

Legal Landscape of Medication Assisted Treatment (MAT)

PRESENTED BY:
Keegan Warren, JD, LLM

LOGISTICS

- » Recording and slides will be sent to all registrants/ attendees within one week of webinar
 - » All webinars are also posted to <https://addictionfreeca.org/project/mat-in-jails-and-drug-courts>
- » Please utilize the chat and/or Q&A feature to ask questions – for any questions not answered during webinar, please email MATinCountyCJ@healthmanagement.com

Presenter Information






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AGENDA

- » Welcome
- » Justice Matters
- » Key Court Decisions
- » Key Policy Documents
- » Learning From Liability
- » Case Studies
- » Q&A



LEARNING OBJECTIVES

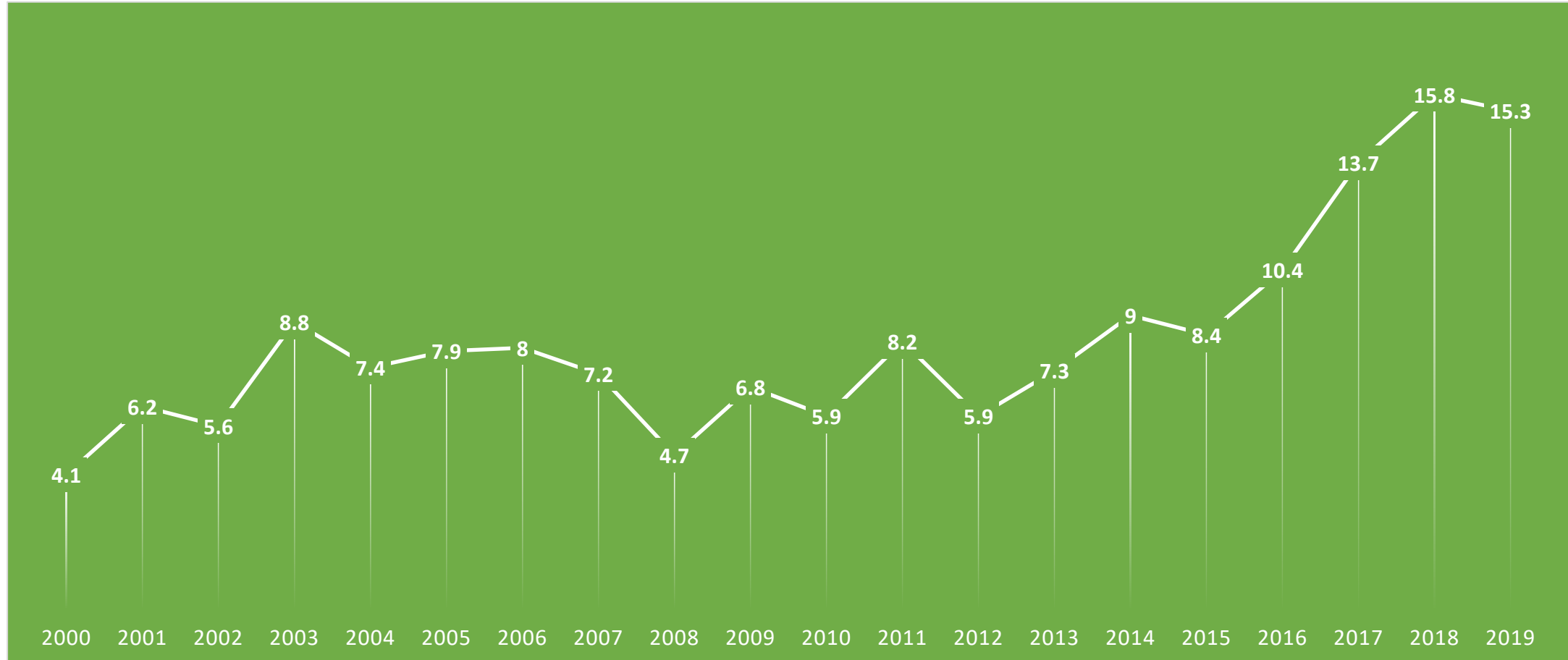
-  Compare how historical legal approaches to substance use disorder shape societal perspective.
-  Summarize the role of contemporary courts in shaping access to MAT.
-  Evaluate to what extent institutional policies and practices align with best practices for MAT.



JUSTICE MATTERS

How the Legal Approach to
Substance Use Shapes Our
Opinions

PERCENT OF DEATHS OF LOCAL INCARCERATED PERSONS RELATED TO DRUG AND ALCOHOL INTOXICATION, 2000–2019



Source: Department of Justice Bureau of Justice Statistics, Mortality in Local Jails, 2000–2019 – Statistical Tables (Dec. 2021), <https://bjs.ojp.gov/content/pub/pdf/mlj0019st.pdf>.

A BRIEF LEGAL HISTORY OF SUBSTANCE USE



Regulated

How do we assure safety and quality?



Taxed

How do we increase revenue / make it more expensive to obtain?



Medicalized

How do we start to think about medical treatment, with a defined beginning and end?



