing how “[p]unishing relapse without considering the clinical course of SUD . . . will not effectively accomplish the goal of deterrence.”¹⁶³ The risk of substance use persists throughout the course of treatment and even afterwards.¹⁶⁴ Studies acknowledge that continued substance use is such a common part of SUD recovery that it should be considered “a dynamic, ongoing process rather than a discrete or terminal event.”¹⁶⁵ The National Institute on Drug Abuse,¹⁶⁶ public health departments,¹⁶⁷ and specialty professional organizations¹⁶⁸ have all recognized continued substance use as an expected part of caring for SUDs.¹⁶⁹ Most patients use several times before achieving ultimate abstinence.¹⁷⁰ Data indicate that stress caused by the requirement or condition to remain asymptomatic exacerbates the risk of noncompliance.¹⁷¹

Given the pervasive expectation that individuals suffering with SUD fail to immediately abstain, it should be managed and addressed as such.¹⁷² Less than thirty percent of individuals with OUD can achieve complete abstinence from opioid use during recovery.¹⁷³ Iterative noncompliance is common in other chronic diseases as well.¹⁷⁴ The World Health Organization estimates that less than fifty percent of individuals with chronic diseases are able to adhere to long-term therapy.¹⁷⁵ Such adherence rates are even lower among individuals living in poverty or lacking social support, indicating that a scarcity of resources is a contributing factor.¹⁷⁶

The connotation associated with the term “relapse” further shames individuals struggling with OUD. Relapse is not common terminology for recurring issues in other chronic conditions; instead, they are termed “noncompliance,” “nonadherence,” and “uncontrolled disease.”¹⁷⁷ Given that “shaming or discharging patients who are nonadherent is not customary” for other chronic diseases, the medical community has

163. *Id.* at 20. SUD is defined as “repeated substance use despite destructive consequences, physical dependence, and difficulty abstaining notwithstanding the user’s resolution to do so.” *Id.*

164. *Id.* at 31 (“Recovery from SUD characteristically involves periods of recurrence and remission The fact that relapse is an almost inevitable feature of SUD leads to the straightforward conclusion that relapse is ‘not a weakness of character or will.’” (quoting WORLD HEALTH ORG. ET AL., SUBSTITUTION MAINTENANCE THERAPY IN THE MANAGEMENT OF OPIOID DEPENDENCE AND HIV/AIDS PREVENTION 7 (2004))).

165. *Id.* at 33 (quoting Hendershot et al., *supra* note 20, at 2).

166. NAT’L INST. ON DRUG ABUSE, *supra* note 3, at 5–7.

167. MASS. DEP’T OF PUB. HEALTH, BUREAU OF SUBSTANCE ADDICTION SERVS., *supra* note 4, at 1.

168. AM. SOC’Y OF ADDICTION MED. *supra* note 5, at 6–7.

169. Martin et al., *supra* note 6, at 630.

170. Brief on Behalf of the Massachusetts Medical Society, *supra* note 2, at 33.

171. *Id.* at 20.

172. See Martin et al., *supra* note 6, at 630–31.

173. *Id.* at 630.

174. *Id.*

175. *Id.*; see also WORLD HEALTH ORG., ADHERENCE TO LONG-TERM THERAPIES: EVIDENCE FOR ACTION, at xiii (Eduardo Sabaté ed., 2003), http://www.who.int/chp/knowledge/publications/adherence_full_report.pdf [<https://perma.cc/M8ZX-LGRA>].

176. Martin et al., *supra* note 6, at 630.

177. *Id.*

found that this type of treatment towards nonadherent OUD patients is inappropriate.¹⁷⁸ Accordingly, punitive consequences are an ineffective way to respond to individuals with OUD.¹⁷⁹ This conclusion does not mean that it is impossible to support individuals who are noncompliant; rather, it should spur thoughtful, patient-centered care.¹⁸⁰ Ongoing treatment may consist of a range of options and approaches, as well as different intensities of that care.¹⁸¹ Patients who are nonadherent should not be identified as “failing medical treatment.”¹⁸²

The Massachusetts Standards on Substance Abuse noted that “[w]hen structuring a sentence for a defendant who is a substance abuser, the judge should keep in mind that substance abuse is a disease of relapse, and try to fashion a sentence which leaves room for the application of escalating sanctions for non-compliance with specific conditions of probation.”¹⁸³ In 1925, the Supreme Court recognized individuals with SUD as “diseased and proper subjects for [medical] treatment” in *Linder v. United States*.¹⁸⁴ Then in 1962, the Court in *Robinson* held that a state law, which made the status of a “narcotic addiction” a criminal offense, constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.¹⁸⁵ The *Robinson* Court reasoned that because the *Linder* Court recognized narcotic addiction as an illness, punishment based on addiction is akin to punishment based on any other type of sickness. The Court added, “Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”¹⁸⁶ The Court explored how “narcotics addiction” is an illness that could be contracted innocently and involuntarily,¹⁸⁷ and as such, imprisoning a defendant for something she cannot control would constitute cruel and unusual punishment.¹⁸⁸ Thus, the Supreme Court held that a defendant cannot be punished simply for having a substance abuse disorder.¹⁸⁹

The reach of the *Robinson* holding is unclear: while the decision could be interpreted narrowly to prohibit only the criminalization of a medical condition without any corresponding criminal act, a broader interpretation would apply the disease concept of SUD in circumstances where the disease controlled the defendant’s actions or where

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Standards on Substance Abuse: Standard V. Ordering Treatment*, MASS.GOV, <http://www.mass.gov/info-details/standards-on-substance-abuse-standard-v-ordering-treatment> [<https://perma.cc/JL9R-MD5B>] (last visited Apr. 1, 2020).

184. 268 U.S. 5, 18 (1925).

185. *Robinson v. California*, 370 U.S. 660, 666–67 (1962) (noting that while selling or possessing illegal drugs was against the law, the state could not punish people solely for the status of their illness).

186. *Id.* at 667.

187. *Id.* at 667 n.9 (“Not only may addiction innocently result from the use of medically prescribed narcotics, but a person may even be a narcotics addict from the moment of his birth.”).

188. *Id.* at 667.

189. *Id.*

SUD spurred the criminal action.¹⁹⁰ In 1968, a Supreme Court plurality attempted to clarify *Robinson*.¹⁹¹ Justice Marshall, writing for four members of the Court, adopted the narrow interpretation in *Powell v. Texas*.¹⁹² He explained that the Cruel and Unusual Punishment Clause permitted criminal penalties only if the accused has committed some act.¹⁹³ Justice Fortas, writing for four members in dissent, argued for the broader interpretation: “Criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change.”¹⁹⁴ Because the defendant in *Powell* was a “chronic alcoholic” who could not willfully and instantly resist alcohol, Justice Fortas argued that inflicting punishment on him for imbibing alcohol would be cruel and unusual punishment under the Eighth Amendment.¹⁹⁵ *Powell* did not produce a majority opinion, so the matter of criminal responsibility, as affected by the Eighth Amendment, remains obscure.¹⁹⁶

F. Discordant Adjudications and Sentencing Reform

Although thousands of cases are tried where a defendant suffering from SUD is convicted of an underlying crime, different jurisdictions and distinct judges handle these cases discordantly. The Illinois Appellate Court held that it was an abuse of discretion for a trial court to not inquire further where it had reason to believe the defendant was struggling with SUD in order to determine whether the defendant was a likely subject for rehabilitation.¹⁹⁷ On the other hand, the New York Appellate Division in *People v. Martin*¹⁹⁸ upheld the probation sentence of a defendant with SUD who was convicted of third-degree burglary and then subsequently imprisoned upon violation of his probation.¹⁹⁹ These cases highlight how some courts do not consider a defendant’s SUD at all. They are distinguishable from *People v. Jackson*,²⁰⁰ where the court held that

190. Martin R. Gardner, *Rethinking Robinson v. California in the Wake of Jones v. Los Angeles: Avoiding the “Demise of the Criminal Law” by Attending to “Punishment,”* 98 J. CRIM. L. & CRIMINOLOGY 429, 436 (2008).

