

Legal Landscape of Medications for Opioid Use Disorder (MOUD)

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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Keegan Warren is the Executive Director of a new collaboration between Texas A&M University's Health Science Center, School of Medicine, and School of Law that strives to change conversations on healthcare access. Keegan brings a civil justice lens to bear on healthcare services, specializing in access to treatment, health equity, and non-medical drivers of health. An FQHC director and attorney with two decades of senior management experience in law and healthcare, Keegan is also a subject-matter expert on medical-legal partnership, a care delivery model that embeds attorneys within clinical settings to address the root causes of health-related social needs. Her most recent publications seek to connect law, health, and healthcare for targeted patient populations, and she is a current member of the National Academy of Medicine Board on Health Care Services. In her spare time, Keegan hangs out with her undergraduate twin daughters and her fiancé, Patrick, and she rows crew competitively.

AGENDA

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



LEARNING OBJECTIVES

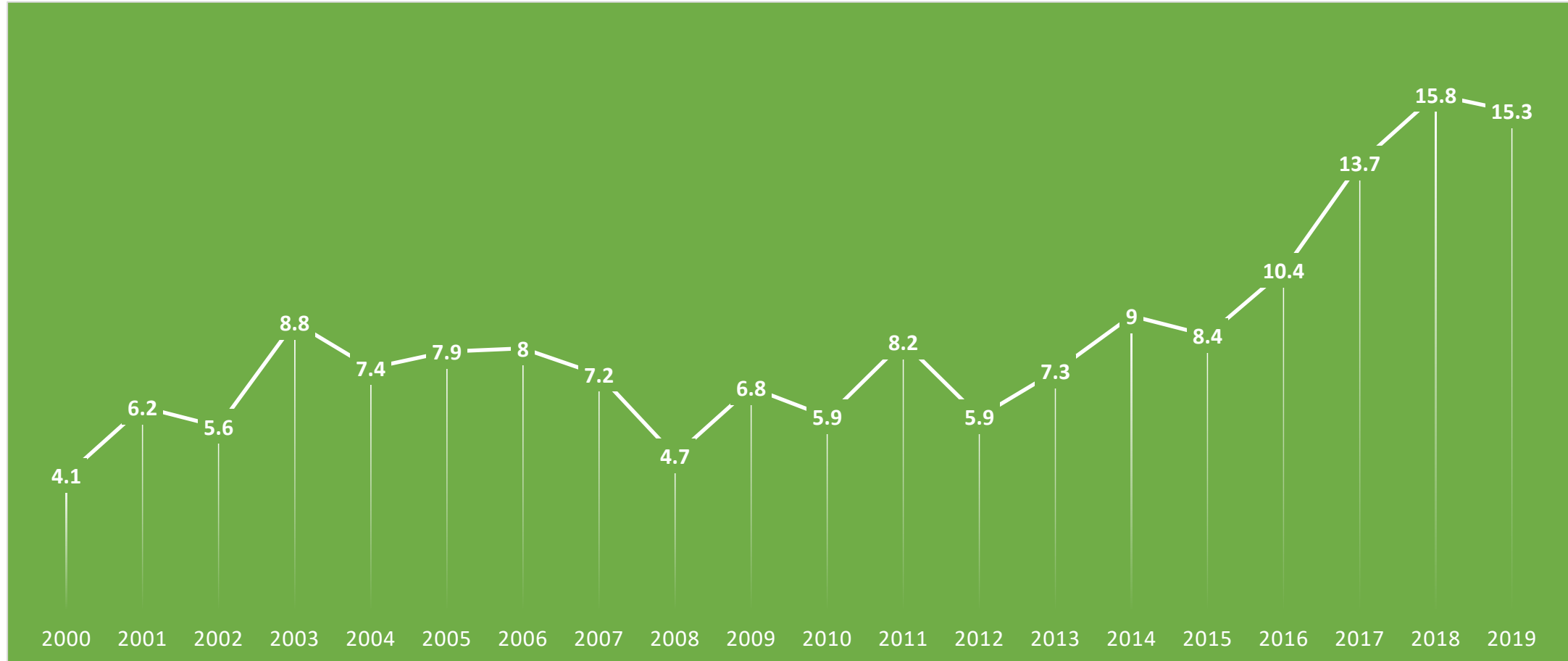
-  Compare how historical legal approaches to substance use disorder shape societal perspective.
-  Summarize the role of contemporary courts in shaping access to MOUD.
-  Evaluate to what extent institutional policies and practices align with best practices for MOUD.



