

## No Treatment, No Hope, No Future: Decriminalization of Heroin and Creation of A Medical Dependent Standard

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# NO TREATMENT, NO HOPE, NO FUTURE: DECRIMINALIZATION OF HEROIN AND CREATION OF A MEDICAL DEPENDENT STANDARD

ALEXANDER MANGANO<sup>†</sup>

## PART I: INTRODUCTION

“It is never too late to be what you might have been.” – George Eliot<sup>1</sup>

“It’s easier to walk up a down escalator backwards than to get clean, especially in the system we have now.”<sup>2</sup> The individual who said this has been struggling with overcoming addiction since 2007, started treatment in 2011 but did not overcome the addiction until 2015.<sup>3</sup> Now she has recently completed her schooling and is on her way to becoming a New York State certified drug counselor.<sup>4</sup> Unfortunately, many people think heroin users are people shooting up in gutters, alleys, and drug houses, lying on dirty mattresses with a needle in their arm. But this is patently untrue. Heroin users are not on the outskirts of society. A heroin user could be your brother, your sister, your cousin, your friend, or your neighbor. It could be the “smart” kid you went to high school with who got a scholarship to Dartmouth. It could be your neighbor who always said “Hello” to you in the morning before you went to work or school.

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<sup>1</sup> George Eliot [Mary Ann Evans], Source Unknown (Date Unknown).

<sup>2</sup> Interview with Ms. E, Person in Recovery, (date of interview). Interview conducted with Ms. E, a person who has been in recovery, when being asked about how hard it is to get past addiction and deal with the current system.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

Abuse of opioids, such as heroin, has greatly impacted the United States for the past four decades.<sup>5</sup> The sad fact is, heroin is an epidemic in this country and it takes more than just “saying no” to stop it. For those who are fortunate enough to beat the addiction and get clean, which is a monumental feat in and of itself, now face the stigma of being a drug user and, in the majority of cases, a criminal.<sup>6</sup>

In 2012, an estimated 467,000 people were addicted to heroin in the United States alone.<sup>7</sup> The current problems with heroin can be traced back to the over-prescription of opioids that created a wide availability of access.<sup>8</sup> Over-prescription of opioids allowed people excessive access to these drugs, resulting in a chemical dependency that drove people to seek out alternatives once they were no longer able to get a prescribed opioid.<sup>9</sup> Many then sought heroin because it has an extremely similar effect on the brain, since it is an opioid.<sup>10</sup> Additionally, it is easier to use, easier to find, and far cheaper than buying prescription opioids.<sup>11</sup> Prescription pills can cost between “\$60 to \$100 per pill,” while a single dose of heroin can cost around ten dollars.<sup>12</sup> Additionally, increased state monitoring of prescribing doctors has made it harder for unscrupulous doctors to prescribe opioids in excess,

<sup>5</sup> See Thomas Tracy, *Heroin is Making A Comeback in New York City, With Fatal Overdoses Outnumbering Homicides*, N.Y. DAILY NEWS (Apr. 4, 2015, 10:45 PM), [http://www.nydailynews.com/new-york/nyc-crime/heroin-making-comeback-nyc-overdoses-outnumberhomicidesarticle1.2173981?utm\\_content=buffer3d0f7&utm\\_medium=social&utm\\_source=twitter.com&utm\\_campaign=NYDailyNewsTw](http://www.nydailynews.com/new-york/nyc-crime/heroin-making-comeback-nyc-overdoses-outnumberhomicidesarticle1.2173981?utm_content=buffer3d0f7&utm_medium=social&utm_source=twitter.com&utm_campaign=NYDailyNewsTw) (highlighting how heroin today has become a much larger problem since its more well-known use in the 1960s and 1970s).

<sup>6</sup> See *Mass Incarceration and Criminalization*, DRUG POLICY ALLIANCE, <http://www.drugpolicy.org/issues/mass-criminalization> (last visited Oct. 16, 2018) (arguing that “[t]he stigma associated with drug use and addiction has resulted in policies that systematically discriminate against drug users and sellers”).

<sup>7</sup> Nora D. Volkow, *America’s Addiction to Opioids: Heroin and Prescription Drug Abuse*, NAT’L INST. ON DRUG ABUSE (May 14, 2014), <https://www.drugabuse.gov/about-nida/legislative-activities/testimony-to-congress/2014/americas-addiction-to-opioids-heroin-prescription-drug-abuse>.

<sup>8</sup> See *id.*

<sup>9</sup> See *id.*

<sup>10</sup> See *id.*

<sup>11</sup> See *5 Reasons Prescription Addiction Turns to Heroin*, NARCONON INT’L, <http://www.narconon.org/blog/heroin-addiction/5-reasons-prescription-addiction-turns-to-heroin/> (last visited Oct 5, 2016).

<sup>12</sup> *Id.*

thus curtailing “pill mills.”<sup>13</sup> When pill mills were shut down, those who could once obtain the opioids legally had to turn to the streets, and when they could no longer afford illegal prescription pills they moved towards cheaper forms of opioids.<sup>14</sup> As a result, people have moved towards heroin as a means to get the same feeling opioids provide.<sup>15</sup>

While using heroin, people are at increased risk of overdosing and contracting HIV, STDs, hepatitis, and other blood borne diseases because they do not know what else is in the drug or how potent it is and because heroin is commonly injected through hypodermic needles.<sup>16</sup> The main problem with heroin is that there is a severe physical and mental dependence on the drug, and the body builds a tolerance to it the more it is used.<sup>17</sup> This leads to uncontrollable drug-seeking no matter the consequence.<sup>18</sup> There are some studies that suggest chronic long-term heroin use can lead to some deterioration in the white matter of the user’s brain.<sup>19</sup>

Because of the highly addictive nature of opioids and the high risk of overdose, the Federal government classifies heroin as a schedule I narcotic.<sup>20</sup> Schedule I narcotics are drugs that have a high risk of abuse and their safe use cannot be ensured, even under medical supervision.<sup>21</sup> The Federal government reserves schedule I drug classification for the most addictive substances, those that create the greatest physical and/or psychological dependence.<sup>22</sup> Prison sentences for those convicted depend on the

<sup>13</sup> See Bill M., *What is a Pill Mill*, MONARCH SHORES (July 5, 2018), <https://www.monarchshores.com/food-for-thought/what-is-a-pill-mill>. “Pill mills” are hospitals, clinics, or doctor offices that write prescriptions for medications for very little reason. *Id.* This leads to over-prescription and increased chances of people becoming addicted to opioids. *See id.*

<sup>14</sup> See Brian Krans, *More ‘Pill Mill’ Doctors Prosecuted Amid Opioid Epidemic*, HEALTHLINE MEDIA (May 19, 2016), <https://www.healthline.com/health-news/pill-mill-doctors-prosecuted-amid-opioid-epidemic#1>.