Criminalized

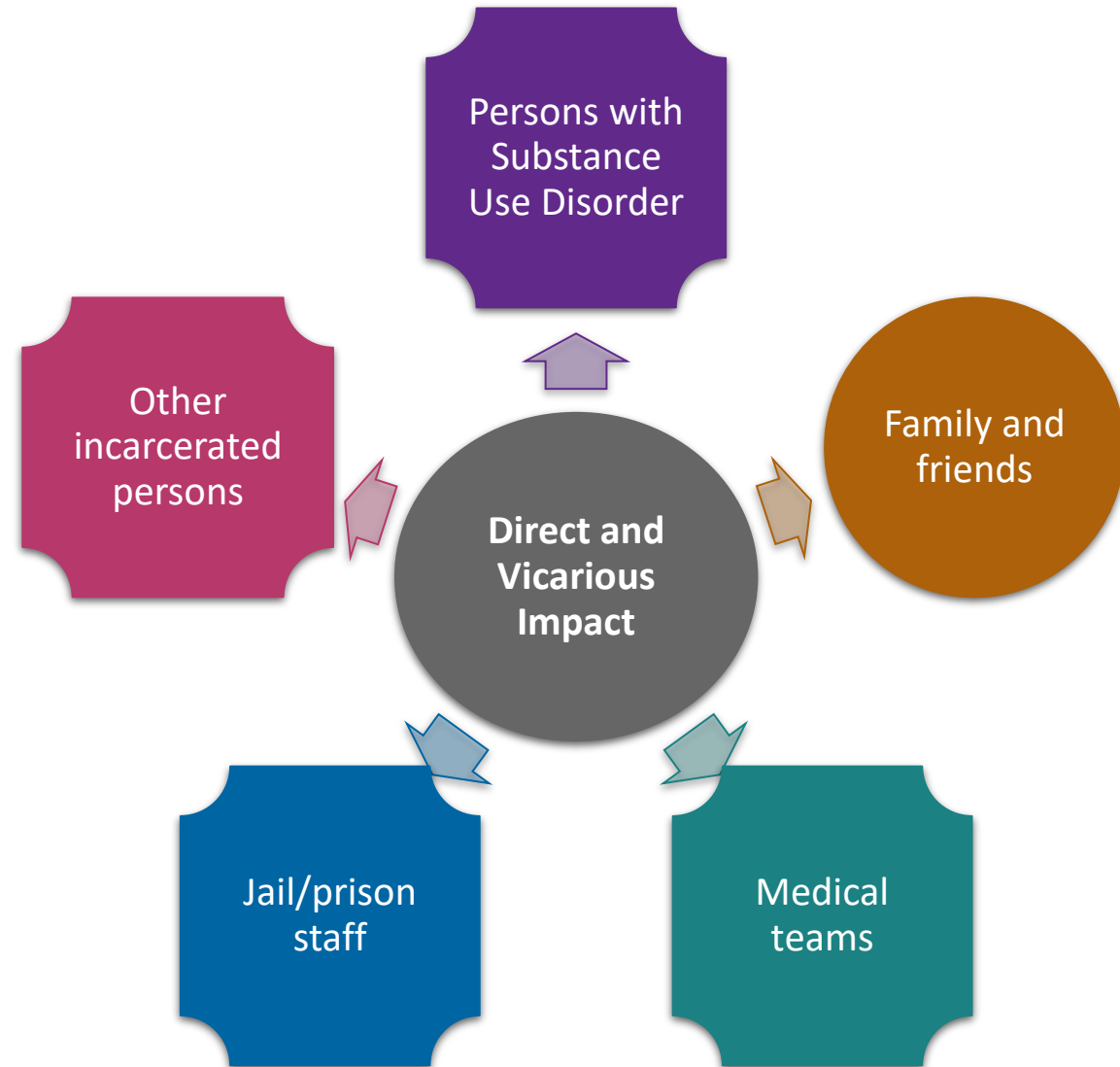
How do we punish immoral choices?

THE POTENTIAL OF THE CURRENT LEGAL ERA



Public Policy

How do we facilitate wellness across stakeholders in the context of the medical condition of addiction?



POLL #1

True or false:

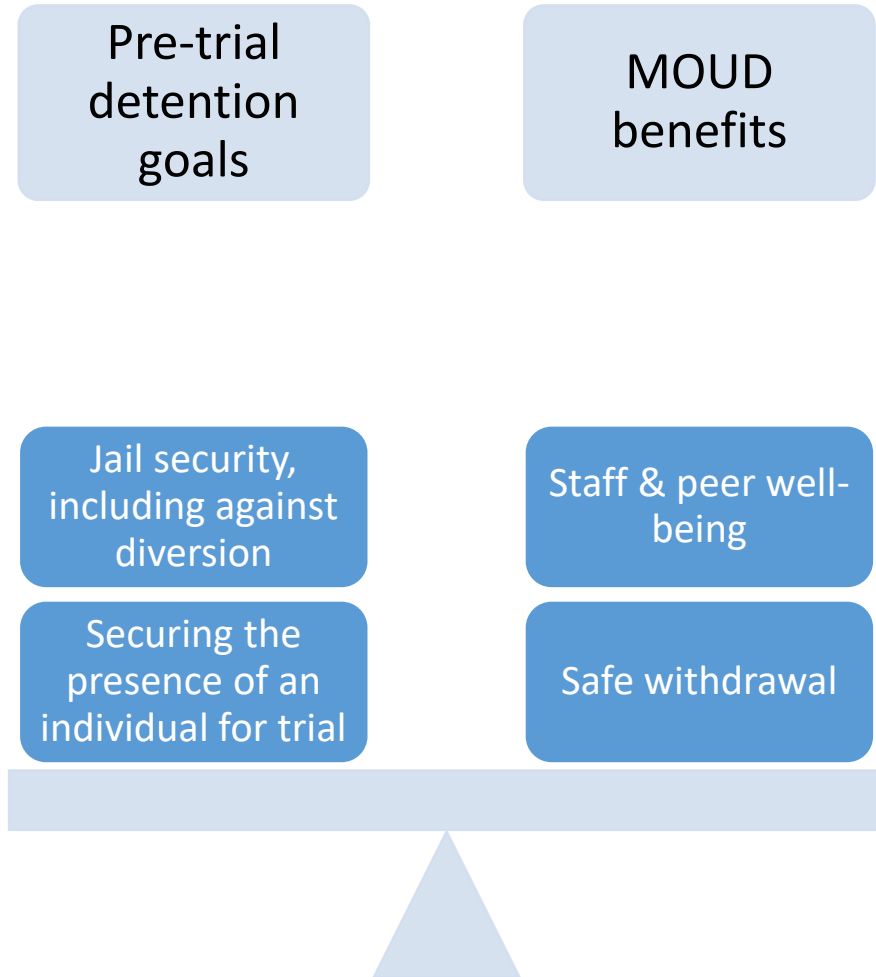
Your jail or prison could face liability in the civil legal system if you do not provide medications for opioid use disorder (MOUD).