191. See *Powell v. Texas*, 392 U.S. 514, 548–49 (1968) (White, J., concurring) (“If it cannot be a crime to have an irresistible compulsion to use narcotics, I do not see how it can constitutionally be a crime to yield to such a compulsion. Punishing an addict for using drugs convicts for addiction under a different name. Distinguishing between the two crimes is like forbidding criminal conviction for being sick with flu or epilepsy but permitting punishment for running a fever or having a convulsion. . . . Similarly, the chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or for being drunk.” (citations omitted)). But see *id.* at 544 (Black, J., concurring) (“If the original boundaries of *Robinson* are to be discarded, any new limits too would soon fall by the wayside and the Court would be forced to hold the States powerless to punish any conduct that could be shown to result from a ‘compulsion,’ in the complex, psychological meaning of that term. The result, to choose just one illustration, would be to require recognition of ‘irresistible impulse’ as a complete defense to any crime . . .”).

192. 392 U.S. 514 (1968) (plurality opinion).

193. *Powell*, 392 U.S. at 533–34.

194. *Id.* at 567 (Fortas, J., dissenting).

195. *Id.* at 569–70.

196. Emily Grant, *While You Were Sleeping or Addicted: A Suggested Expansion of the Automatism Doctrine To Include an Addiction Defense*, 2000 U. ILL. L. REV. 997, 1015.

197. *People v. Robinson*, 297 N.E.2d 621, 624 (Ill. App. Ct. 1973).

198. 346 N.Y.S.2d 855 (N.Y. App. Div. 1973).

199. *Martin*, 346 N.Y.S.2d at 856.

200. 339 N.Y.S.2d 135 (N.Y. App. Div. 1972).

because the sentencing court was aware of the defendant's drug usage at the time it sentenced the defendant to probation, a remand was necessary for medical examination.²⁰¹ Such cases represent the various and opposing ways judges handle criminal defendants suffering from SUD.²⁰²

Congress created the current federal sentencing system in 1984 when it passed the Sentencing Reform Act.²⁰³ The Act sought to curtail inconsistent sentencing decisions.²⁰⁴ The U.S. Sentencing Guidelines, established through this Act, considerably constrained district court judges.²⁰⁵ Judges applied the Guidelines in over seven hundred thousand federal criminal cases²⁰⁶ until the Supreme Court found them unconstitutional and rendered their further use to be only advisory, rather than mandatory.²⁰⁷ In 2007, the Supreme Court in *Kimbrough v. United States*²⁰⁸ and *Gall v. United States*²⁰⁹ broadened district court discretion in providing judges greater flexibility in sentencing.²¹⁰

IV. COURT'S ANALYSIS

The Massachusetts Supreme Judicial Court highlighted the need for "judges [to] act with flexibility, sensitivity, and compassion when dealing with people who suffer from [SUD]."²¹¹ The court explained that this "dispositional flexibility at each stage of the process" makes it permissible for a judge to impose strict conditions.²¹²

The court relied on the standards that the Supreme Judicial Court Standing Committee on Substance Abuse issued.²¹³ It emphasized how one of these standards

201. *Jackson*, 339 N.Y.S.2d at 136.

202. The constant conflict between politicians who portray themselves as tough on crime and judges who want to act independently in adjudicating criminal cases creates continuous sentencing reform movements. Lydia Brashear Tiede, *The Swinging Pendulum of Sentencing Reform: Political Actors Regulating District Court Discretion*, 24 *BYU J. PUB. L.* 1, 2 (2009). Many scholars agree that political institutions control the courts through rational choice and strategic interactions. *E.g.*, *id.* at 5 (citing LEE EPSTEIN & STEPHEN KNIGHT, *THE CHOICES JUSTICES MAKE* (1997)) ("suggesting that Supreme Court justices make decisions based on their own self-interest as well as their beliefs about how other political actors will act").

203. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987; *see also* Tiede, *supra* note 202, at 3.

204. U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A.1.3 (U.S. SENTENCING COMM'N 2018); *see also* Tiede, *supra* note 202, at 3.

205. Tiede, *supra* note 202, at 3.

206. *Id.* at 12.

207. *United States v. Booker*, 543 U.S. 220, 221 (2005).

208. 552 U.S. 85 (2007).

209. 552 U.S. 38 (2007).

210. *See Kimbrough*, 552 U.S. at 101 (holding that the district court has the freedom to deviate from a sentencing statute's "unwarranted sentence disparities" provision); *Gall*, 552 U.S. at 47 (holding that judges may use their own discretion in sentencing, as there is no rule that requires "extraordinary" circumstances to justify sentencing outside of the guidelines range).

211. *Commonwealth v. Eldred*, 101 N.E.3d 911, 918 (Mass. 2018).

212. *Id.*

213. *See id.* at 919; *Massachusetts Courts Standards on Substance Abuse*, *supra* note 128 ("The Massachusetts Standards on Substance Abuse were approved on April 28, 1998 by the Justices of the Supreme Judicial Court (SJC), in collaboration with the Massachusetts Trial Court. These Standards are designed to guide Massachusetts courts in responding to criminal offenders and civil litigants who abuse substances. The Standards should be reviewed in their entirety and kept handy as a reference guide.").

directly addressed the issue of requiring a defendant to remain drug-free by stating that “[o]nce [a] judge has concluded that a party’s substance abuse is a factor in the case, in supervising criminal . . . cases and in establishing court ordered substance abuse conditions, the judge should *specifically and unambiguously prohibit the party from all use of alcohol an[d] illicit drugs*.”²¹⁴ Thus, the court explained it was necessary to incorporate a drug-free condition as a term of Eldred’s probation.²¹⁵

Although the court acknowledged the prevalence of noncompliance, it still found it appropriate to mandate a drug-free condition.²¹⁶ The court noted that the standards inherently recognize that noncompliance is a “common” problem and therefore judges “should . . . employ strategies consistent with public safety to prevent it.”²¹⁷ However, due to the combination of the judge’s flexible discretion and the policy goal to prohibit alcohol and drug use during probation in order to allegedly bolster public safety, the court reasoned that judges may impose substance-free conditions of probation even on defendants facing noncompliance “so long as the condition is ‘reasonably related’ to the goals of sentencing and probation.”²¹⁸

The court also addressed the issue of the probationer’s constitutional rights.²¹⁹ It reasoned that “[e]ven where a condition of probation affects a constitutional right, it is valid if it is ‘reasonably related’ to the goals of sentencing and probation, in light of the defendant’s underlying crime and her particular circumstances.”²²⁰ Despite the fact that random drug and alcohol testing constitutes a search and seizure under article XIV of the Massachusetts Declaration of Rights,²²¹ the court found that such testing remains permissible as long as the condition of probation is reasonably related to the goals of probation.²²² The Massachusetts Supreme Judicial Court held that the lower court adequately tailored Eldred’s probation conditions to address her underlying crime for two reasons.²²³ First, they furthered the rehabilitative goal of probation by facilitating treatment for SUD.²²⁴ Second, they furthered the goal to protect the public by discouraging the very drug use that motivated Eldred to commit the crime.²²⁵

214. *Eldred*, 101 N.E.3d at 919 (omission in original) (second alteration in original) (quoting *Standards on Substance Abuse: Standard XI. Mandatory Abstinence*, MASS.GOV, <http://www.mass.gov/info-details/standards-on-substance-abuse-standard-xi-mandatory-abstinence> [https://perma.cc/2K9E-8M26] (last visited Apr. 1, 2020)).