<sup>15</sup> *Id.*

<sup>16</sup> See Volkow, *supra* note 7.

<sup>17</sup> See *Heroin*, NAT’L INST. DRUG ABUSE, <https://www.drugabuse.gov/publications/drugfacts/heroin> (last updated June 2018).

<sup>18</sup> *See id.* (emphasizing that continued drug use can lead to “health problems and failure to meet responsibilities at work, school, or home.”).

<sup>19</sup> *Id.*

<sup>20</sup> 21 U.S.C.A. § 812 (McKinney 2012).

<sup>21</sup> *Id.*

<sup>22</sup> *Drug Scheduling*, U.S. DEA, <https://www.dea.gov/druginfo/ds.shtml> (last visited Feb. 27, 2017).

amount of drugs and how many times the individual has committed the offense.<sup>23</sup> For simple possession of a schedule I narcotic, under Federal law, the person can be imprisoned for up to a year for the first offense, 2 years for the second offense, and 3 years for a third offense.<sup>24</sup> These punishments were designated because of the effects heroin can have on the individual given its classification as a schedule I drug.<sup>25</sup>

One of the reasons why heroin is a highly-penalized crime is because its use can easily result in death.<sup>26</sup> Nationally, there has been a two-hundred-forty-eight percent (248%) increase in drug poisoning deaths caused by heroin from 2010 through 2014.<sup>27</sup> Additionally, along with the increase in the amount of heroin used, the purity has had an overall increase, heading towards a 40% purity rate, while the price has drastically dropped.<sup>28</sup> This means that the heroin being sold today is stronger, more potent, cheaper, and likely to be more addictive.

To try to reduce the amount of use and deaths from heroin, law enforcement agencies have cracked down on suppliers and addicts.<sup>29</sup> Heroin arrests have nearly doubled from slightly over 2,000 arrests in 2007 to over 4,000 arrests in 2014,<sup>30</sup> resulting in the seizure of 6,722 kilograms of heroin in 2015.<sup>31</sup> The amount of arrests have even surpassed Drug Enforcement Agency (“DEA”) arrests for marijuana.<sup>32</sup> The DEA now recognizes that heroin is a national problem, and the majority of patients in publicly funded treatment programs are there for heroin use.<sup>33</sup> Heroin and opioid abuse has led to more deaths than any other drug within the

<sup>23</sup> CHARLES DOYLE, CONG. RESEARCH SERV., R45075, MANDATORY MINIMUM SENTENCING OF FEDERAL DRUG OFFENSES IN SHORT (2018).

<sup>24</sup> 21 U.S.C.A. § 844(a) (McKinney 2010).

<sup>25</sup> See DOYLE, *supra* note 23, at 4.

<sup>26</sup> See generally Rosa Goldensohn, *They Shared Drugs. Someone Died. Does That Make Them Killers?*, N.Y. TIMES (May 25, 2018), <https://www.nytimes.com/2018/05/25/us/drug-overdose-prosecution-crime.html>.

<sup>27</sup> DEA, NATIONAL HEROIN THREAT ASSESSMENT SUMMARY 2 (2016).

<sup>28</sup> *Id.* at 7.

<sup>29</sup> See *id.* at 3.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 4.

<sup>32</sup> See *id.* at 3.

<sup>33</sup> See *id.* at 10 (finding that 300,000 admissions to public treatment facilities in 2013 were for heroin treatment).

United States.<sup>34</sup> Half of those who died were thirty-five-years-old or younger.<sup>35</sup> In 2014, the number of deaths in New York rose to 825, which was a 2000% death rate increase from 2005.<sup>36</sup> Further, the prevalence of heroin use per 100,000 New Yorkers rose from 178 in 2012-2013 to 444 in 2013-2014, which is significantly higher than the United States average of 298.<sup>37</sup> DEA heroin seizures have increased by 67% in the past years, with New York accounting for 20% of all DEA arrests nationally.<sup>38</sup> In the city of New York alone, there was 754 pounds of heroin seized in 2014, which was a drastic increase from 174 pounds seized in 2013.<sup>39</sup> In 2014, there was 75,110 “opioid related in-patient hospital admissions” and 85,917 opioid related emergency room visits to hospitals in New York State.<sup>40</sup>

Heroin use is a large problem, and there have been tremendous efforts taken by law enforcement to remove supplies of this dangerous drug from the streets.<sup>41</sup> Law enforcement agencies have been taking both heroin supplies and those who have had the misfortune of being exposed to the effects of the drug off the street. Heroin addicts have traditionally been treated as criminals, with only recent judicial steps<sup>42</sup> towards treatment instead of punishment.<sup>43</sup> Today, if an individual is caught using heroin, he or she is either arrested and processed through the criminal justice

<sup>34</sup> See *id.* at 9. The chart shows that heroin and opioid related deaths have been steadily increasing since 1999, with heroin deaths taking a drastic increase since 2010. See *id.*

<sup>35</sup> N.Y. DEP’T OF HEALTH, OPIOID POISONING, OVERDOSE AND PREVENTION 2015 REPORT TO GOVERNOR AND NYS LEGISLATURE 9 (2015) [hereinafter OPIOID POISONING].

<sup>36</sup> See OFF. N.Y.S. COMPTROLLER, PRESCRIPTION OPIOID ABUSE AND HEROIN ADDICTION IN NEW YORK STATE 5 (2016) [hereinafter PRESCRIPTION OPIOID ABUSE].

<sup>37</sup> See *id.* at 6.

<sup>38</sup> See *Heroin Use in the United States: NY Accounts for 20 Percent of DEA Seizures of the Drug*, SYRACUSE.COM, [http://www.syracuse.com/news/index.ssf/2014/04/heroin\\_hits\\_ny\\_hard\\_state\\_accounts\\_for\\_20\\_percent\\_of\\_dea\\_seizures\\_of\\_the\\_drug.html](http://www.syracuse.com/news/index.ssf/2014/04/heroin_hits_ny_hard_state_accounts_for_20_percent_of_dea_seizures_of_the_drug.html) (last updated Apr. 6, 2014, 12:29 AM).