KEY COURT DECISIONS

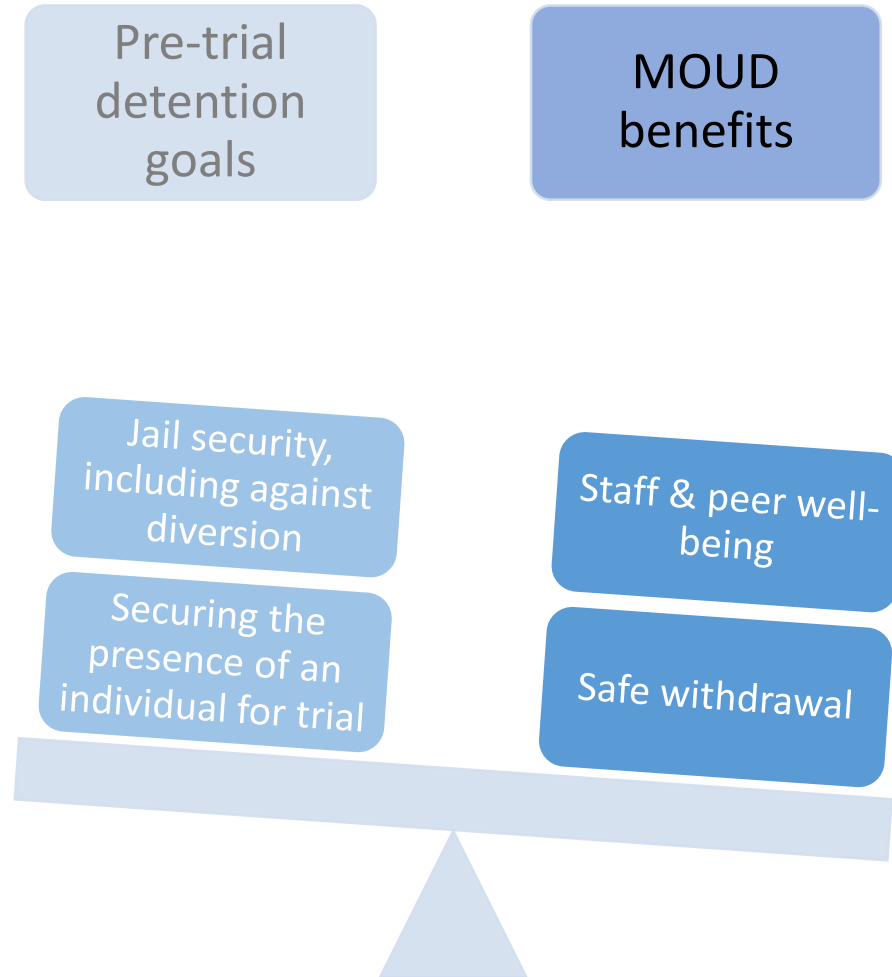
The Role of the Judiciary in
Increasing Access to
Medications for Opioid Use
Disorder (MOUD)

THE FOURTEENTH AMENDMENT: DISCONTINUATION OF MOUD IS A DENIAL OF DUE PROCESS



- » The named plaintiffs in *Cudnick v. Kreiger* had been forced to taper off methadone.
- » The court sought to balance the goals of pre-trial detention with the benefits of methadone maintenance for the class of current and future pre-trial detainees.

THE FOURTEENTH AMENDMENT: DISCONTINUATION OF MOUD IS A DENIAL OF DUE PROCESS



- » The named plaintiffs in *Cudnick v. Kreiger* had been forced to taper off methadone.
- » The court sought to balance the goals of pre-trial detention with the benefits of methadone maintenance for the class of current and future pre-trial detainees.
- » Court: The jail's policy prohibiting methadone "constitutes punishment imposed without a finding of criminal culpability and, as such, is violative of fundamental due process rights."

--Cudnik v. Kreiger, 392 F.Supp. 305 (N.D. Ohio 1974)

THE EIGHTH AMENDMENT: DISCONTINUATION OF MOUD IS DELIBERATE INDIFFERENCE AND CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT



“We therefore conclude that **deliberate indifference** to serious medical needs of prisoners constitutes the ‘**unnecessary and wanton infliction of pain**’ proscribed by the Eighth Amendment. This is **true whether the indifference is manifested by prison doctors in their response to the prisoner’s needs or by prison guards in *intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed.***”

--Estelle v. Gamble, 429 U.S. 97, 104-05 (1976)

THE AMERICANS WITH DISABILITY ACT (ADA): DISCONTINUATION OF MOUD IS DISCRIMINATION



- » Facts: Geoffrey Pesce was on his way to get his daily dose of methadone when he was arrested for driving without a license. The jail's policy was to require a tapered withdrawal from methadone, and they would not negotiate with him. And so he sued.
- » Law: To establish a violation of Title II of the ADA, a petitioner must show that:
 - » (1) he is a qualified individual with a disability;
 - » (2) he was either excluded from participation in or denied the benefits of some public entity's services, programs, or activities or was otherwise discriminated against; and
 - » (3) such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability.
- » Court: "[Ab]sent medical or individualized security considerations underlying the decision to deny access to medically necessary treatment," the plaintiff was likely to succeed in his ADA claim