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

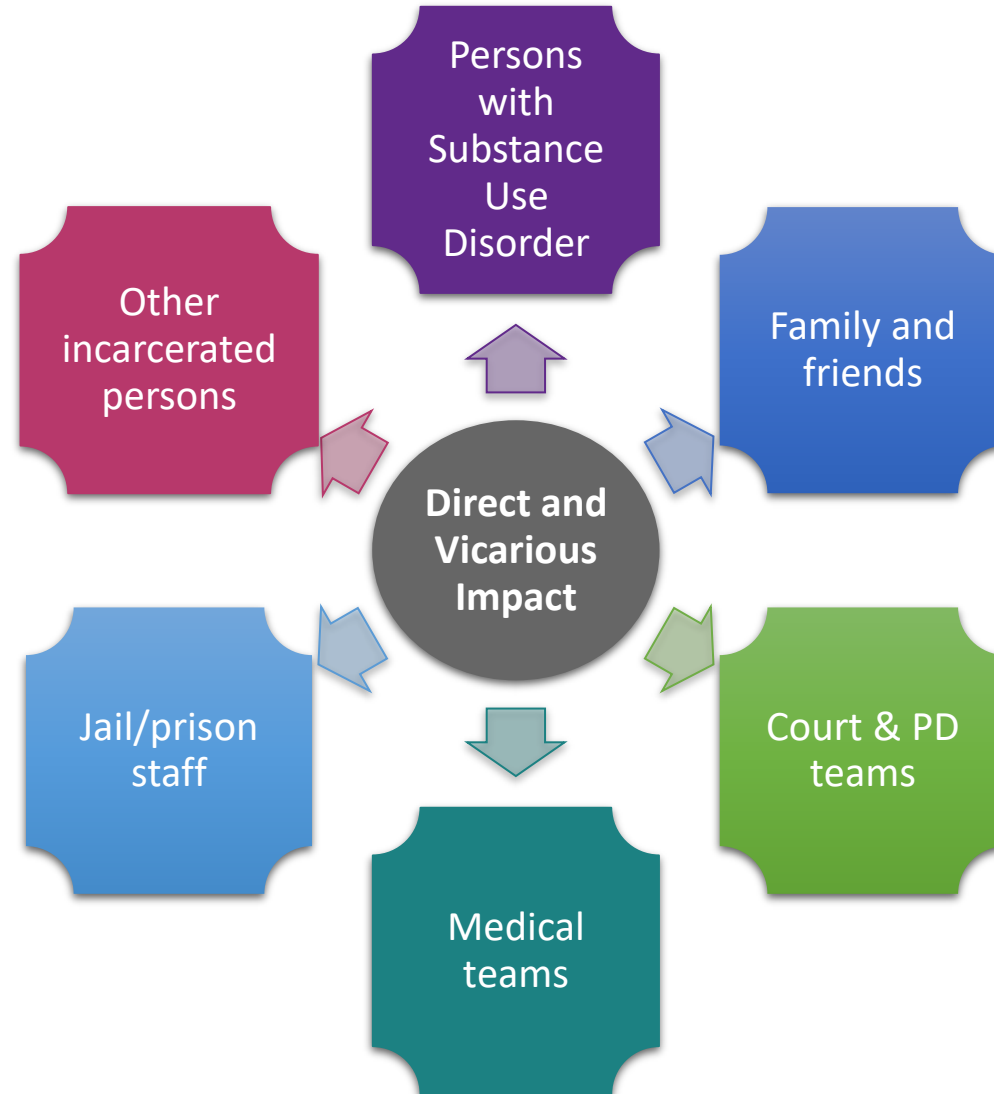
How do we punish immoral choices?