<sup>39</sup> See OFF. SPECIAL NARCOTICS PROSECUTOR CITY N.Y., HEROIN SEIZURES SOAR IN 2014, 6 (2014).

<sup>40</sup> OPIOID POISONING, *supra* note 35, at 5.

<sup>41</sup> See PRESCRIPTION OPIOID ABUSE, *supra* note 36, at 1-2.

<sup>42</sup> See *Problem-Solving Courts*, NYCOURTS.GOV, [https://www.nycourts.gov/courts/problem\\_solving/drugcourts/overview.shtml](https://www.nycourts.gov/courts/problem_solving/drugcourts/overview.shtml) (last visited Oct. 16, 2018). Many counties and municipalities in New York have moved towards diversionary programs and drug courts which will be discussed in more detail in Part II and Part III of this note. See *id.*; *infra* Part II-III.

<sup>43</sup> See 21 U.S.C.A. § 844(a) (McKinney 2010).

system<sup>44</sup> or, if he or she is fortunate, processed through a diversion program<sup>45</sup> with the hope of not serving any time in prison or having a criminal record.<sup>46</sup> However, the caveat of most of these diversion programs is that the individual pleads guilty to a drug charge, or if the individual fails to comply with all the requirements he or she will serve time in jail.<sup>47</sup> The problem is that those who fail the program and leave with a criminal record face the stigma of not only being a drug user, but also a convicted criminal.

The problem with having a criminal record is that it can affect employment opportunities.<sup>48</sup> In New York, employers can inquire into former convictions or any pending arrests that a person may be facing.<sup>49</sup>

In 2013, an average of two New Yorkers died every day because of heroin, rising from eighty-five deaths in 2009 to three hundred and thirteen deaths in 2013.<sup>50</sup> An employer cannot inquire into any sealed records, prior arrests, or convictions that the individual has been acquitted of.<sup>51</sup> This means that those convicted of drug crimes can be asked about these arrests, and the employer can use this information in deciding whether or not the individual should be hired.<sup>52</sup> While the Americans with Disabilities Act prevents employers from discriminating against individuals with mental illness and even contains protections for alcoholism, heroin addiction is not protected.<sup>53</sup> Even colleges and institutions that

<sup>44</sup> See N.Y. CRIM. PROC. LAW § 216.05(9)(e) (McKinney 2016).

<sup>45</sup> See *Problem-Solving Courts*, *supra* note 42. Diversion programs are offered through drug or treatment courts and are generally a part of the criminal justice system. See *id.* The goal is to get people into treatment programs, instead of jail, to overcome their drug habits. See *id.* Diversion programs will be discussed in greater depth in Part II and Part III of this note. See *infra* Part II-III.

<sup>46</sup> See CRIM. PROC. § 216.05(10).

<sup>47</sup> See *id.* § 9(c).

<sup>48</sup> See SCOTT H. DECKER ET AL, CRIMINAL STIGMA, RACE, GENDER, AND EMPLOYMENT: AN EXPANDED ASSESSMENT OF THE CONSEQUENCES OF IMPRISONMENT FOR EMPLOYMENT, ARIZ. ST. U. 4-5 (2010), [http://thecrimereport.s3.amazonaws.com/2/fb/e/2362/criminal\\_stigma\\_race\\_crime\\_and\\_unemployment.pdf](http://thecrimereport.s3.amazonaws.com/2/fb/e/2362/criminal_stigma_race_crime_and_unemployment.pdf).

<sup>49</sup> See N.Y. EXEC. LAW § 296(16) (McKinney 2018).

<sup>50</sup> See OPIOID POISONING, *supra* note 35, at 1-2.

<sup>51</sup> See EXEC. LAW § 296(16).

<sup>52</sup> See *id.*

<sup>53</sup> See Americans with Disabilities Act 42 U.S.C.A. § 12114(a)-(c) (West 2018) (showing that drug addiction does not count as a disability under the Americans with Disabilities

provide higher education are allowed to inquire into former convictions and drug use. In fact, 90.1% of colleges look at felony convictions negatively, and 75.2% look at drug or alcohol convictions negatively when making admission decisions.<sup>54</sup> Thus, heroin addiction can affect the ability to acquire both a job and an education.

This Note will analyze the current ways heroin users are treated, stigmatized, and left with very little options upon recovery to support themselves and live a normal, productive life. Specifically, this Note will focus on how New York<sup>55</sup> handles heroin users and their experiences with the criminal justice system. This Note proposes the decriminalization, not legalization, of only heroin use.<sup>56</sup> To help addicts with recovery, diversionary courts and programs should be removed from the criminal justice system and instead act as a civil court. Additionally, the creation of a “medical dependent” classification will allow families to effectively force the individual into a treatment program without getting the individual in the criminal justice system or declared mentally unfit. Rather than family or friends attempting to declare a loved one mentally incapacitated in order to force the loved one into treatment,<sup>57</sup> a heroin user who

Act); *Americans with Disabilities Act Questions and Answers*, U.S. DEP’T OF JUST. CIV. RTS. DIV. 9 (2013), [https://adata.org/sites/adata.org/files/files/ADANN\\_FAQbooklet\\_2013vupdated-5-15.pdf](https://adata.org/sites/adata.org/files/files/ADANN_FAQbooklet_2013vupdated-5-15.pdf).

<sup>54</sup> See MARSHA WEISSMAN ET. AL, *THE USE OF CRIMINAL HISTORY RECORDS IN COLLEGE ADMISSIONS*, CTR. CMTY. ALTERNATIVES 18, <http://www.communityalternatives.org/pdf/Reconsidered-criminal-hist-recs-in-college-admissions.pdf>.

<sup>55</sup> See BENNETT ALLEN & CODY COLON-BEREZIN, *NEW YORK CITY MUNICIPAL DRUG STRATEGY COUNCIL: 2018 REPORT AND RECOMMENDATIONS*, N.Y.C. MUN. DRUG STRATEGY COUNCIL 36-37 (2018), <https://www1.nyc.gov/assets/doh/downloads/pdf/public/drug-strategy-report.pdf>. See also *State Medical Marijuana Laws*, NAT’L CONF. ST. LEGIS. (Oct. 17, 2018), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>. While the Federal government also has laws regulating heroin and classifying it as a schedule I drug, this Note will focus on how New York handles and processes individuals that are caught using drugs. See *id.* There is still a dispute as to whether Federal law will be able to supersede state law. See *id.* Although the White House and other federal agencies have considered this a state right, there is still a debate when it comes to the legalization of drugs. See *id.* This topic will not be addressed in this Note.