215. *Id.* at 918–19.

216. *Id.* at 921.

217. *Id.* at 919 (omission in original) (quoting *Standards on Substance Abuse: Summary of Action Steps*, MASS.GOV, <http://www.mass.gov/info-details/standards-on-substance-abuse-summary-of-action-steps> [https://perma.cc/6X3V-JXLA] (last visited Apr. 1, 2020)).

218. *Id.* (quoting *Commonwealth v. Obi*, 58 N.E.3d 1014, 1020 (Mass. 2016)).

219. *See id.*

220. *Id.* (citing *Commonwealth v. Power* 650 N.E.2d 87, 91–92 (Mass. 1995)).

221. *Id.*; *see also* MASS. CONST. pt. 1, art. XIV.

222. *Eldred*, 101 N.E.3d at 919 (citing *Commonwealth v. Gomes*, 903 N.E.2d 234, 237 (Mass. App. Ct. 2009)).

223. *Id.* at 920.

224. *Id.*

225. *Id.*

The court discussed Massachusetts Supreme Judicial Court precedent that held courts may not sanction probation violations that were involuntary.²²⁶ However, the court found Eldred's violation willful without clearly distinguishing her case.²²⁷ The court refused to consider how Eldred's diagnosis of SUD should affect the conditions imposed.²²⁸ It repeatedly highlighted that at no time prior to agreeing to her probation conditions did Eldred object, inform the judge that she had been diagnosed with SUD, or otherwise notify the judge that she would be unable to abide by the drug-free condition.²²⁹ It rejected Eldred's claim that the requirement to remain drug-free is an outdated moral judgment.²³⁰ Moreover, the court found that Eldred's claim of SUD rested on untested science.²³¹

The court addressed how judges often face difficult decisions involving a defendant struggling with SUD who violated probation by continuing drug use.²³² In the face of evolving societal norms and medical standards surrounding SUD, judges "stand on the front lines of the opioid epidemic."²³³ It reasoned that judges make these decisions thoughtfully and carefully, recognizing that SUD is a status that may not be criminalized.²³⁴

The court explained that judges "cannot ignore the fact that relapse is dangerous for the person who may be in the throes of [SUD] and, often times, for the community in which that person lives."²³⁵ In the present case, the judge sought to have the defendant admitted to an inpatient treatment facility pending her final violation hearing, after determining that there was probable cause to believe the defendant had violated the drug-free condition of her probation based on drug test results.²³⁶ However, a placement was not immediately available, so the judge determined that holding Eldred in custody until placement at an inpatient treatment became available was the best option to stabilize her.²³⁷

The Massachusetts Supreme Judicial Court upheld the decision to temporarily place Eldred in custody because doing so encompassed the factors enumerated in Rule 5(c) of the District/Municipal Court Rules for Probation Violation Proceedings,²³⁸ which determine whether the defendant should be held in custody pending a final probation

226. *See id.* at 924.

227. *Id.* at 924–25.

228. *Id.*

229. *Id.* at 920 ("[B]y agreeing to abide by [a] probationary condition . . . , defendant agreed to be subject to probation revocation for noncompliance." (citing *Commonwealth v. Vargas*, 55 N.E.3d 923, 929 (Mass. 2016))).

230. *Id.*

231. *Id.*

232. *Id.* at 921.

233. *Id.*

234. *Id.* (citing *Robinson v. California*, 370 U.S. 660, 666 (1962)) (holding that it is unconstitutional to criminalize the status of addiction).

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.* at 921–22; *see also* MASS. DIST. CT. R. PROB. VIOLATION PROCEEDINGS 5(c), <http://www.mass.gov/files/documents/2018/01/22/DistrictCourtRulesForProbationViolation2015.pdf> [<https://perma.cc/RMQ9-HX77>].

violation hearing.²³⁹ In particular, the court emphasized the nature of the offense for which the defendant was on probation and the nature of the alleged violation, while still furthering the overarching goal of preserving public safety and the welfare of the defendant.²⁴⁰ The Massachusetts Supreme Judicial Court determined that the lower court judge made the tough yet correct decision when weighing the difficult options either to release the defendant and risk that she suffers an overdose or to hold her in custody until a placement at an inpatient treatment became available.²⁴¹ Given the lack of inpatient beds, the court found that detaining the defendant was permissible in order to protect both the public and the defendant.²⁴²

Lastly, the court distinguished its opinion from the Supreme Court's decision in *Robinson*. The *Robinson* Court emphasized that the criminal statute at issue was unconstitutional because it criminalized the status of "being addicted to narcotics."²⁴³ The court here reasoned that the lower court judge's decision represented an appropriate exercise of judicial power during probation proceedings and not the criminalization of the defendant's SUD diagnosis.²⁴⁴

V. PERSONAL ANALYSIS

While *Robinson* set a Supreme Court precedent,²⁴⁵ the scope of criminalizing SUD remains unclear.²⁴⁶ Given developments in science and newfound understanding through experiences in the opioid epidemic, Justice Fortas's interpretation of the *Robinson* standard in *Powell* should be authoritative.²⁴⁷ Moreover, the Massachusetts Supreme Judicial Court refused to extend its existing progressive doctrine—that only willful probation violations may be punished—to those struggling with SUD.²⁴⁸

Eldred offends public policy, Massachusetts precedent, and the Constitution. The decision violates public policy by resulting in two horrendous social consequences. First, incarcerating an individual for noncompliance interrupts her recovery process.²⁴⁹ Second, the decision perpetuates the dysfunctional way our criminal justice system treats people suffering from SUD, punishing them instead of seeking to rehabilitate them.²⁵⁰

239. *Eldred*, 101 N.E.3d at 921–22.

240. *Id.* at 922.

241. *Id.*

242. *Id.*

243. *Id.* at 922 n.7.

244. *Id.*

245. *See Robinson v. California*, 370 U.S. 660, 678 (1962).

246. *See Powell v. Texas*, 392 U.S. 514, 521 (1968) (writing a split decision and discussing whether criminalizing SUD encompasses punishing individuals for actions that are pattern to their disease and "occasioned by a compulsion symptomatic of the disease").

247. *See id.* at 566–70 (Fortas, J., dissenting).

248. *See supra* notes 226–231 and accompanying text.

249. *See Shira Schoenberg, Addiction Experts Disappointed in SJC Ruling on 'Drug-Free' Probation Conditions*, MASS LIVE (July 17, 2018), http://www.masslive.com/politics/2018/07/addiction_experts_disappointed.html [<https://perma.cc/DJ4G-ZB86>].

250. *See* CTR. FOR SUBSTANCE ABUSE TREATMENT, *supra* note 21, at 141–42 (providing possible rehabilitative treatments for individuals with SUD); *see also* Etienne Benson, *Rehabilitate or Punish?*, 34 AM. PSYCHOL. ASS'N 46, 46 (2003).