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:

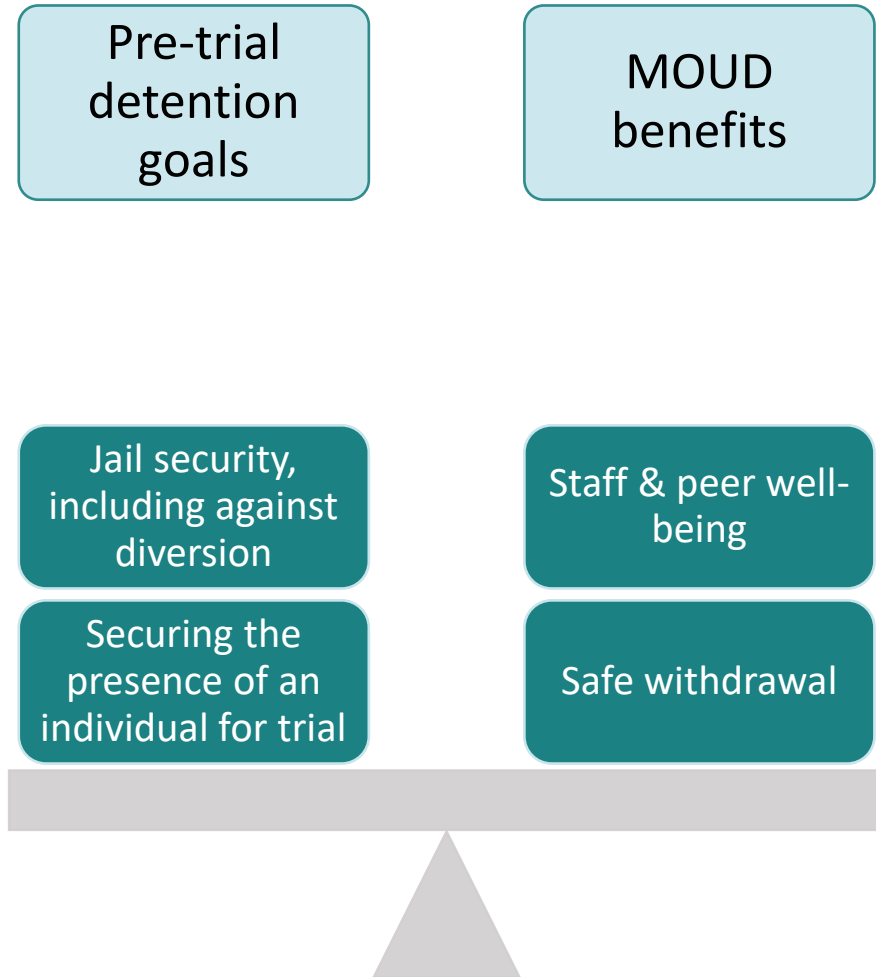
Your court could be held liable if you do not authorize medications for opioid use disorder (MOUD).