<sup>56</sup> This proposal could be applied to other types of illegal drugs, but this proposal focuses on heroin with some investigation into opioids, as it takes into account the physical and mental dependency that heroin, as an opioid derivative, inflicts upon the user. This Note argues that once these individuals are no longer using heroin and the cravings are gone, they are no different than an individual who has never abused the drug.

<sup>57</sup> See *In re Doe*, 696 N.Y.S.2d 384, 386 (N.Y. Sup. Ct. 1999).

is arrested or apprehended by law enforcement would be brought to a diversion court where he or she would be declared medically dependent and assigned a Medical Guardian who could make relevant medical decisions to provide the addict appropriate treatment without further stigma. A medical dependent standard would allow recovered addicts to easily transition back into society without being labeled a criminal, a drug addict, or in general, a bad person, allowing them to secure gainful employment or enroll in higher education without being denied those opportunities because of a prior chemical dependency.

Part II of this Note will discuss the current New York criminal system for heroin users, including the arrest process and diversion courts, the current way to force individuals into treatment, and the current efficacy of the diversion program. It will also discuss the stigma of drug use and a criminal record. Part III will (1) discuss the proposed new standard of medical dependency, the arrest process, the treatment program, and the creation of a medical dependent classification; (2) compare medical dependency and mental incapacitation; and (3) discuss the efficacy of forced treatment. Part IV will discuss how the current system can be converted to this new standard, minimizing costs and reducing the burden on taxpayers. Part V concludes.

## PART II: CURRENT SYSTEM IN NEW YORK

Under current New York law, a heroin user can face jail, a prison sentence, or go through an alternative path in drug courts and diversion programs; regardless of the path taken, there is a criminal punishment or threat that can affect future employment or education opportunities.<sup>58</sup> Alternatively, family and friends of heroin users currently can have users declared mentally incapacitated through civil court proceedings.<sup>59</sup> But it is difficult to get an individual who uses drugs declared mentally incapacitated, and there is a stigma that can follow from being

<sup>58</sup> See Eric Patterson, *Penalties and Sentencing*, DRUGABUSE.COM, <https://drugabuse.com/library/drug-abuse-penalties/> (last updated Oct. 19, 2017).

<sup>59</sup> See N.Y. MENTAL HYG. LAW § 9.27(a) (McKinney 2015).

declared mentally incapacitated.<sup>60</sup> There is also stigma associated with drug use and criminal convictions.<sup>61</sup> Because of these problems with the current treatment method and process, heroin addiction should be treated as a mental health and medical problem instead of a criminal act that warrants punishment.

*A. Current Arrest and Criminal Procedure for Heroin Use and Possession in New York.*

Individuals who get involved with and addicted to heroin can have a previous mental or emotional issue that leads to drugs, or they could have been prescribed an opioid that they then developed an addiction to.<sup>62</sup> Heroin is a life altering drug that makes users preoccupied with getting their next dose.<sup>63</sup> From the moment the person wakes up, the user is constantly figuring out where and when he or she will be using again.<sup>64</sup> Heroin takes such control over the person that he or she is preoccupied with getting heroin or getting the money to buy it. Once the person gets the drug, the goal switches to finding a place to use.<sup>65</sup> Many people relapse and overdose as they constantly chase the feeling and escape that heroin provides.<sup>66</sup> This cycle and dependency often leads to interactions with the criminal justice system.

<sup>60</sup> See Graham C.L. Davey, *Mental Health & Stigma*, PSYCHOL. TODAY (Aug. 20, 2013), <https://www.psychologytoday.com/us/blog/why-we-worry/201308/mental-health-stigma>.

<sup>61</sup> See Chris Elkins, *Stigma of Addiction*, DRUGREHAB.COM, <https://www.drugrehab.com/addiction/stigma/> (last updated May 31, 2018).

<sup>62</sup> See *Drugs, Brains, and Behavior: The Science of Addiction*, NAT'L INST. DRUG ABUSE, <https://www.drugabuse.gov/publications/drugs-brains-behavior-science-addiction/drug-abuse-addiction> (last updated July 2018).

<sup>63</sup> See generally CBS Evening News, *A Day in the Life of a Heroin Addict*, YOUTUBE (May 16, 2016), [https://www.youtube.com/watch?v=i-yLz\\_i44c](https://www.youtube.com/watch?v=i-yLz_i44c). This is the first part in a series about a man on the road to recovery who has been struggling with heroin addiction as he goes through treatment. See *id.* This first part covers the day before he enters treatment and a regular day for him as he tries to obtain heroin. See *id.*

<sup>64</sup> See *id.*

<sup>65</sup> See *id.*; Rita Rubin, *Clean, Safe Places for Heroin Addicts to Shoot Up: Coming To A City Near You?*, FORBES (Mar. 30, 2016, 1:49 PM), <https://www.forbes.com/sites/ritarubin/2016/03/30/clean-safe-places-for-heroin-addicts-to-shoot-up-coming-to-a-city-near-you/#3f67bc6f3ce9>.

<sup>66</sup> See *Chasing the Heroin Dragon: Why You'll Never Catch Him*, ASPENRIDGE NORTH (Nov. 8, 2017), <https://www.aspenridgenorth.com/blog/chasing-heroin-dragon-youll-never-catch/> [hereinafter *Chasing*]; see also Elkins, *supra* note 61.

Heroin use is illegal in New York, as heroin is classified as a schedule I drug.<sup>67</sup> In fact, Section 220.46 of the New York State Penal Law makes the mere injection of a narcotic a class E felony.<sup>68</sup> Thus, under New York law, merely using heroin and choosing to inject it with a hypodermic needle can lead to a four-year prison sentence.<sup>69</sup>

Possession charges, in New York, vary depending on quantity.<sup>70</sup> In New York, a person in possession of heroin can be charged with criminal possession in the 7th, 4th, 3rd, 2nd, and 1st degrees. <sup>71</sup> Criminal Possession of a Controlled Substance in the Seventh Degree is the only charge where the person can receive less than a year in prison.<sup>72</sup> Criminal Possession in the seventh degree occurs when an individual is caught with anything less than an eighth of an ounce of heroin.<sup>73</sup> Criminal possession in the fourth degree is anything from an eighth of an ounce of heroin to less than half an ounce and is considered a class C felony, punishable by 15 years in jail.<sup>74</sup> Half an ounce to four ounces is third degree possession and a class B felony, punishable up to 25 years in jail.<sup>75</sup> From four ounces to eight ounces is considered an A-II felony possession in the second degree,<sup>76</sup> mandating three to eight years and four months in jail, and anything eight ounces or more is criminal possession in the first and considered an A-I felony, requiring a minimum of a 15 to 25 year sentence.<sup>77</sup> While there is discretion afforded to the presiding judge, New York has deemed heroin possession worthy of strict punishment.<sup>78</sup>

The problem with punishing heroin use is that use is hard to deter because of the tolerance that develops. This increased

<sup>67</sup> See N.Y. PUB. HEALTH LAW § 3306(a), (c)(11) (McKinney 2016).