Beyond the public policy implications, *Eldred* disregards Massachusetts precedent and is unconstitutional. The *Eldred* decision permits the imposition of conditions that defendants with SUD are fundamentally unable to fulfill.

This Section analyzes how *Eldred* missed a crucial opportunity. Part V.A highlights the relevance of this issue, given the staggeringly high proportion of incarcerated individuals who suffer from SUD. Part V.B analyzes how *Eldred* should have prohibited the imposition of a drug-free condition of probation for defendants with SUD. Part V.C argues that the drug-free condition for defendants with SUD violates the Eighth Amendment. Lastly, Part V.D recommends combatting SUD with rehabilitation and treatment over incarceration.

A. An Influx of Individuals with OUD in U.S. Courts

OUD is a pressing national crisis affecting all ethnicities, races, socioeconomic classes, and ages.²⁵¹ Between August 2018 and August 2019, there were 67,410 drug overdose deaths.²⁵² Data from 2018 indicate that 128 people die every day in the United States due to opioid overdoses.²⁵³ Concerning the *Eldred* decision, the court had reason to be particularly concerned: in 2017 Massachusetts reported over two thousand opioid overdose deaths.²⁵⁴ Recent decades have led to numerous scientific and clinical breakthroughs that have created a better understanding of OUD and the development of treatment strategies.²⁵⁵ However, while the medical community has defined OUD as a primary, chronic brain disease, the legal system has not adopted this definition.²⁵⁶ Personal biases often impact understanding, sentencing, and treatment strategies.²⁵⁷

Not only has the number of individuals incarcerated significantly increased but the number of prisoners who struggle with OUD has ballooned as well.²⁵⁸ In the past twenty years, the number of individuals incarcerated or under another form of criminal supervision has significantly increased.²⁵⁹ This growth in the criminal justice population is in large part due to the tougher laws and penalties for minor drug offenses.²⁶⁰ Despite

251. Richard Gustin et al., *Individualizing Opioid Use Disorder (OUD) Treatment: Time To Fully Embrace a Chronic Disease Model*, 1 J. REWARD DEFICIENCY SYNDROME 10, 10 (2015).

252. *Provisional Drug Overdose Death Counts*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm> [<https://perma.cc/LL3T-D5AZ>] (last updated Mar. 1, 2020).

253. *Opioid Overdose Crisis*, NAT'L INST. ON DRUG ABUSE, <http://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis> [<https://perma.cc/MT2S-432K>] (last updated Feb. 2020).

254. *Fighting the Opioid Crisis*, MASS.GOV, <http://www.mass.gov/fighting-the-opioid-crisis> [<https://perma.cc/CVP2-E6HC>] (last visited Apr. 1, 2020).

255. See Gustin et al., *supra* note 251, at 10.

256. See *id.*

257. See *id.*

258. See NAT'L CTR. ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIV., BEHIND BARS II: SUBSTANCE ABUSE AND AMERICA'S PRISON POPULATION 10–12 (2010), <http://www.centeronaddiction.org/addiction-research/reports/behind-bars-ii-substance-abuse-and-america%E2%80%99s-prison-population> [<https://perma.cc/9487-ETDG>].

259. Chandler et al., *supra* note 13, at 183.

260. *Id.*

the abundance of evidence showing that OUD is a brain disease, most incarcerated individuals who suffer from OUD do not receive treatment.²⁶¹

Staggeringly, an estimated one-half of all prisoners meet the criteria for diagnosis of SUD.²⁶² Dr. Redonna Chandler of the National Institute of Drug Abuse has conducted studies that estimate 5.6 million incarcerated adults would meet the diagnostic qualifications for SUD, yet only 7.6% are estimated to receive any type of intervention.²⁶³ About twenty percent of prisons offer a drug education or self-help program.²⁶⁴ Although such supplemental programs are respectable, a single drug education or self-help class is insufficient to be considered an effective, evidence-based treatment for SUD.²⁶⁵ Legitimate evidence-based treatments are only available to less than ten percent of individuals in treatment.²⁶⁶

Current policies that punish noncompliance with incarceration withhold treatment from those suffering.²⁶⁷ Although some may argue that incarceration acts as effective treatment by denying inmates access to drugs, that type of “treatment” is truly just withdrawal.²⁶⁸ Withdrawal does nothing to treat the underlying addiction, and individuals forced into withdrawal while incarcerated often start using again upon release.²⁶⁹ Few prisons offer evidence-based, effective treatment for SUD, which uses both medication and therapy over an extended period of time, called medication-assisted therapy (MAT).

B. A Missed Opportunity

Given the severity of substance abuse—nearly eighty-five percent of incarcerated adults have struggled with substances²⁷⁰—the decision in *Eldred* had potential for considerable effect. Because state courts are on the front lines in the opioid epidemic, *Eldred* posed a unique opportunity to signal that opioid-related sanctions are suspect.²⁷¹ Instead the court reaffirmed the status quo, despite credible science indicating

261. *Id.*

262. *Id.*

263. Redonna K. Chandler, Nat’l Inst. on Drug Abuse, Addiction, the Brain, and Evidence-Based Treatment, Address at the Research for the Real World, NIJ’s Installment of a Translational Criminality Seminar Series (Mar. 1, 2012), <http://www.nij.gov/multimedia/presenter/presenter-chandler/Pages/presenter-chandler-transcript.aspx> [<https://perma.cc/7XBL-S98Q>].

264. *Id.*

265. *Id.*; see also Suzette Glasner-Edwards & Richard Rawson, *Evidence-Based Practices in Addiction Treatment: Review and Recommendations for Public Policy*, 97 HEALTH POL’Y 93, 93 (2010).

266. Chandler, *supra* note 263.

267. The Editorial Board, Opinion, *If Addiction Is a Disease, Why Is Relapsing a Crime?*, N.Y. TIMES (May 29, 2018), <http://www.nytimes.com/2018/05/29/opinion/addiction-relapse-prosecutions.html> [<https://perma.cc/V2RA-QA67>].

268. See Amy Roe, *People in Jail Deserve Effective Drug Treatment Not Forced Withdrawal*, ACLU (June 15, 2018, 10:00 AM), <http://www.aclu.org/blog/prisoners-rights/medical-and-mental-health-care/people-jail-deserve-effective-drug-treatment> [<https://perma.cc/U56E-9CTL>].

269. *Id.*

270. NAT’L CTR. ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIV., *supra* note 258, at 2.

271. Recent Case, *supra* note 14, at 2081.

otherwise.²⁷² *Eldred* could have advanced antiquated moral judgments; in doing so it would have acted as persuasive authority for other courts facing probationers with OUD. Part V.B.1 explains how the medical community defines OUD as a chronic brain disease. Part V.B.2 discusses effective treatment for SUD. Because defendants with OUD are unable to comply with a drug-free condition, Part V.B.3 considers alternative conditions.

1. OUD Is an Established Brain Disease

OUD is a brain disease, and continued drug use is a symptom of it.²⁷³ The National Institute on Drug Abuse,²⁷⁴ the American Medical Association,²⁷⁵ and the Diagnostic and Statistical Manual of Mental Disorders²⁷⁶ all define SUD as a chronic, relapsing brain disorder.²⁷⁷ Just like chronic disorders, such as diabetes and heart disease, a combination of behavioral, environmental, and biological forces cause SUD.²⁷⁸ Accordingly, SUD is not an opportunity for the adversarial “he said, she said” legal process to shine. The leading scientific organizations unanimously consider SUD to be a chronic brain disease.²⁷⁹ As prominent institutions, they are credible in their determinations, and the scientific community has accepted their findings.