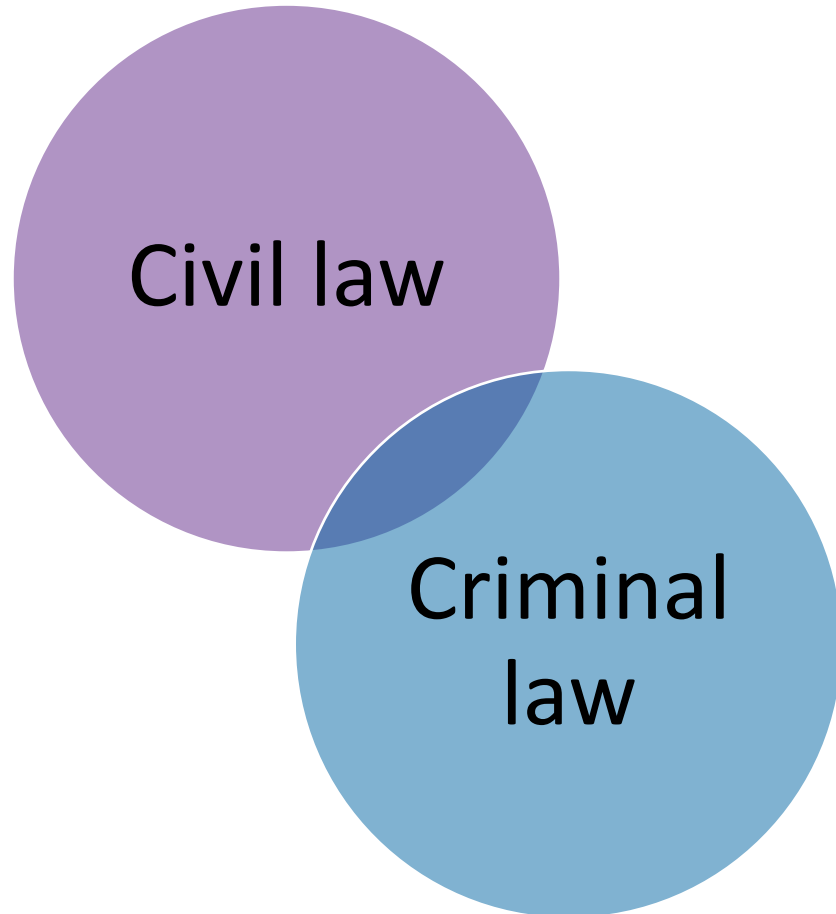
--Pesce v. Coppinger, 355 F. Supp. 3d 35, 45 (D. Mass. 2018)

DISABILITY DISCRIMINATION: ADA, §504, & §1557



- » Several laws prohibit discrimination on the basis of disability.
 - » Americans with Disabilities Act Title II
 - » Rehabilitation Act §504
 - » Patient Protection and Affordable Care Act §1557

- » Under the ADA, people with SUD are considered to have a disability if their addiction substantially limits one or more of their major life activities.
 - » Exception: current unlawful drug use
 - » BUT! An individual cannot be denied health services, or services provided in connection with drug rehabilitation, on the basis of that individual's current illegal use of drugs, if the individual is otherwise entitled to such services.



- » Civil lawsuits are generally filed against:
 - » the locality or state
 - » the sheriff
 - » department personnel
 - » internal care teams
 - » contracting healthcare entity
- » Criminal charges are generally filed against department personnel.

POLL #2

Civil courts have ordered jails and prisons to fix which of the following policies? **(Select all that are correct.)**

- A policy that requires “cold turkey” withdrawal from MOUD.
- A policy that requires tapered withdrawal from MOUD.
- A policy that provides only comfort medications for opioid withdrawal.
- A policy that allows only one type of MOUD.
- A policy that provides MOUD to only persons who are soon to be released.
- A policy that provides MOUD to only pregnant persons.



KEY POLICY DOCUMENTS

The Role of the Executive
Branch in Increasing Access
to Medications for Opioid
Use Disorder (MOUD)

GUIDANCE: BUREAU OF JUSTICE ASSISTANCE (FEBRUARY 2022)



BUREAU OF JUSTICE ASSISTANCE

MANAGING SUBSTANCE WITHDRAWAL IN JAILS: A LEGAL BRIEF

A disproportionate number of people in jails have substance use disorders (SUDs).¹ Incarceration provides a valuable opportunity for identifying SUD and addressing withdrawal.² Within the first few hours and days of detainment, individuals who have suddenly stopped using alcohol, opioids, or other drugs may experience withdrawal symptoms, particularly when they have used the substances heavily or long-term. Without its identification and timely subsequent medical attention, withdrawal can lead to serious injury or death.

Deaths from withdrawal are preventable, and jail administrators have a pressing responsibility to establish and implement withdrawal policy and protocols that will save lives and ensure legal compliance. This brief describes the scope of the challenge, provides an overview of constitutional rights and key legislation related to substance use withdrawal, and outlines steps for creating a comprehensive response to SUD.

Scope of the Challenge


Among sentenced individuals in jail, 63 percent have an SUD, compared to 5 percent of adults who are not incarcerated.³ From 2000 to 2019, the number of local jail inmates who died from all causes increased 33 percent; the number who died from drug/alcohol intoxication during the same period increased 397 percent.⁴ Among women

When Kelly Coltrain was booked for unpaid traffic violations in 2017, she told jail staff that she was drug dependent and had a history of seizures. Her request to go to the hospital for help with withdrawal symptoms was denied. She was placed in a cell that required 30-minute checks, but these checks rarely occurred. For the next 3 days, she was observed (by video camera) vomiting, sleeping often, and eating little. On her third night in jail, she started convulsing; then, all movement ceased. For at least the next 4 hours, no deputies or medical staff came to the cell to determine why she was still. Kelly's family filed a wrongful death suit, which was settled in 2019 for \$2 million plus 4 years of federal district court monitoring of the jail during implementation of new policies and procedures to ensure proper care of inmates at risk of withdrawal.⁵

Incarcerated in local jails, the average annual mortality rate due to drug/alcohol intoxication was nearly twice that of their male counterparts.⁶ The median length of stay in jail before death from alcohol or drug intoxication was just 1 day,⁶ indicating that individuals on short stays, including those who are detained in pretrial status, are equally at risk. It is not uncommon for individuals to experience substance withdrawal at the time of entry into jail, when access to their drug of choice is abruptly stopped. Estimates within specific regions vary widely, from 17 percent of people entering New York City jails being in acute opioid withdrawal⁷ to a record 81 percent of people entering a Pennsylvania county jail needing detoxification services—half of them for opioid use disorders.⁸

* As noted in the Substance Abuse and Mental Health Services Administration's *Use of Medication-Assisted Treatment for Opioid Use Disorder in Criminal Justice Settings* (2019), medically supported withdrawal (also referred to as medical detoxification) is "designed to alleviate acute physiological effects of opioids or other substances while minimizing withdrawal discomfort, cravings, and other symptoms."