<sup>68</sup> N.Y. PENAL LAW § 220.46 (McKinney 2016).

<sup>69</sup> See *id.* § 70.00(2)(e) (outlining the sentencing guidelines for non-violent felonies).

<sup>70</sup> See *id.* §§ 220.03-220.21 (McKinney 2018) (containing the varying degrees of criminal possession of a narcotic drug in New York from the seventh degree through first degree possession).

<sup>71</sup> See *id.*

<sup>72</sup> See *id.* §§ 220.03, 70.00(3)(b)-(4).

<sup>73</sup> *Id.* § 220.03.

<sup>74</sup> *Id.* §§ 220.09, 70.00.

<sup>75</sup> *Id.* §§ 220.16, 70.00.

<sup>76</sup> *Id.* §§ 220.18, 70.00.

<sup>77</sup> *Id.* §§ 220.21, 70.00.

<sup>78</sup> See *supra* Part II(A).

tolerance requires the user to inject more heroin to achieve a similar effect.<sup>79</sup> Thus, the more someone uses heroin, the more likely he or she is to consume higher doses each time. The typical heroin user consumes 300 milligrams to 500 milligrams per day, and some consume up to triple these amounts.<sup>80</sup> If the average user of heroin purchases a week supply of heroin at a time, that would equal 2,100 milligrams.<sup>81</sup> This means that on a weekly basis, the average heroin user, consuming 300 milligrams a day, would be guilty of a Class A misdemeanor.<sup>82</sup> If a heavy user can consume 507 milligrams a day and purchases a week supply of heroin, that person would be purchasing 3,549 milligrams of heroin.<sup>83</sup> Considering an eighth of an ounce is 3.54375 grams (3,543.75 milligrams), a heavy user would be guilty of a Class C felony every week, punishable by up to 15 years in prison.<sup>84</sup> This means that someone who has developed a tolerance for heroin,<sup>85</sup> and is now so addicted that he or she needs to consume a larger dose, is subject to a potential fifteen years in prison.<sup>86</sup> While it seems unlikely that an individual would receive the maximum sentence for such crimes, these are the current laws.

Recently, New York has changed the way people arrested for heroin and other drugs have been processed through the criminal justice system. New York has recognized the need for more treatment options and has created diversion programs and drug treatment courts.<sup>87</sup> Diversion programs and drug treatment courts are designed to focus more on treatment, and less on punishing individuals who use drugs.<sup>88</sup> These courts have been successful, to an extent, over the years at helping people into addiction recovery and are a positive step forward towards rehabilitation instead of

<sup>79</sup> See *Chasing*, *supra* note 66.

<sup>80</sup> *How Much Heroin is too Much?*, ADDICTIONBLOG.COM (Dec. 11, 2016), <https://drug.addictionblog.org/how-much-heroin-is-too-much/>.

<sup>81</sup> See *id.* This is assuming a typical user consumes 300 milligrams of heroin per day.

<sup>82</sup> See N.Y. PENAL LAW § 220.03 (McKinney 2015).

<sup>83</sup> There are 1,000 milligrams in one gram, and 28.3495 grams in an ounce.

<sup>84</sup> See PENAL LAW § 220.09.

<sup>85</sup> See *Heroin*, *supra* note 17.

<sup>86</sup> See PENAL LAW §§ 220.09, 70.00.

<sup>87</sup> See *Drug Treatment Courts*, NYCOURTS.GOV, [https://www.nycourts.gov/courts/problem\\_solving/drugcourts/](https://www.nycourts.gov/courts/problem_solving/drugcourts/) (last visited Feb. 27, 2017).

<sup>88</sup> See *id.*

punishment, since the treatment programs are designed to help people recover instead of having them sit in a jail or prison.<sup>89</sup> However, these courts are part of the criminal justice system and still have an emphasis on punishment.<sup>90</sup>

Before an individual can enter a diversion program, he or she must first be considered “eligible.”<sup>91</sup> One of the major requirements of the program is that the individual cannot have been convicted of a violent felony within the past ten years and cannot currently be charged with a violent felony.<sup>92</sup> However, an individual may also be disqualified from participation in the program if he or she is being charged with driving a motor vehicle while being impaired by use of drugs, even if this is his or her first offense, and if the judge deems the actions sufficiently dangerous to the public.<sup>93</sup> After the judge determines if the defendant is eligible, the judge will then consider the following: (1) the defendant’s history with alcohol or substance abuse or dependence; (2) if the alcohol or substance abuse or dependence was a contributing factor to the criminal behavior; (3) if the judicial diversion program (“JDP”) can address the abuse or dependency; and (4) whether the defendant should be put in “institutional confinement” necessary to protect the public.<sup>94</sup>

If the judge determines that the JDP can effectively treat the defendant and help the defendant overcome addiction without the need for incarceration, the individual will still have criminal charges.<sup>95</sup> First, the defendant is required to enter a guilty plea to enter into a JDP, unless the People, through the prosecution,

<sup>89</sup> *See id.*

<sup>90</sup> *See* N.Y. CRIM. PROC. LAW § 216.05(1) (McKinney 2016).

<sup>91</sup> *See id.* § 216.00(1). An eligible defendant “means any person who stands charged in an indictment or a superior court information with a class B, C, D or E felony offense defined in article one hundred seventy-nine, two hundred twenty or two hundred twenty-one of the penal law or any other specified offense as defined in subdivision four of section 410.91 of this chapter.” *See id.*

<sup>92</sup> *See id.* § (1)(a).

<sup>93</sup> *See* *People v. Zerafa*, 954 N.Y.S.2d 831, 834-35 (N.Y. Sup. Ct. 2012) (holding that an individual who was arrested for operating a vehicle with a suspended license under the influence of cocaine, oxycodone, and PCP, that reversed into a police car and tried to flee on foot, was ineligible for the diversion program even though this was the individuals first offense).