KEY COURT DECISIONS

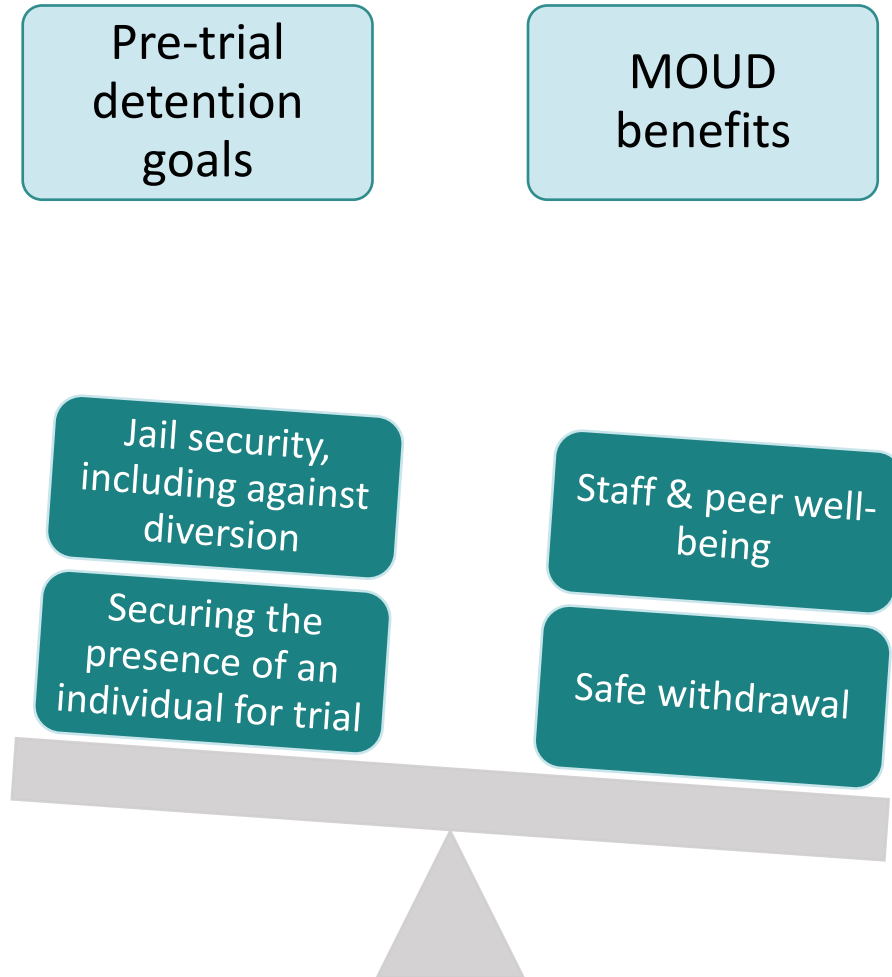
The Role of the Judiciary in
Increasing Access to
Medications for Opioid Use
Disorder (MOUD)

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



- » Facts: Pursuant to Sheriff Krieger's policy, Ms. Cudnick was disallowed methadone upon incarceration while awaiting trial and instead provided comfort medications for withdrawal from heroin.
- » Issue: Whether, as a matter of due process, a pretrial detainee who is undergoing a specific treatment for substance use prior to detention has the right to the continuation of that treatment uninterrupted by officials at the detention facility

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- » Issue: Whether, as a matter of due process, a pretrial detainee who is undergoing a specific treatment for substance use prior to detention has the right to the continuation of that treatment uninterrupted by officials at the detention facility
- » Holding: 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: DELIBERATE INDIFFERENCE TO MEDICAL NEEDS 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 had been in active recovery from opioid addiction for two years with the help of a methadone treatment program prescribed by his doctor. His sister and parents were unavailable one day, forcing him to skip his daily dose of methadone or drive on a suspended license. On the way, a broken turn signal led to arrest for driving without a license. Facing incarceration under mandatory sentencing laws, he sought to negotiate the jail's policy to require a tapered withdrawal from methadone. Unsuccessful, he filed suit.
- » Issue: Whether it is discrimination on the basis of a disability when a jail implements a blanket policy prohibiting the use of methadone treatment without considering the individual's particular medical history and prescribed treatment

To establish a violation of Title II of the ADA, a petitioner must show that:

he is a qualified individual with a disability;

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

such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability.