This project was supported by Grant No. 2019-AR-BX-K061 to Advocates for Human Potential, Inc. awarded by the Bureau of Justice Assistance, a component of the Office of Justice Programs, which also includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, the Office for Victims of Crime, and the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking. Advocates for Human Potential, Inc. was supported by the Addiction and Public Policy Initiative of the O'Neill Institute for National and Global Health Law at Georgetown University Law Center. This project was developed in partnership with the National Institute of Corrections, an agency within the Department of Justice's Federal Bureau of Prisons.




February 2022
<https://bja.ojp.gov>

- <https://bja.ojp.gov/doc/managing-substance-withdrawal-in-jails.pdf>
- Provides an overview of constitutional rights and key legislation related to substance use withdrawal and outlines steps for creating a comprehensive response to SUD.

GUIDANCE: DEPARTMENT OF JUSTICE CIVIL RIGHTS DIVISION (APRIL 2022)



 U.S. Department of Justice
Civil Rights Division

The Americans with Disabilities Act and the Opioid Crisis: Combating Discrimination Against People in Treatment or Recovery

The opioid crisis poses an extraordinary challenge to communities throughout our country. The Department of Justice (the Department) has responded with a comprehensive approach prioritizing prevention, enforcement, and treatment. This includes enforcing the Americans with Disabilities Act (ADA), which prohibits discrimination against people in recovery from opioid use disorder (OUD) who are not engaging in illegal drug use, including those who are taking legally-prescribed medication to treat their OUD. This guidance document provides information about how the ADA can protect individuals with OUD from discrimination—an important part of combating the opioid epidemic across American communities. While this document focuses on individuals with OUD, the legal principles discussed also apply to individuals with other types of substance use disorders.

1) What is the ADA?

The ADA is a federal law that gives civil rights protections to individuals with disabilities in many areas of life. The ADA guarantees that people with disabilities have the same opportunities as everyone else to enjoy employment opportunities,¹ participate in state and local government programs,² and purchase goods and services.³ For example, the ADA protects people with disabilities from discrimination by social services agencies; child welfare agencies; courts; prisons and jails; medical facilities, including hospitals, doctors' offices, and skilled nursing facilities; homeless shelters; and schools, colleges, and universities.

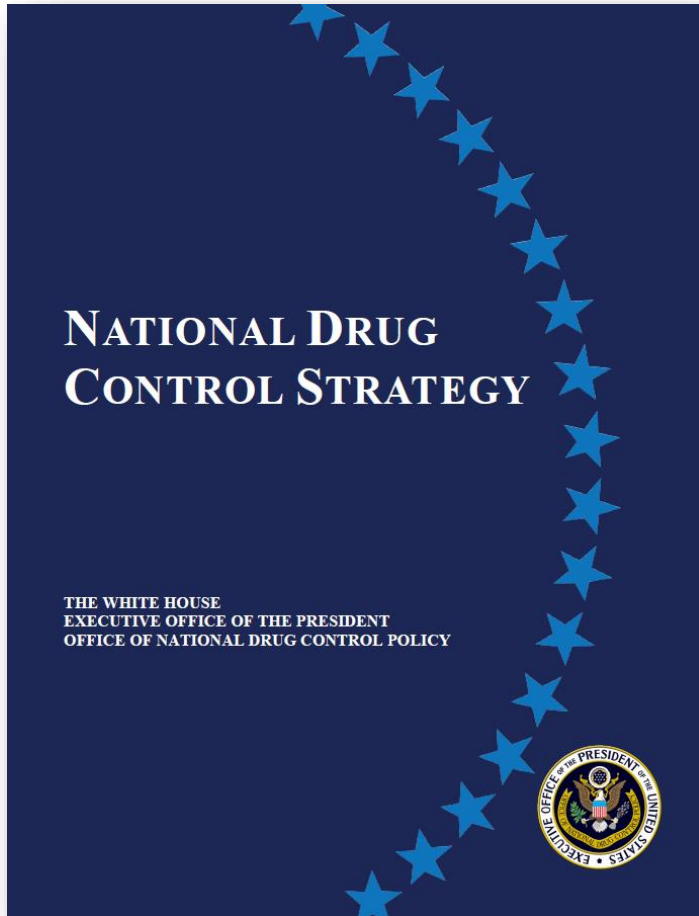
2) Does an individual in treatment or recovery from opioid use disorder have a disability under the ADA?

Typically, yes, unless the individual is currently engaged in illegal drug use. See Question 5.

The ADA prohibits discrimination on the basis of disability.⁴ The ADA defines disability as (1) a physical or mental impairment that substantially limits one or more major life activities,

- » https://archive.ada.gov/opioid_guidance.pdf
- » Provides information about how the ADA can protect individuals with OUD from discrimination—an important part of combating the opioid epidemic across American communities.
 - » The legal principles discussed apply also to individuals with other types of substance use disorders.
- » Example: A jail does not allow incoming inmates to continue taking MOUD prescribed before their detention. The jail's blanket policy prohibiting the use of MOUD would violate the ADA.