<sup>94</sup> CRIM. PROC. LAW § 216.05(3)(b)(ii).

<sup>95</sup> *See id.* § (1).

consent that it is not necessary or the court determines that requiring the individual to enter a guilty plea would result in “severe collateral consequences.”<sup>96</sup> However, judges within New York have disagreed with what is a “severe collateral consequence.” For example, courts differ on whether or not a defendant’s subsequent deportation upon entering a guilty plea constitutes a severe collateral consequence sufficient to meet the guilty plea exception.<sup>97</sup> Next, the individual is required to abide by certain terms in exchange for being allowed to participate in the JDP.<sup>98</sup> If the court has reason to believe that the individual has violated any of these terms, the individual can be ordered to appear before the court.<sup>99</sup> If the court determines that the person has violated a term (for example, if the individual relapses and uses heroin again), the court can terminate the individual’s participation in the JDP, order the individual into custody, and enter a verdict according to the guilty plea the person entered prior to entering the JDP, or the judge can reduce the sentence or crime

<sup>96</sup> *See id.* § (4).

<sup>97</sup> Compare *People v. Brignolle*, 971 N.Y.S.2d 866, 868 (N.Y. Sup. Ct. 2013) (finding that deportation resulting from a guilty plea is not a severe collateral consequence), with *People v. Kollie*, 38 Misc.3d 865, 868 (N.Y. Sup. Ct. 2013) (“[T]he Court finds the defendant has documented that he would likely suffer the severe collateral consequence of deportation if required to enter a plea of guilty upon being accepted into the Judicial Diversion program.”).

<sup>98</sup> The statute states:

The defendant shall agree on the record or in writing to abide by the release conditions set by the court, which, shall include: Participation in a specified period of alcohol or substance abuse treatment at a specified program or programs identified by the court, which may include periods of detoxification, residential or outpatient treatment, or both, as determined after taking into account the views of the health care professional who conducted the alcohol and substance abuse evaluation and any health care professionals responsible for providing such treatment or monitoring the defendant’s progress in such treatment; and may include: (i) periodic court appearances, which may include periodic urinalysis; (ii) a requirement that the defendant refrain from engaging in criminal behaviors; (iii) if the defendant needs treatment for opioid abuse or dependence, that he or she may participate in and receive medically prescribed drug treatments under the care of a health care professional licensed or certified under title eight of the education law, acting within his or her lawful scope of practice, provided that no court shall require the use of any specified type or brand of drug during the course of medically prescribed drug treatments.

CRIM. PROC. LAW § 216.05(5).

<sup>99</sup> *Id.* § (9)(a).

according to how much treatment or how much of the JDP was completed.<sup>100</sup>

At this point, the individual would now have to serve a sentence in prison and have a criminal record that reflects the drug charge and time served. Even if the individual fully complies and completes the JDP, he or she may (1) be assigned a probation officer and subject to probation requirements; (2) have the guilty plea or indictment withdrawn or replaced with a guilty plea for a misdemeanor; or (3) in the best case scenario, simply have the guilty plea or indictment withdrawn without any probationary requirements.<sup>101</sup> This is left to the discretion of the court,<sup>102</sup> and two of the three options subject the individual to a criminal record.

In New York, many people in drug courts have been referred to and accepted into programs, but success is not guaranteed. New York City alone, from the inception of the drug court through 2014, has had 56,601 referrals, 9,471 pleas, and 20,986 refusals to participate, but only 4,818 people have graduated from a recovery program, while 4,568 people have failed.<sup>103</sup> Out of these failures, 1,179 were considered voluntary, 2,668 were involuntary, and 811 were declared inactive because they had either died, been warranted, or been declared ineligible for another reason.<sup>104</sup> Across New York State, one year after completion of a recovery program, participants were only 3% less likely to be re-arrested (2% less likely for drug crimes), after two years only 4% less likely (2% again for drug crimes), and after 3 years still only 2% less likely to be re-arrested.<sup>105</sup> These rates show that while the drug courts do have an impact, there is still the issue of re-offending and re-arrest.<sup>106</sup> In the current system, people who are re-arrested

<sup>100</sup> *Id.* § (9)(c).

<sup>101</sup> *Id.* § (10).

<sup>102</sup> *Id.*

<sup>103</sup> DARREN EDWARDS, CRIM. CT. N.Y.C., DRUG COURT INITIATIVE ANNUAL REPORT 2014, 21 (2014), [https://www.nycourts.gov/courts/nyc/drug\\_treatment/publications\\_pdf/2014\\_drug\\_court\\_annual\\_report.pdf](https://www.nycourts.gov/courts/nyc/drug_treatment/publications_pdf/2014_drug_court_annual_report.pdf).

<sup>104</sup> *Id.*

<sup>105</sup> AMANDA B. CISSNER ET. AL, URBAN INSTITUTE JUSTICE POLICY CENTER A STATEWIDE EVALUATION OF NEW YORK'S ADULT DRUG COURTS 41 (2013), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/412867-A-Statewide-Evaluation-of-New-York-s-Adult-Drug-Courts.PDF>.

<sup>106</sup> *See id.*

and re-convicted of a drug crime have a subsequent criminal conviction on their record that will hurt their prospect of employment or higher education.<sup>107</sup>

These criminal punishments and sentences are very severe and are only leading to more criminal records without much success in rehabilitation. While diversion and drug courts are a step in the right direction towards rehabilitation, they still focus on criminal punishment as the safety net for the program. Because many people suffering addiction require multiple attempts at sobriety, they are left with a criminal record, even if they participate in the diversion programs. This leaves families searching for non-criminal ways to get help, but there are very few ways to force a legal adult into treatment.

### *B. Non-criminal Intervention for Heroin Users in New York*

If an individual consents and chooses to get treatment voluntarily, there are several options in New York, assuming that the judge or the prosecutor would allow them instead of a guilty plea.<sup>108</sup> There are over seventy-five rehabilitation facilities located in New York that focus on addiction treatment.<sup>109</sup> However, if the individual does not voluntarily decide to enter a treatment program, or is not forced by the court, there is very little family or friends can do to mandate that individual get help. The only real option is attempting to get the addict declared mentally incapacitated and labeled as “An Incapacitated Person” (AIP).<sup>110</sup> Going through the process and getting the family member declared AIP would allow the family to force the individual into a treatment program.

In making the determination about mental incapacitation, the court will evaluate whether the person can provide for personal needs and property management and if the person understands

<sup>107</sup> DECKER ET AL., *supra* note 48, at 1-2.