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- » Issue: Whether it is discrimination on the basis of a disability when a jail implements a blanket policy prohibiting the use of methadone treatment without considering the individual's particular medical history and prescribed treatment
- » Holding: "[A]bsent 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)

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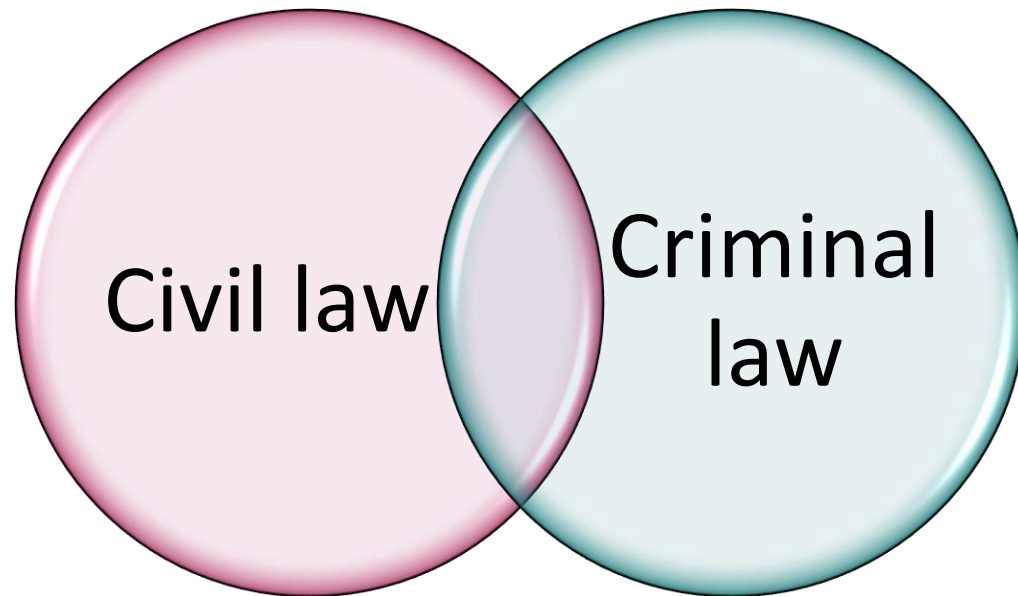
SUD DISCRIMINATION: ADA, §504, & §1557



Laws that similarly prohibit discrimination on the basis of disability include the

- Americans with Disabilities Act
- 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.

CASES I'M WATCHING (AND YOU SHOULD, TOO!)



Spurlock v. Wexford Health Sources, Inc., 3:23-cv-00476 (S.D. W. Va.)

- Issue: Whether Wexford's policy to provide MOUD only to pregnant persons who were receiving MOUD in the community with forced withdrawal after giving birth violates CRIPA, 8A, 14A, and state laws
- Why Pay Attention: Δ contracts with 100+ jails/prisons across the country; but no disability claim, and proposed class is of persons released but not the currently or future incarcerated
- Procedural posture: Δ answered on 09/19; initial scheduling order was entered 09/20

Miller v. Marshall, 2:23-cv-00304 (S.D. W. Va.)

- Issue: Whether the state of West Virginia may validly require incarcerated individuals, as a condition of eligibility for parole, to complete a substance use treatment program alleged to involve pervasive religious elements
- Why Pay Attention: Although not a matter of first impression nationally, this case is consistent with growing judicial attention to increasing access to SUD treatment
- Procedural posture: Preliminary injunction issued barring the parole board from requiring Π to complete RSAT

U.S. v. Unified Judicial System of Penn., 22-cv-00709 (E.D. Pa.)

- Issue: Whether the entire state court system can and should be held accountable for unconstitutional policies, which prohibit MOUD as part of probation and parole terms, by several local judges
- Why Pay Attention: Amended complaint was recently filed and case appears set to finalize soon
- Procedural posture: On 08/14, a Settlement Conference was set for 09/25; Δ filed a Motion to Dismiss on 08/31 on substantially the same grounds as was successful previously



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
- Outlines steps for jails and prisons to create a comprehensive response to SUD
- Provides insights for court and legal professionals

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.