GUIDANCE: NATIONAL DRUG CONTROL STRATEGY (2022)

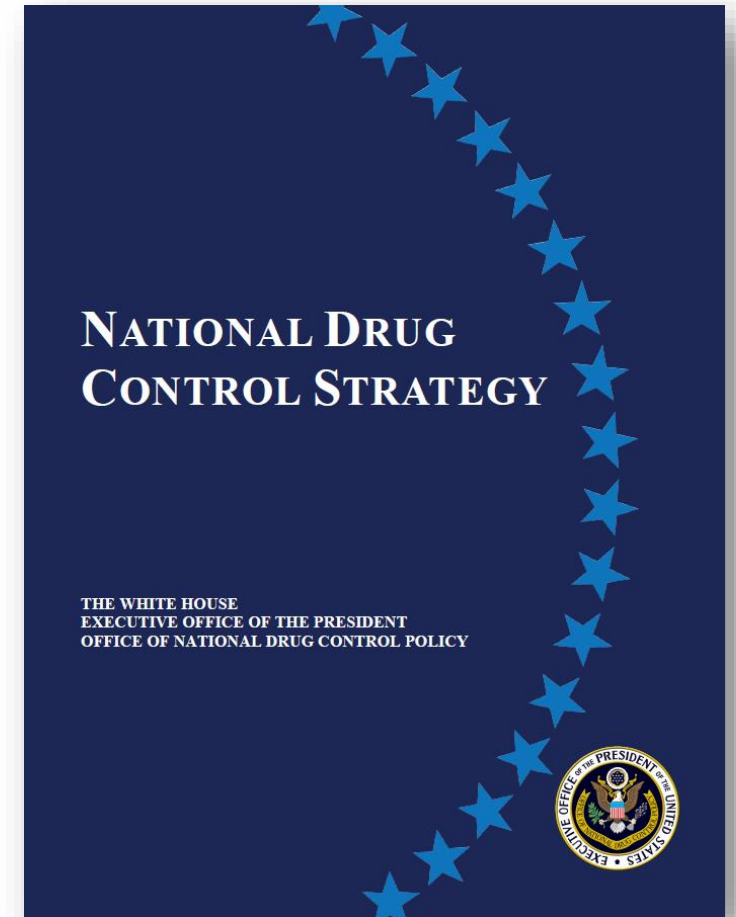


- » <https://www.whitehouse.gov/wp-content/uploads/2022/04/National-Drug-Control-2022Strategy.pdf>
- » “[T]he criminal justice system, while improving public safety, must also **play an important role in ensuring that people within its custody** or supervision and upon reentry who use drugs **do not overdose** and instead **have access to the continuum of services and support**. Ensuring meaningful rehabilitation and successful reentry advances public health and public safety goals.”

GUIDANCE: NATIONAL DRUG CONTROL STRATEGY (2022) – PRINCIPLE 1 (PART 1)



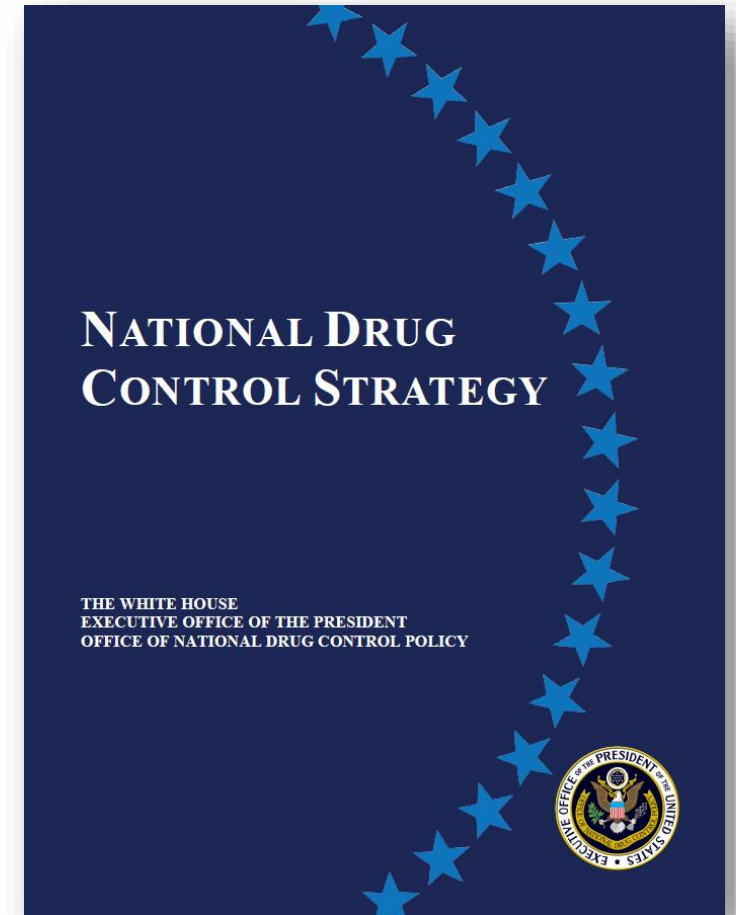
- » Principle 1: Improve access to MOUD for incarcerated and reentry populations
 - » A. Expand access to MOUD in state and local correctional facilities and community corrections.
 - » Develop approaches that are customized for the facility and population.
 - » Continue MOUD while on pretrial release, probation, or parole.
 - » Court-ordered treatment should not ban or discourage the use of MOUD—nor should it mandate or encourage use of one medication over another.