Not only was the prosecution’s argument in *Eldred*—that it is unsettled whether SUD is a brain disease—unconvincing, it is also inconsequential to the question.²⁸⁰ People struggling to overcome SUD often continue to use, whether one defines it as a

272. A lower court cited the *Eldred* decision to support a drug-free condition for a probationer with SUD because such a condition facilitates treatment. *Commonwealth v. Desmond*, 2018 WL 6186244, at *3 n.5 (Mass. App. Ct. Nov. 28, 2018); *see also* Recent Case, *supra* note 14, at 2081.

273. *See* Chandler, *supra* note 263.

274. NAT’L INST. ON DRUG ABUSE, NAT’L INSTS. HEALTH, DRUGS, BRAINS, AND BEHAVIOR: THE SCIENCE OF ADDICTION 1 (2007).

275. Troy Parks, *Surgeon General Asks Physicians To Lead Way in Fighting Opioid Epidemic*, AMA (Aug. 24, 2016), <http://www.ama-assn.org/delivering-care/opioids/surgeon-general-asks-physicians-lead-way-fighting-opioid-epidemic> [<https://perma.cc/86QS-X3HE>].

276. AM. PSYCHIATRIC ASS’N, *supra* note 159, at 541–46. This is the final authority on psychiatric conditions that qualify for insurance reimbursement. *DSM–5: Frequently Asked Questions*, AM. PSYCHIATRIC ASS’N, <http://www.psychiatry.org/psychiatrists/practice/dsm/feedback-and-questions/frequently-asked-questions> [<https://perma.cc/J9FY-M23N>] (last visited Apr. 1, 2020) (discussing the Diagnostic and Statistical Manual of Mental Disorder’s connection to the coding used for insurance reimbursement).

277. *See* The Editorial Board, *supra* note 267; *AMA Applauds Surgeon General Report on Substance Use Disorders*, AM. MED. ASS’N (Nov. 17, 2016), <http://www.ama-assn.org/press-center/statement/ama-applauds-surgeon-general-report-substance-use-disorders> [<https://perma.cc/89BX-4CW9>] (“The [Surgeon General] report’s detailed findings and research provide important guidance for the nation to see that addiction is a chronic disease and must be treated as such. This is a crucial starting point.”); *Understanding Drug Use and Addiction*, NAT’L INST. ON DRUG ABUSE, <http://www.drugabuse.gov/publications/drugfacts/understanding-drug-use-addiction> [<https://perma.cc/S6FE-D5DD>] (last updated June 2018) (“Addiction is a chronic disease characterized by drug seeking and use that is compulsive, or difficult to control, despite harmful consequences.”).

278. *Understanding Drug Use and Addiction*, *supra* note 277 (“No single factor can predict whether a person will become addicted to drugs. A combination of genetic, environmental, and developmental factors influences risk for addiction. The more risk factors a person has, the greater the chance that taking drugs can lead to addiction.”).

279. *See* The Editorial Board, *supra* note 267.

280. *Id.*

“disease” or not.²⁸¹ Data indicate that those struggling with OUD continue to use for an average of five to six times before ever achieving complete sobriety.²⁸² The problem is evident and needs to be dealt with appropriately, no matter what name one calls it.

Moreover, individuals diagnosed with SUD are unable to make decisions rationally and consistently. The prosecutor’s argument—that people who suffer from SUD are capable of choosing to abstain from drug use—has merit, for addicts can avoid using at specific places and times.²⁸³ However, changes of the brain that chronic substance use provokes and the immense power of SUD itself impairs an individual with SUD’s ability to make *rational* and *consistent* decisions.²⁸⁴

2. Known, Effective Treatment for SUD

Data indicate that individuals with SUD do respond to incentives, and evidence suggests that incentive-focused approaches are much more successful than threat-based approaches.²⁸⁵ Both approaches are based on the assumption that drug users are unable to exercise rational decisions, and therefore incentives are necessary to regulate their behavior.²⁸⁶ Currently, judges and prosecutors treat threats of punishment like incarceration as imperative to coerce defendants into treatment.²⁸⁷ Such threats encourage continual participation; however, this often means defendants “go through the motions” to formally comply rather than act upon their own intrinsic desire for substantive compliance.²⁸⁸ As such, threats do not promote internalized self-regulation.²⁸⁹

Additionally, the specific threat of incarceration hinders the treatment process entirely.²⁹⁰ Patients are less willing to talk openly and honestly to social workers about their obstacles and noncompliance if they think doing so will result in incarceration.²⁹¹ While the threat of imprisonment ruins trusted relationships, imprisonment itself removes any opportunity for effective treatment.²⁹² The majority of prisons deny those struggling with OUD access to MAT.²⁹³ MAT uses medications that the U.S. Food and

281. *Id.*

282. *Id.*

283. *Id.*

284. See Shreeya Sinha, *Heroin Addiction Explained: How Opioids Hijack the Brain*, N.Y. TIMES (Dec. 18, 2018), <http://www.nytimes.com/interactive/2018/us/addiction-heroin-opioids.html> [<https://perma.cc/R83T-CYAU>] (“As the high wears off, the brain regains its balance—but not for everyone. That’s the opioid trap for many people: In the beginning, no serious ill effects are apparent. But the brain rewires little by little with each use.”); The Editorial Board, *supra* note 267 (“‘It’s not that they don’t have free will,’ says Mark Kleiman, a professor of public policy at New York University. ‘It’s that they are exerting that will against such a colossal force.’”).

285. Emma Wincup, *More Carrots, Less Sticks: The Role of Incentives in Drug Treatment*, 112 ADDICTION 761, 761 (2016).

286. *See id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. The Editorial Board, *supra* note 267.

291. *Id.*

292. *See id.*; see also Roe, *supra* note 268.

293. *See* Roe, *supra* note 268.

Drug Administration has approved to relieve withdrawal symptoms and opioid cravings, such as Suboxone, which Eldred used, alongside psychosocial therapy.²⁹⁴

Addiction specialists find that MAT is the most effective treatment for OUD.²⁹⁵ When uninterrupted, it reduces arrests and increases employment upon release.²⁹⁶ A 2001 study conducted at Rikers Island, which started one of the first jail-based methadone programs in 1987, found that participants enrolled in the MAT program were less likely to commit new crimes and more likely to continue treatment.²⁹⁷ Additionally, an Australian study in 2014 found fewer overdose deaths after release if the individual had undergone the treatment.²⁹⁸ Providing MAT to people in confinement suffering from SUD could reduce overdose deaths upon release by over sixty percent.²⁹⁹

Because so few prisons have effective MAT programs, incarcerating defendants with SUD strips their opportunity for effective rehabilitation, along with their freedom. Of the nation's 5,100 jails and prisons, less than thirty offer opioid users this treatment, according to the Federal Bureau of Justice Assistance.³⁰⁰ The lack of effective treatment increases the chances of continued substance use.³⁰¹ Much of the criminal justice system still takes a punitive approach to SUD.³⁰² Many who work within corrections have implicit biases and incorrectly believe that treatments such as methadone allow inmates to get high, working to merely replace one addiction with another.³⁰³

294. The Editorial Board, *supra* note 267; *see also* Brief on Behalf of the Massachusetts Medical Society, *supra* note 2, at 25.