<sup>108</sup> See *126 New York Inpatient Drug Rehabs and Inpatient Alcohol Treatment in NY*, INTERVENTIONAMERICA.ORG, [http://interventionamerica.org/Inpatient\\_Rehab/Searchdirectory.cfm?State=NY](http://interventionamerica.org/Inpatient_Rehab/Searchdirectory.cfm?State=NY) (last updated Oct. 31, 2018).

<sup>109</sup> See *id.*

<sup>110</sup> *Guardianship of an Incapacitated Adult*, NYCOURTS.GOV, <http://nycourts.gov/courthelp/Guardianship/AIP.shtml> (last updated Oct. 11, 2018).

and appreciates the consequences of the inability to make decisions uninfluenced by opioids.<sup>111</sup> Factors the court will consider include if the person can manage day to day life, if the person appreciates his or her inability, the individual's preferences, and the individual's ability to manage finances and properties.<sup>112</sup> Section 81.02 of New York Mental Hygiene Law specifically mentions that the court can evaluate the individual's "alcoholism or substance dependence" and the "prognosis of such . . . alcoholism or substance dependence".<sup>113</sup> Under this section, heroin qualifies as a substance dependence.<sup>114</sup>

Courts have made it clear that declaring an individual mentally incapacitated is a "last resort."<sup>115</sup> Furthermore, not every declaration of mental incapacitation is the same, and each should be tailored with respect to the areas where the person requires guardianship.<sup>116</sup> In essence, a person who is incapable of making certain decisions, but capable of making other decisions, should not be stripped of all decision-making ability.<sup>117</sup> However, if a person is declared AIP, it can affect his or her ability to manage property (where he or she lives), control finances (what he or she can buy), and make medical decisions.<sup>118</sup>

If a family is able to successfully show that their relative is a chronic heroin user and it is affecting their ability to make decisions sufficient to get the person declared AIP, the person can be treated, in essence, like an infant.<sup>119</sup> In the extreme, guardians can have control over every facet of AIPs' lives including where they live, where they sleep, who they associate with, where they

<sup>111</sup> See N.Y. MENTAL HYG. LAW § 81.02(b) (McKinney 2016).

<sup>112</sup> See *id.* §(c).

<sup>113</sup> *Id.* § (4).

<sup>114</sup> See § 1.03(39)-(40) (McKinney 2017). Part 39 of the statute describes what is considered a "substance" and part 40 describes what qualifies as "substance dependence." See *id.*

<sup>115</sup> *In re Joseph V.*, 762 N.Y.S.2d 669, 671 (N.Y. App. Div. 2003).

<sup>116</sup> See *In re Eggleston*, 757 N.Y.S.2d 24, 27 (N.Y. App. Div. 2003).

<sup>117</sup> See *id.*

<sup>118</sup> See N.Y. MENTAL HYG. LAW § 81.02(a) (McKinney 2016).

<sup>119</sup> See generally MENTAL HYG. LAW §§ 81.06-81.44 (listing how an individual becomes a guardian, when an individual is deemed to require guardianship, the area and scope of guardianship, reimbursement, filing requirements, discharge and removal, and generally, all the regulatory and statutory requirements and implications of being a guardian of a person declared mentally incapacitated).

go, what they eat, what they drink, and so forth.<sup>120</sup> Guardianship is supposed to be limited to the scope of the person's deficiencies,<sup>121</sup> but people addicted to heroin may need help making all of their decisions, considering the extreme physical and chemical dependency heroin use inflicts.<sup>122</sup> The guardian, once appointed and trained,<sup>123</sup> is responsible for making these decisions for AIPs and must act in their best interest.<sup>124</sup> Both initial and annual reports are required to inform the court of their current situation and to make sure that guardians are acting in the best interest of AIPs.<sup>125</sup> AIPs will maintain control over all rights, except the ones granted to the guardian.<sup>126</sup>

According to New York's Mental Hygiene Law, there are very few limitations on who can bring an action to declare an individual mentally incapacitated, making it appropriate for a guardian to be appointed.<sup>127</sup> A person who lives with a heroin user or any person "concerned with the welfare of the person alleged to be incapacitated" may bring such an action.<sup>128</sup> This may be a corporation, a public agency, or social services.<sup>129</sup> There is a preference for a family members to be appointed AIPs' guardians, but courts have made it clear that they will assign an outside party if family members are "not suited" in some way.<sup>130</sup> This is beneficial in cases where an individual who is using heroin and is in the process of obtaining a guardianship is surrounded by family or friends who also use. In a situation like this, a third party who is not struggling with addiction could serve as the guardian.

<sup>120</sup> *See id.* §§ 81.20-81.23.

<sup>121</sup> *Id.* § 81.02.

<sup>122</sup> *See* Volkow, *supra* note 7.

<sup>123</sup> *See* MENTAL HYG. LAW § 81.39(b).

<sup>124</sup> *See id.* §§ (a), 81.20(a).

<sup>125</sup> *See* §§ 81.20(a), 81.30(a)-81.31(a).

<sup>126</sup> N.Y. MENTAL HYG. LAW § 81.29(a).

<sup>127</sup> *Id.* § 81.06.

<sup>128</sup> *Id.* § 6.

<sup>129</sup> *Id.*

<sup>130</sup> *In re Joseph V.*, 762 N.Y.S.2d 669, 671 (N.Y. App. Div. 2003) (finding a mother not committed to her sobriety and a sister who was struggling with heroin addiction were not suitable guardians for the individual and were trying to move the person from facility against the advice of medical professionals, and there was worry that they would terminate the individual's life support).