GUIDANCE: NATIONAL DRUG CONTROL STRATEGY (2022) – PRINCIPLE 1 (PART 2)



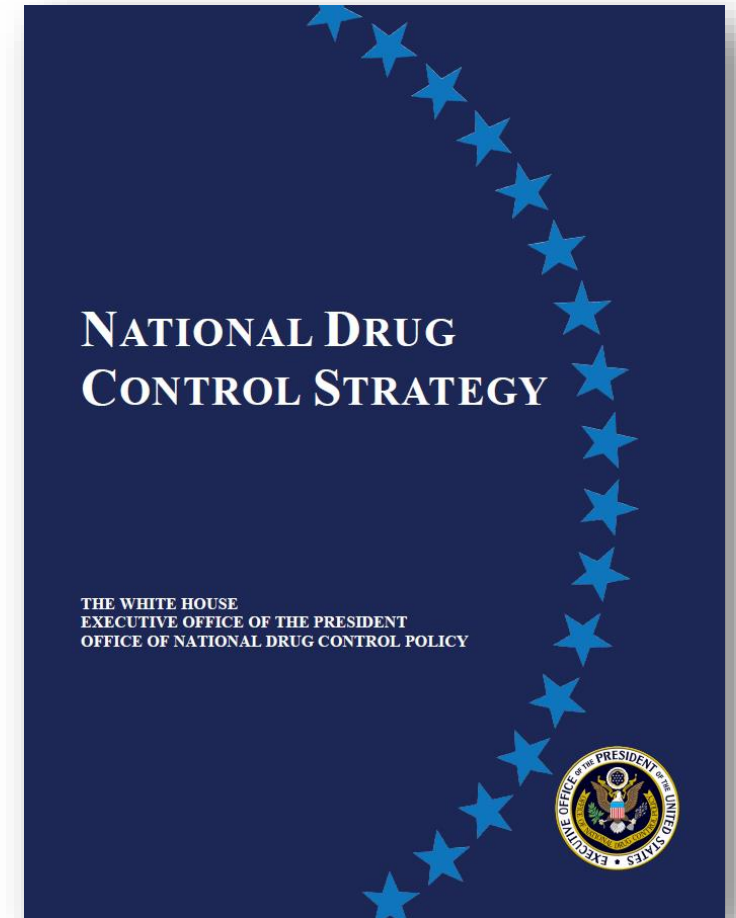
- » Principle 1: Improve access to MOUD for incarcerated and reentry populations
 - » A. Expand access to MOUD in state and local correctional facilities and community corrections.
 - » Medication decisions, including the decision to reduce or discontinue a medication, should be made by patients in consultation with a competently trained medical practitioner.
 - » Nonmedically-trained criminal justice professionals should consider medication decisions relating to participants' psychosocial needs made by duly trained and credentialed clinicians and supervision officers in conjunction with the individual.



GUIDANCE: NATIONAL DRUG CONTROL STRATEGY (2022) – PRINCIPLE 1 (PART 3)



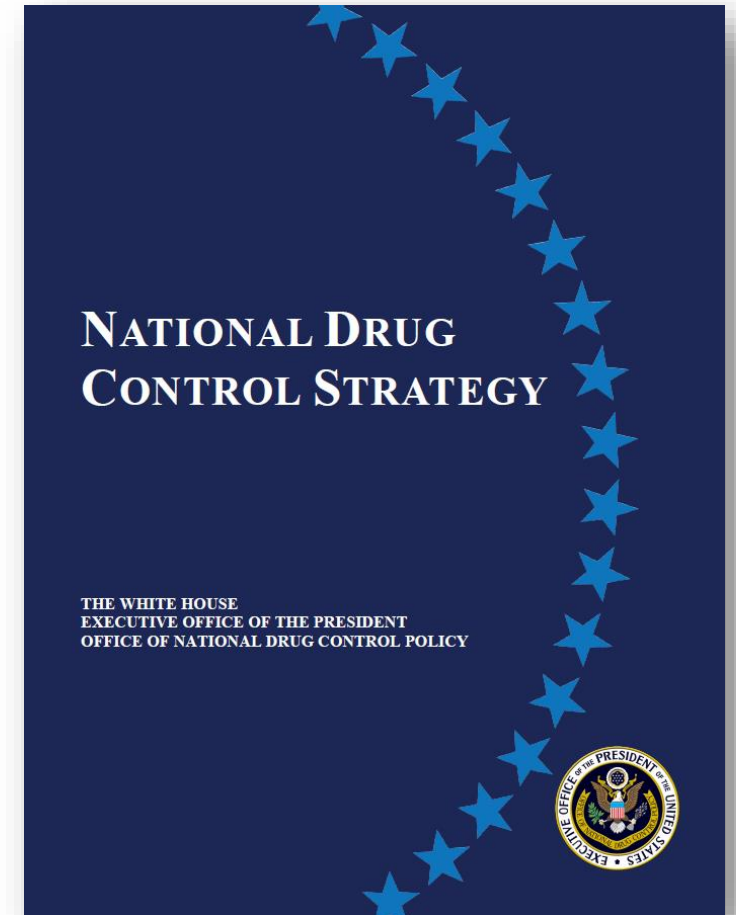
- » Principle 1: Improve access to MOUD for incarcerated and reentry populations
 - » A. Expand access to MOUD in state and local correctional facilities and community corrections.
 - » Communication and coordination among jails, prisons, courts, and community corrections regarding treatment plans can help ensure continued access to MOUD throughout transitions within the correctional system and upon release.
 - » Working groups and discussions with corrections officials should convene to facilitate peer-learning, including lessons learned implementing and funding MOUD in various criminal justice settings.



GUIDANCE: NATIONAL DRUG CONTROL STRATEGY (2022) – PRINCIPLE 4



- » Principle 4: Improve reentry—Expand and remove barriers to support services
 - » A. Ensure evidence-based in reentry support, improving linkages to the community and reentry and recovery outcomes.
 - » Individuals should leave the facility with state-issued identification, Medicaid (if applicable), and other benefits.
 - » Individuals should also be provided with naloxone and naloxone training upon release.
 - » Individuals on MOUD should be provided with a bridge prescription or take-home medication, along with an appointment with a community provider and a warm handoff to the provider.