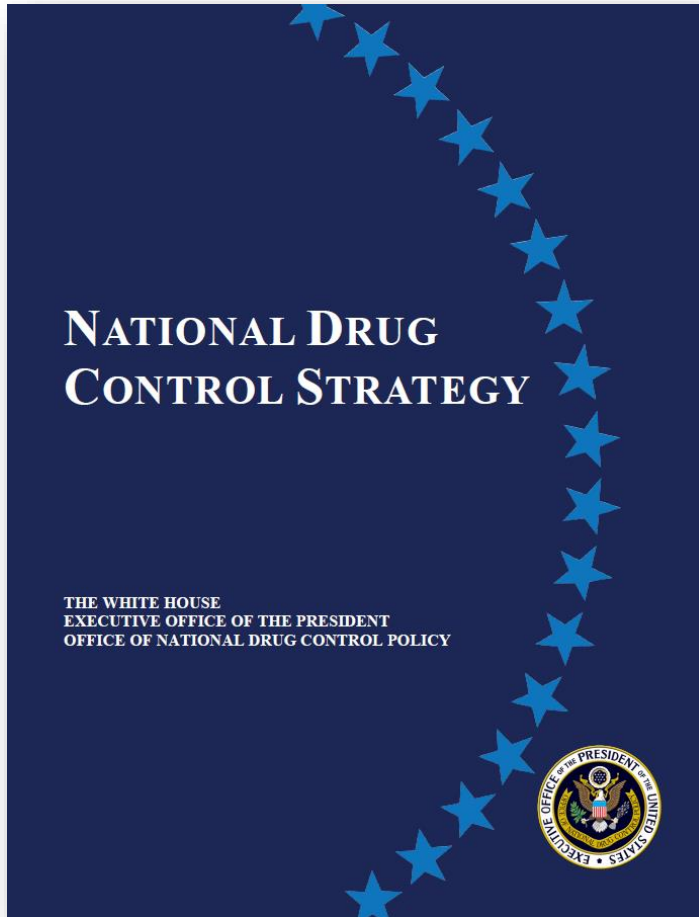
2) Does an individual in treatment or recovery from opioid use disorder have a disability under the ADA?

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 referenced 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)