295. See Josh Katz, *How a Police Chief, a Governor and a Sociologist Would Spend \$100 Billion To Solve the Opioid Crisis*, N.Y. TIMES (Feb. 14, 2018), <http://www.nytimes.com/interactive/2018/02/14/upshot/opioid-crisis-solutions.html> [<https://perma.cc/U4KD-CR4L>] (“Robust evidence supports these kinds of medications to treat opioid addiction, with systematic reviews showing they cut mortality rates by more than half.”); *see also* PEW CHARITABLE TRUSTS, MEDICATION-ASSISTED TREATMENT IMPROVES OUTCOMES FOR PATIENTS WITH OPIOID USE DISORDER (2016), http://www.pewtrusts.org/~media/assets/2016/11/medicationassistedtreatment_v3.pdf [<https://perma.cc/42PN-2LBV>]. *Contra* Katherine Drabiak, *Expanding Medication Assisted Treatment Is Not the Answer: Flaws in the Substance Abuse Treatment Paradigm*, 21 DEPAUL J. HEALTH CARE L. 1, 18–24 (2019) (analyzing current evidence that reveals critical flaws underlying the premise of MAT).

296. Timothy Williams, *Opioid Users Are Filling Jails. Why Don't Jails Treat Them?*, N.Y. TIMES (Aug. 4, 2017), <http://www.nytimes.com/2017/08/04/us/heroin-addiction-jails-methadone-suboxone-treatment.html> [<https://perma.cc/Y6HC-NDSQ>].

297. See Christine Vestal, *At Rikers Island, a Legacy of Medication-Assisted Opioid Treatment*, STATELINE (May 23, 2016), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/05/23/at-rikers-island-a-legacy-of-medication-assisted-opioid-treatment> [<https://perma.cc/Q8S4-9KXL>]; Williams, *supra* note 296; *see also* Vincent Tomasino et al., *The Key Extended Entry Program (KEEP): A Methadone Treatment Program for Opiate-Dependent Inmates*, 68 MOUNT SINAI J. MED. 14, 14 (2001) (discussing the 1987 Rikers program and detailing its successes).

298. Williams, *supra* note 296.

299. See Traci C. Green et al., *Postincarceration Fatal Overdoses After Implementing Medications for Addiction Treatment in a Statewide Correctional System*, 75 JAMA PSYCHIATRY 405, 406 (2018).

300. Williams, *supra* note 296.

301. *Id.*

302. *Id.*

303. *Id.*

3. Alternative Conditions

Although opponents contend that prohibiting courts from imposing drug-free conditions on defendants with OUD would allow them to avoid consequences, the approach need not be so black and white.³⁰⁴ Consequences are still necessary for criminal defendants, but they should be fair. As a matter of public policy, the courts intuitively do not want to avoid punishment for those with SUD generally, but they also cannot continue to incarcerate individuals for continued drug use.³⁰⁵

Alternative demands could be implemented instead of a drug-free condition. Professor Kelly Mitchell has suggested one solution: “A judge could order the offender to be evaluated for [SUD] and to subsequently follow treatment recommendations.”³⁰⁶ A violation would be for “failing to get the evaluation and to attend treatment, rather than failing to remain drug-free.”³⁰⁷ Michael Botticelli, Director of the Office of National Drug Control Policy during the Obama administration, has suggested a condition requiring people to demonstrate compliance with treatment, even if they continue to use throughout the recovery process.³⁰⁸

Alternatively, SUD is a medical issue with which the courts should not involve themselves.³⁰⁹ Seattle’s Law Enforcement Assisted Diversion Program (LEAD) provides a suggestion in this regard.³¹⁰ Since 2012, LEAD has diverted individuals with SUD away from incarceration—instead, officers connect these individuals to services that help them get sober.³¹¹ Probation condition recommendations do not suggest imposing conditions dealing with other types of chronic diseases.³¹² Just as society has come to accept SUD as a chronic disease, it is time for our courts to acknowledge the medical reality.³¹³ If judges refuse to accept SUD as a chronic illness, they will continue to criminalize a disease.

304. The Editorial Board, *supra* note 267.

305. *See id.*

306. Hoffman, *supra* note 19. *But see* William L. White et al., *It’s Time To Stop Kicking People Out of Addiction Treatment*, 6 COUNSELOR 4 (2005) (noting that some treatment programs problematically require individuals to abstain from drugs).

307. Hoffman, *supra* note 19 (statement from Professor Mitchell).

308. Schoenberg, *supra* note 249 (“That’s a much more responsible and humane way, and quite honestly, I think represents addiction as a disease,” Botticelli said.”).

309. *See* Aharon Barak, *A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 21–22 (2002) (“People increasingly turn to the judiciary, hoping it can solve pressing social problems. Several questions therefore arise: Is this enhanced judicial status appropriate? Have judges taken on too much power?”).

310. LAW ENFORCEMENT ASSISTED DIVERSION, <http://leadkingcounty.org/> [<https://perma.cc/2KA7-5A76>] (last visited Apr. 1, 2020).

311. Kara Dansky, *Jail Doesn’t Help Addicts. Let’s Stop Sending Them There.*, ACLU (Oct. 17, 2014, 11:17 AM), <http://www.aclu.org/blog/smart-justice/mass-incarceration/jail-doesnt-help-addicts-lets-stop-sending-them-there> [<https://perma.cc/2S3F-H35Q>].

312. *See* ADMIN. OFFICE OF THE U.S. COURTS PROB. AND PRETRIAL SERVS. OFFICE, OVERVIEW OF PROBATION AND SUPERVISED RELEASE CONDITIONS 49–50 (2016), http://www.uscourts.gov/sites/default/files/overview_of_probation_and_supervised_release_conditions_0.pdf [<https://perma.cc/K2LB-9Y99>].

313. *See* Schoenberg, *supra* note 249.

C. Implications of Unachievable Drug-Free Conditions for Defendants with SUD

Demanding a defendant refrain from a manifestation of their chronic disease is more than just poor taste. It not only offends public policy but also contradicts Massachusetts precedent and the Constitution. This Section highlights how courts may not punish unwillful violations. Part V.C.1 discusses how *Eldred* is contrary to Massachusetts Supreme Judicial Court jurisprudence. Part V.C.2 analyzes how the decision violates the Eighth Amendment.

1. Failure To Extend Massachusetts's Willful Violation Mandate

A drug-free condition of probation for defendants suffering from SUD is improper. While judges certainly have immense discretion in imposing probation conditions, the drug-free condition for a defendant with SUD does not fall within the appropriate limits. Although the drug-free condition was tailored to Eldred and her underlying offense—the burglary was induced by Eldred's need for money to quell her desire for opioids—Eldred did not willfully violate the condition, and the condition did not meet the goals of probation.³¹⁴

First, Eldred did not *willfully* violate the drug-free condition. While the *Eldred* court cited cases supporting the proposition that only willful probation violations may be punished,³¹⁵ the Massachusetts Supreme Judicial Court refused to extend its own jurisprudence to probationers with SUD despite credible science against drug-free conditions for such probationers.³¹⁶ Instead, the court contradicted practices that drug courts encourage. As mentioned in *Henry*, the judge ought to have considered Eldred's circumstances when imposing the condition, for she could “be found in violation of a probationary condition only where the violation was willful.”³¹⁷ In light of highly regarded science surrounding SUD, the drug-free condition is not achievable for defendants struggling with SUD, and is therefore improper.³¹⁸

Second, a drug-free condition did not meet the goals of probation. As mentioned previously, probation has two goals: (1) to rehabilitate the defendant, and (2) to protect the public from the defendant's potential recidivism.³¹⁹ While incarcerated, the individual likely will not receive any effective rehabilitation services.³²⁰ For a defendant

314. See *infra* notes 319–326 and accompanying text for a discussion of the goals of probation and how the drug-free condition runs counter to those goals.