LEARNING FROM LIABILITY

What Loss Teaches about
How to Save Lives

True or false:

Continuing and initiating medications for opioid use disorder can help prevent other kinds of harm in jails and prisons.

STUDY: SUBSTANCE USE IS INTERCONNECTED WITH OTHER HARMS



» Treating SUD may mitigate other morbidity and mortality issues.

CATEGORY OF DEATH (34 Cases in California)	TOTAL NUMBER OF CASES	EVIDENCE OF SUBSTANCE USE ISSUES	EVIDENCE OF WITHDRAWAL
Withdrawal	69	58*	67*
Officer Use of Force	42	13	8
Overdose	17	17	1
Physical Illness	144	17	15
Suicide	157	31	32
Force by Another Incarcerated Person	14	0	0

*The study's authors determined evidence based on facts plead in the complaint that a person was observably in withdrawal before they died. In the "missing" cases, there were no facts in the complaint about substance use or withdrawal, though the cause of death was available.

Source: O'Neill Institute, Dying Inside: To End Deaths of Despair, Address the Crisis in Local Jails (Dec. 2022).

STUDY: FINANCIAL COMPENSATION TO FAMILIES OF THE DECEASED



- »» A survey of **civil litigation from 2015 to 2020** involving all causes of deaths in jail custody showed over **\$292,000,000** in awards across **359 cases**.
- »» Only 76% of the 477 cases studied had financial outcome data.
- »» Payors: state and local governments, correctional officers, and healthcare providers (via liability insurance and/or taxpayer dollars)

Settlements

Range: \$4,000 - \$12,850,000

Median: \$575,000

Mean: \$1,376,816

Jury Verdicts

Range: \$119,000-\$11,857,344

Median: \$1,600,000

Mean: \$3,397,908

Source: O'Neill Institute, Dying Inside: To End Deaths of Despair, Address the Crisis in Local Jails (Dec. 2022).

STUDY: COMMON FACT PATTERNS (PART 1)



Lessons
from
common
fact
patterns
leading to
liability for
deaths in
jails/prisons

Screen individuals at intake for mental health conditions, suicide risk, substance use disorders, and physical illnesses.

Develop and follow protocol (for example, require correctional staff to inform a qualified health care professional when alerted about a medical need).

Address requests for care/presence of distress by the incarcerated individual, other incarcerated persons witnessing medical distress, and/or jail personnel.

Do not delay necessary healthcare.

Source: O'Neill Institute, Dying Inside: To End Deaths of Despair, Address the Crisis in Local Jails (Dec. 2022).

STUDY: COMMON FACT PATTERNS (PART 2)



Lessons
from
common
fact
patterns
leading to
liability for
deaths in
jails/prisons

Evaluate individual need for therapy, counseling, psychiatric care, or other medical care when explicitly requested by the incarcerated individuals.

Provide evidence-based medication to incarcerated people with opioid use disorder—specifically, methadone and buprenorphine.

Do not use of restrictive housing to address suicide risk because research shows that it increases the risk of suicide.

Seek to provide adequate mental health and medical staffing to address needs.

Properly train correctional officers.

Source: O’Neill Institute, Dying Inside: To End Deaths of Despair, Address the Crisis in Local Jails (Dec. 2022).



MOUD CASE STUDIES

You be the judge!

CASE STUDY 1



- » Mark has been diagnosed with substance use disorder (SUD) in connection with his use of opioids. Mark became dependent on opioids after they were prescribed to him following an injury, but when he could no longer obtain them through proper channels, he eventually turned to the illegal opioid pill trade. Mark was ultimately arrested and incarcerated for possession of narcotics.
- » Mark is incarcerated at State Correctional Institution (SCI). He has sought help with his SUD—under the supervision of medical professionals—through his request for MOUD or the opportunity to see a doctor who could prescribe him MOUD. Mark wrote to a social worker requesting that he be permitted to receive MOUD for his disorder, specifically with the medication known as Vivitrol. His request was refused because SCI’s policies prohibit MAT except for prisoners whose release on parole is imminent. Mark then filed a grievance in which he requested the opportunity to be treated with MOUD, but his grievance was denied because “there are no MOUD programs in place within general population institutions. For an individual in your position, SCI offers only group counseling sessions.” He appealed the grievance determination and was again denied.
- » Due to his continuing addiction, lack of treatment, and internal denials, Mark unlawfully obtained and used the medication Suboxone to treat his condition, which he purchased through the prison black market. He then sued the jail, requesting an order compelling him access to a doctor who specializes in SUD and who is authorized to prescribe MAT.

If you were the judge and based on the cases we’ve discussed, how would you decide this case? What is the legal justification for your decision?

A SINGULAR ACTION ITEM



PLAN NOW.

- » Providing appropriate access to MAT now means you can...
 - » Meet the clinical standard of care.
 - » Take control of the timeline.
 - » Test processes, workflows, and Quality Improvement activity through data.
 - » Assure experience-based participation informs the development of regulations.
 - » Reduce liability for predicted specific court action that forces you to increase access to MAT.
 - » Minimize the likelihood of adverse federal enforcement action.
 - » Save lives.

POLLING QUESTIONS

1. Overall, today's webinar was:
 - A. Very useful
 - B. Somewhat useful
 - C. Not very useful
 - D. Not useful at all

2. The material presented today was:
 - A. At the right level
 - B. Too basic
 - C. Too detailed

CONTACT US

FOR ANY QUESTIONS OR COMMENTS
MATinCountyCJ@healthmanagement.com

UPCOMING EVENTS



- » CalAIM Justice-Involved Funding Opportunities: PATH 3 Deep Dive
 - » **Webinar:** May 31, 2023 at 1:00 pm PDT
 - » **Q&A/Discussion:** June 7, 2023 at 1:00 pm PDT
 - » **Register here:**
https://healthmanagement.zoom.us/meeting/register/tJUvc-2rrDwjHtNf_-SYmTY4gEWJucrxkGAd#/registration