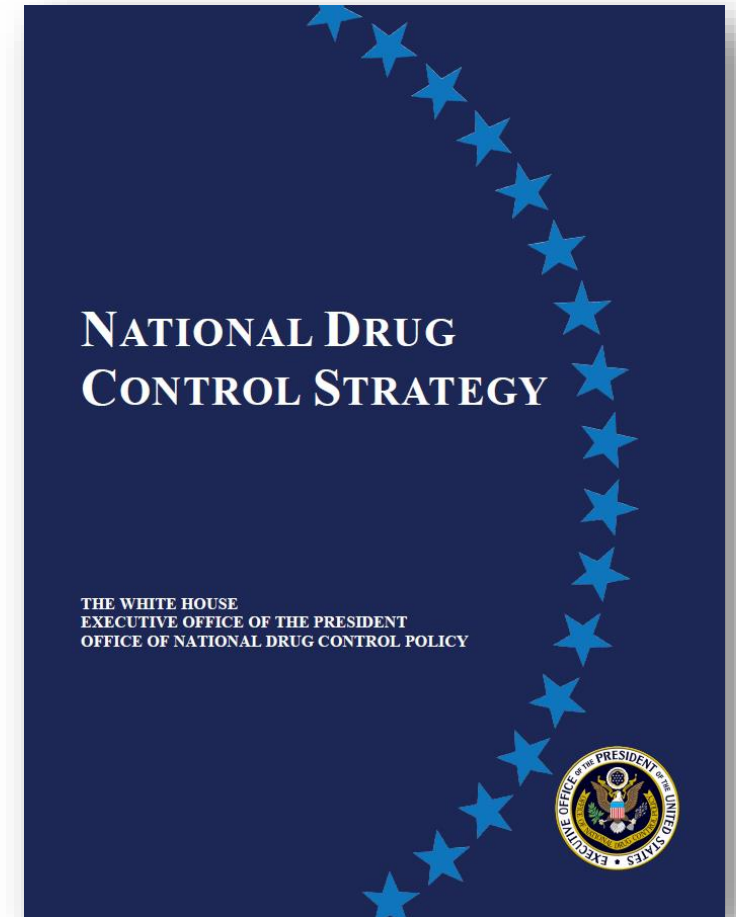


- » <https://www.whitehouse.gov/wp-content/uploads/2022/04/National-Drug-Control-2022Strategy.pdf>
- » “[T]he criminal justice system, while improving public safety, must also **play an important role in ensuring that people within its custody or supervision** and upon reentry who use drugs **do not 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)



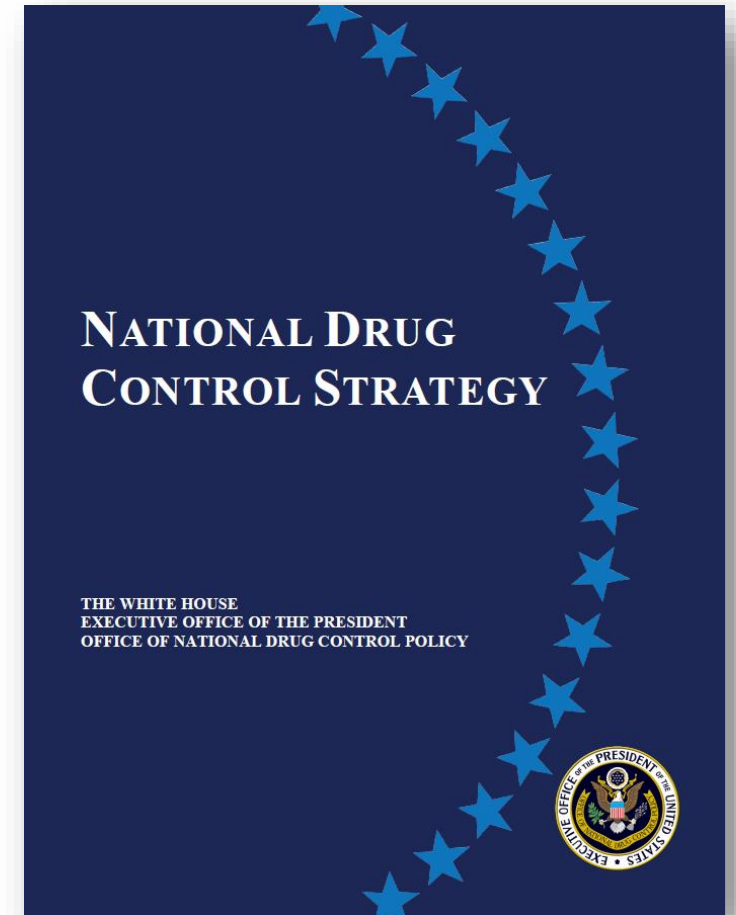
- » Principle 1: Improve access to MOUD for incarcerated and reentry populations
 - » A. Expand access to MOUD in state and local correctional facilities and community corrections.
 - » Courts and community corrections agencies play a large role in determining the type of treatment available to individuals with SUD in the criminal justice system.
 - » When appropriate, individuals should be allowed to continue MOUD while on pretrial release, probation, or parole, and court-ordered treatment should not ban or discourage the use of MOUD—nor should it mandate or encourage use of one medication over another.
 - » Medical decisions, including the decision to reduce or discontinue a medication, should be made by patients in consultation with a legally authorized and competently trained medical practitioner.