315. *Commonwealth v. Eldred*, 101 N.E.3d 911, 923 (Mass. 2018) (citing *Commonwealth v. Henry*, 55 N.E.3d 943, 950 (Mass. 2016) (“A defendant can be found in violation of a probationary condition only where the violation was willful . . .”); then citing *Commonwealth v. Canadyan*, 994 N.E.2d 93, 96 (Mass. 2010) (finding that violation of a condition requires willful noncompliance); and then citing *Commonwealth v. Poirier*, 935 N.E.2d 1273, 1276 (Mass. 2010) (holding that a defendant is not responsible for violating conditions where the probation department failed to provide the equipment needed for compliance)).

316. Recent Case, *supra* note 14, at 2081.

317. *Henry*, 55 N.E.3d at 950.

318. Brief on Behalf of the Massachusetts Medical Society, *supra* note 2, at 38.

319. *Commonwealth v. Goodwin*, 933 N.E.2d 925, 930 (Mass. 2010); *Commonwealth v. Lapointe*, 759 N.E.2d 294, 298 (Mass. 2001); *Commonwealth v. Durling*, 551 N.E.2d 1193, 1195 (Mass. 1990).

320. See *Benson*, *supra* note 250, at 46 (“[A] combination of strict sentencing guidelines, budget shortfalls and a punitive philosophy of corrections has made today's prisons much more unpleasant—and much less likely to rehabilitate their inhabitants—than in the past . . .”).

with SUD, the drug-free condition simply mandates withdrawal, which does nothing to treat the underlying addiction.³²¹ Individuals forced into withdrawal often start using again.³²² Current policies that punish noncompliance with incarceration withhold effective treatment from those suffering.³²³ While prisons do not offer effective treatment, drugs are heavily circulated and easily obtained.³²⁴ Therefore, while people who are incarcerated do not have access to effective treatment, many have access to drugs.

The drug-free condition does not protect the public from the probationer's potential recidivism either. Because it is likely that individuals forced into withdrawal will start using again,³²⁵ logic suggests that the incentive to commit a low-level crime in order to fund one's drug cravings will not go away. The most effective way to truly stop this cyclical problem is to fully address SUD through proper treatment.³²⁶

2. Unattainable Drug-Free Conditions Violate the Eighth Amendment

A drug-free condition of probation violates the Eighth Amendment. The Eighth Amendment is subject to new interpretation as time progresses, for it must adapt with the "evolving standards of decency" in a maturing society.³²⁷ Society's values and comprehension of medical advancements develop with time—notably here, society's understanding of individuals suffering with SUD.³²⁸ In the 1920s doctors believed that the "addiction evil" was an affliction of the "weak-minded."³²⁹ For years, medical scholars "perpetuate[d] what the US government's National Institute on Drug Abuse now calls 'myths.'"³³⁰ Because of those sentiments, laws served to "punish rather than to prevent or treat" drug use.³³¹

321. See The Editorial Board, *supra* note 267 (noting that forced withdrawal disrupts promising treatment and increases the risk of post-incarceration overdose deaths).

322. *Id.*

323. See Roe, *supra* note 268.

324. See Andrew O'Hagan & Rachel Hardwick, *Behind Bars: The Truth About Drugs in Prisons*, 5 FORENSIC RES. & CRIMINOLOGY INT'L J. 1, 1 (2017).

325. See The Editorial Board, *supra* note 267.

326. See Steven Belenko et al., *Treating Substance Use Disorders in the Criminal Justice System*, 15 CURRENT PSYCHIATRY REP. 414, 421 (2013) ("Recent systematic reviews of MAT with offenders have concluded that methadone maintenance and naltrexone reduce reoffending and relapse.").

327. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

328. See Matthew Ryan, *Discussion of Drug Addiction: Is It All About Race?*, HARV. L.: BILL OF HEALTH (Feb. 1, 2016), <http://blog.petrieflom.law.harvard.edu/2016/02/01/discussion-of-drug-addiction-is-it-all-about-race/> [https://perma.cc/HCU4-UKNJ] ("[O]ne contributing factor may be that heroin is predominately a white person problem. In fact, almost 90 percent of new heroin users are white. Now that drug addiction affects people that look more like our politicians . . . , does that make our solutions more humane? If so, what does that say about what drives our policies when it is people that don't look like us? And how can we change that?").

329. Jen Christensen, *Drug Users on Probation Can Be Required To Remain Drug-Free, Court Rules*, CNN (July 16, 2018, 4:12 PM), <http://www.cnn.com/2018/07/16/health/massachusetts-court-opioid-addiction-eldred/index.html> [https://perma.cc/8JMT-QWWW].

330. *Id.*

331. *Id.*

Science has evolved since 1920, but the courts have been unable and unwilling to keep up.³³² OUD is now defined as a chronic brain disease caused by continuous use of opioids, which “includes dysfunction of the brain reward system, motivation, memory, and related circuitry.”³³³ As with other chronic relapsing conditions, the clinical course of OUD includes moments of clarity and moments of remission, but the patient is never entirely disease-free.³³⁴ Recovery is an ongoing process, not a discrete event.³³⁵ With what society now knows about OUD,³³⁶ the court’s decision to impose a drug-free condition on those who are unable to comply due to their chronic disease amounts to cruel and unusual punishment. Because continued use is part of recovery, statistics point to the inevitability that Eldred would violate her condition.³³⁷

Knowing this, judges set defendants up for failure by imposing a condition of probation that they are unable to follow. In writing the majority opinion in *Eldred*, Judge Lowy correctly noted that this situation is not entirely analogous to *Robinson*; in *Robinson*, laws criminalizing the “illness” of SUD inflicted cruel and unusual punishment and therefore violated the Eighth Amendment, whereas the judge sent Eldred to jail for violating a condition of her probation, not for merely having SUD.³³⁸ However, Judge Lowy failed to recognize that the drug-free condition amounted to cruel and unusual punishment for individuals with SUD. The Supreme Court Cruel and Unusual Punishment Clause jurisprudence “forbids only those punishments that are disproportionately severe.”³³⁹ A drug-free condition is a disproportionately severe punishment because it imposes an unrealistic condition that the probationers cannot fulfill.

D. Rehabilitation, Not Incarceration

For years, the justice system’s answer to most crimes ranging from murder to a misdemeanor has been incarceration. Overcriminalization has led to mass incarceration, even though imprisonment does not necessarily enhance public safety.³⁴⁰ More than half of federal inmates are incarcerated for nonviolent drug offenses.³⁴¹ As seen in *Eldred*,

332. Recent Case, *supra* note 14, at 2078.

333. PEW CHARITABLE TRUSTS, *supra* note 295.

334. *Id.*

335. See Christensen, *supra* note 329.

336. See *supra* Parts III.E and V.B.1 for a discussion of the growing knowledge surrounding SUD and OUD.

337. See *supra* Part V.B.1; see also The Editorial Board, *supra* note 267.

338. See *Commonwealth v. Eldred*, 101 N.E.3d 911, 922 n.7 (Mass. 2018).

339. Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause*, 68 TENN. L. REV. 41, 41 (2000).