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



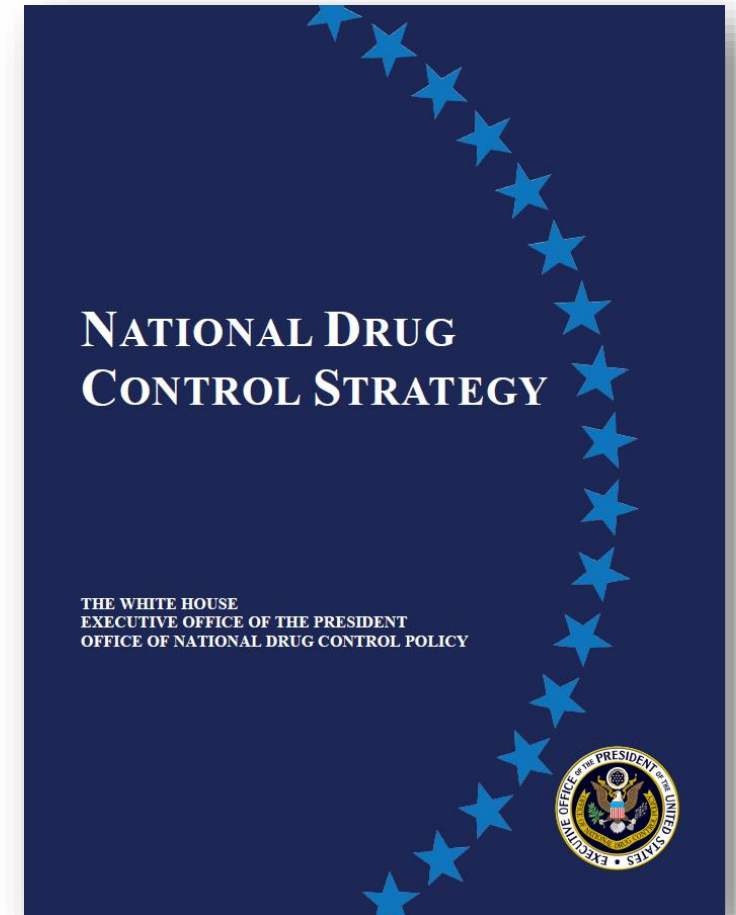
- » Principle 1: Improve access to MOUD for incarcerated and reentry populations
 - » A. Expand access to MOUD in state and local correctional facilities and community corrections.
 - » Deference should be given to the treatment recommendations of medical professionals when appropriate.
 - » Communication 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.



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 Courts Can Save Lives

True or false:

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

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: COMMON FACT PATTERNS



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

Do not delay or interfere with medically necessary healthcare provided consistently with prevailing medical standards.

Always consider the individualized need for therapy, counseling, psychiatric care, or other medical care when explicitly requested by the incarcerated person.

Allow all evidence-based medications for all persons with opioid use disorder—that is, do not prescribe one medication to the exclusion of others.

Properly train decision-makers at all levels.

Non-medical personnel should not practice medicine, including making determinations of appropriate medications.

Trained personnel should practice within the scope of their license, such that those without prescriptive authority should not be asked to make prescription determinations.

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

A PRACTICAL PLAYBOOK: THE MOUD TOOLKIT



Written by:
Douglas B. Marlowe, JD, PhD
Senior Scientific Consultant
National Association of Drug Court Professionals



- » <https://allrise.org/publications/moud-toolkit/>
- » The MOUD Toolkit for treatment courts provides practical resources for programs to implement systems to offer medications for opioid use disorder (MOUD) to their participants in a safe, legal, and scientifically sound manner.
- » This collection of sample documents and other tools is intended for treatment courts implementing or preparing to implement MOUD programs.

CASE STUDIES: IS THE POLICY PERMISSIBLE?

1. A drug court requires all participants to cease taking lawfully prescribed buprenorphine as a condition of participation in the drug court
2. A vets court does not conduct individualized medical assessments to determine the medical appropriateness of requiring the individual to cease taking the prescribed naltrexone
3. A mental health court recommends participants take injectable naltrexone to the exclusion or non-consideration of other treatment, including buprenorphine and methadone, as a condition of participating in the court

Inspired by U.S. v. Mass. Parole Board (Dec. 14, 2021) and U.S. v. Mass. Trial Cts. (June 14, 2022)

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
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