340. See DON STEMEN, VERA INST. OF JUSTICE, THE PRISON PARADOX: MORE INCARCERATION WILL NOT MAKE US SAFER 2 (2017), http://www.vera.org/downloads/publications/for-the-record-prison-paradox_02.pdf [<https://perma.cc/4NMD-RWNM>] (highlighting incarceration and crime deterrence are not correlated).

341. Charles G. Koch & Mark V. Holden, *The Overcriminalization of America*, POLITICO (Jan. 7, 2015), <http://www.politico.com/magazine/story/2015/01/overcriminalization-of-america-113991> [<https://perma.cc/R2ZG-LH4U>].

some defendants are incarcerated for violating a condition of probation, *not* for an underlying crime.³⁴²

This problem began with well-intentioned lawmakers trying to solve perceived problems.³⁴³ The United States is the world's largest jailer;³⁴⁴ on average, Congress creates more than fifty new criminal laws every year.³⁴⁵ Although the United States represents roughly five percent of the world's population, it houses approximately twenty-five percent of the world's prisoners.³⁴⁶ The United States has paid a heavy price for mass incarceration and could benefit from reversing this trend.

Courts even command incarceration when grappling with what to do for defendants struggling with SUD. Some critics argue for improved in-jail treatment, such as MAT, as a solution to rising opioid use.³⁴⁷ They argue that because treatment facilities are often expensive and typically occupied, incarceration is necessary to encourage those suffering with SUD to seek treatment before it is too late.³⁴⁸ Kenton County is one of the two dozen Kentucky county jails that have started full-time "therapeutic communities."³⁴⁹ They seek to provide inmates with services equivalent to those of private treatment centers.³⁵⁰

Although providing better treatment for inmates certainly possesses some positive aspects, doing so further institutionalizes placement in the criminal justice system.³⁵¹ Incarcerating individuals suffering with SUD reinforces the belief that this group of people deserves punishment and consequently unravels years of progress in understanding SUD as a public health issue. Incarceration has "a notoriously bad track record of providing health services."³⁵² Jails and prisons are built to isolate and punish—not to rehabilitate.³⁵³ Treatment within prisons varies greatly in terms of its quality and availability.³⁵⁴ Attempting to provide treatment in correctional facilities is a short-term solution when a long-term one is needed.³⁵⁵

A better idea is rehabilitation: diverting individuals away from incarceration and towards treatment programs instead. Thoughtful programs and services do not mean the state would be "soft on crime"; rather, the state would be using the most effective means

342. *See Eldred*, 101 N.E.3d at 925.

343. Koch & Holden, *supra* note 341.

344. *Id.* ("[T]he United States is the world's largest jailer—first in the world for total number imprisoned and first among industrialized nations in the rate of incarceration.").

345. *Id.*

346. *Id.*

347. Sam Quinones, *Addicts Need Help. Jails Could Have the Answer.*, N.Y. TIMES (June 16, 2017), <http://www.nytimes.com/2017/06/16/opinion/sunday/opioid-epidemic-kentucky-jails.html> [<https://perma.cc/9J3E-AWZU>].

348. *Id.*

349. *Id.*

350. *Id.*

351. Jacob Kang-Brown, Letter to the Editor, *Jail Isn't the Place To Treat Drug Addiction*, N.Y. TIMES (June 26, 2017), <http://www.nytimes.com/2017/06/26/opinion/jail-isnt-the-place-to-treat-drug-addiction.html> [<https://perma.cc/676G-FE5S>].

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.*

available to prevent criminal activity, drug abuse, and recidivism.³⁵⁶ Research shows that incarcerating individuals who are in recovery from SUD fails to address the nature of the disease and the difficulty of quitting.³⁵⁷ It also fails to account for how even a short stint in jail disrupts their lives.³⁵⁸ As the National Research Council noted, “Since would-be employers may refuse to hire users with a record of incarcerations and law-abiding significant others may ostracize such users, punishing drug relapses in these ways may ultimately slow recovery.”³⁵⁹ Two-thirds of drug offenders leaving state prisons are rearrested within three years.³⁶⁰ Nearly half of released drug offenders return to prison through either a technical violation of their sentence or a new sentence.³⁶¹ Imprisoning individuals with SUD does little to reduce recidivism, and it does not quell the underlying issue. Because individuals with SUD develop chronic dependence, connecting probationers to legitimate employment is a vital step in maintaining recovery and reducing potential criminal behavior.³⁶² Proper rehabilitation services that cover the full spectrum of care, including vital prevention programs, will properly address the underlying issue for vulnerable probationers with SUD.

In the face of a public health emergency,³⁶³ it is time to downsize the incarcerated population and invest in community-based treatment. The criminal justice system is not the answer to a public health crisis.³⁶⁴ Further, an order to remain drug-free for a person with SUD goes against what *should* be the ultimate goal: rehabilitation. Such a mandate is neither practical nor reasonable given established knowledge about brain science.

VI. CONCLUSION

Eldred was decided amid a national movement to treat those struggling with SUD as experiencing a health condition. But the modern currents of medicine and rehabilitative punishment could not unsettle the Massachusetts Supreme Judicial Court’s longstanding view of probationers with SUDs. While the court had the opportunity to extend existing state court jurisprudence to only punish willful probation violations, it failed to do so in the face of credible science and a mounting death rate. Moreover, criminalizing an individual for a symptom of her chronic disease stands at odds with

356. DOUG MCVAY ET AL., JUSTICE POLICY INST., TREATMENT OR INCARCERATION? 19 (2004), http://www.justicepolicy.org/uploads/justicepolicy/documents/04-01_rep_mdtreatmentorincarceration_ac-dp.pdf [<https://perma.cc/8X2Y-JBPR>].

357. *Id.* at 16.

358. *Id.*

359. NAT’L RESEARCH COUNCIL, INFORMING AMERICA’S POLICY ON ILLEGAL DRUGS: WHAT WE DON’T KNOW KEEPS HURTING US 351 (Charles F. Manski et al. eds., 2001); *see also* MCVAY ET AL., *supra* note 356, at 16–17 (noting that jobs, relationships, and other stable parts of one’s life can all be lost by sudden incarceration).

360. MCVAY ET AL., *supra* note 356, at 18.

361. *Id.*

362. *Id.* (citing NAT’L CTR. ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIV., CROSSING THE BRIDGE: AN EVALUATION OF THE DRUG TREATMENT-TO-PRISON (DTAP) PROGRAM 10 (2003), <http://www.centeronaddiction.org/addiction-research/reports/crossing-bridge-evaluation-drug-treatment-alternative-prison-dtap-program> [<https://perma.cc/B5RR-JYVU>]).

363. *Ending America’s Opioid Crisis*, WHITE HOUSE, <http://www.whitehouse.gov/opioids/> [<https://perma.cc/D7AD-LHSN>] (last visited Apr. 1, 2020) (declaring the opioid crisis to be a national public health emergency under federal law).

364. Kang-Brown, *supra* note 351.

what the evolving nature the Eighth Amendment ought to represent. As long as *Eldred* remains controlling or persuasive authority, the punitive justice system will continue to exacerbate the medical conditions of thousands of Americans. Perhaps the court's view will wane with time or by witnessing an increasingly futile effort to combat a medical condition with prison time. But the opioid epidemic refuses to wait for such a change.