It is difficult to find many cases where parents or family members have tried to get their relative declared AIP.<sup>131</sup> In *In re Doe*, parents sought to get their seventeen, soon to be eighteen-year-old, son declared mentally incapacitated because he suffered from attention deficit disorder and oppositional defiant disorder and was a polysubstance abuser.<sup>132</sup> The court held that the child should not be declared mentally incapacitated.<sup>133</sup> The court reasoned that although the son had used multiple drugs, the parents could not show that he used to the extent that would be considered a “chronic compulsion,” and that the “mere use or even abuse” of drugs by itself, generally, is not sufficient to meet the high burden that mental incapacitation requires.<sup>134</sup> Even though mental incapacitation can be used for drug addicted individuals, this case exemplifies how hard it can be to get an individual, even with polysubstance abuse, declared AIP and even shows the stigma that a person addicted to drugs is a nuisance to be dismissed.<sup>135</sup>

All guardianships will eventually end, hopefully because the AIP is no longer impaired and is able to fully exhibit control over his or her life. Courts can terminate the guardianship when the AIP is able to exercise some or all control over the rights granted to the guardian, if the AIP has passed away, or if for some other reason the court deems the guardianship is no longer necessary.<sup>136</sup> For a heroin addict, AIP would most likely end when there is a showing that the individual no longer uses heroin and has no indication of relapsing. During the guardianship, the court can modify the terms if the AIP has gained some control over his or her life or is unable to provide and maintain areas that were not covered in the original guardianship.<sup>137</sup> At times, a guardian can

<sup>131</sup> See *In re Doe*, 696 N.Y.S.2d 384, 386 (N.Y. Sup. Ct. 1999). Through my research I was only able to find one case where the parents, unsuccessfully, tried.

<sup>132</sup> See *id.*; see also *Polysubstance Addiction*, BRADFORD HEALTH SERVS., <http://bradfordhealth.com/polysubstance-addiction/> (last visited Feb. 27, 2017). Polysubstance abuse is when an individual abuses three or more substances for twelve months or longer. See *id.* The person may not be considered an addict of either of the substances individually but when combined, it would reach the level of abuse. See *id.*

<sup>133</sup> See *In re Doe*, 696 N.Y.S.2d at 389.

<sup>134</sup> *Id.* at 388.

<sup>135</sup> See *id.*

<sup>136</sup> See N.Y. MENTAL HYG. LAW § 81.36(a) (McKinney 2004).

<sup>137</sup> *Id.*

resign or even suspend his or her role.<sup>138</sup> However, if there is any misconduct, failure to comply, or another cause that would make the guardian unfit, the court can remove the guardian from his or her duty.<sup>139</sup> The court can initiate a hearing to remove a guardian based on the annual reports filed, or any person that would be qualified to initiate the original proceeding to declare someone AIP, under section 81.06, can bring suit to have a guardian removed for cause.<sup>140</sup>

With this new standard, people who are addicted to opioids would be able to get better treatment, without their criminal record or worry about not finding a job because of a past mistake. This standard would leave those who have gone through or are currently going through treatment the ability to move on without stigma.

### *C. Stigma of a Criminal Conviction, Drug Use, and Mental Illness*

After an individual has either completed the diversion program or served his or her sentence, confronted and overcame his or her drug addiction, or is declared only partially mentally incapacitated or no longer requires a guardian, he or she now has to confront the problem of finding employment and integrating back into society with the hopes of living a normal life. Even after overcoming all these obstacles that addiction presents, he or she will still be haunted. One thing that will haunt the person is the stigma attached to drug users.

Stigma is when people feel as though they are labeled or defined by a certain characteristic that society has negative feelings towards, and these people may be viewed as having bad morals or are discredited individuals.<sup>141</sup> Stigmas are negative stereotypes

<sup>138</sup> *See id.* § 81.37(a).

<sup>139</sup> *Id.* § 81.35.

<sup>140</sup> *Id.*; *see In re Wais*, 464 N.Y.S.2d 634, 634 (N.Y. Sup. Ct. 1983). Although this case deals with the former mental incapacitation statute that was replaced by § 81.00, this case provides insight into who is considered an interested party that is analogous to an individual who would be qualified to commence a proceeding under § 81.06.

<sup>141</sup> Arthur Kleinman & Rachel Hall-Clifford, *Stigma: A Social, Cultural, and Moral Process*, 63 J. EPIDEMIOLOGY & CMTY. HEALTH 1, 1 (2009), [https://dash.harvard.edu/bitstream/handle/1/2757548/Klienman\\_StigmaSocialCultural.pdf?sequen](https://dash.harvard.edu/bitstream/handle/1/2757548/Klienman_StigmaSocialCultural.pdf?sequen).

that can lead others to be prejudice or leap to judgments or assumptions about a person's character.<sup>142</sup> When people are stigmatized, they feel that they are devalued in the eyes of the public, and this can lead to further issues, such as depression.<sup>143</sup> Stigmas also negatively impact the individual's ability to find employment.<sup>144</sup> Not only can stigmas influence hiring practices of employers, but also, they can cause the individual to withdraw from social interactions, like working.<sup>145</sup>

Research suggests that incarceration negatively impacts long term employment prospects.<sup>146</sup> A study comparing criminal stigma to employment showed that 54% of employers would not call someone for a job interview if the applicant had a criminal record.<sup>147</sup> Furthermore, 66.7% of employers would not hire someone with a violent crime conviction, 27.1% would not hire someone with a drug conviction, and 35.5% would not hire someone convicted of a property crime.<sup>148</sup> The average time from release before an employer would hire someone convicted of a violent crime was almost 2.78 years, a drug crime was 2.39 years, and a property crime was 2.92 years.<sup>149</sup> These statistics indicate that individuals who use drugs are even less likely to find employment as there is a correlation between drug use and property crime.<sup>150</sup>

Regardless of a criminal conviction, the mere fact that an individual was addicted to drugs can stigmatize them. Labels such as "crackhead," "pillhead," and "junkie" are all examples of how the individual's addiction is viewed as their identity instead of a

<sup>142</sup> See Kendra Cherry, *Understanding Prejudice*, VERYWELLMIND, <https://www.verywellmind.com/what-is-prejudice-2795476> (last updated Oct. 9, 2018).

<sup>143</sup> See Kelly E. Moore et. al., *The Effect of Stigma on Criminal Offenders' Functioning: A Longitudinal Mediation Model*, 37 *DEVIANT BEHAVIOR* 196, 198 (2016).

<sup>144</sup> *Id.*

<sup>145</sup> See *id.* at 199.

<sup>146</sup> SCOTT H. DECKER, *supra* note 48, at 11.

<sup>147</sup> *Id.* at 56.

<sup>148</sup> *Id.* at 54.

<sup>149</sup> *Id.*

<sup>150</sup> Duane C. McBride et al., *The Drugs-Crime Wars: Past, Present, and Future Directions in Theory, Policy, and Program Interventions*, NAT'L CRIM. JUST. REFERENCE SERV. 1, 103 (2003), <https://www.ncjrs.gov/pdffiles1/nij/194616d.pdf>. Drug users have a higher likelihood of committing property crimes (burglary, theft etc.) than other segments of the population. See *id.*

behavior or disease.<sup>151</sup> People often view drug use as a conscious choice by the addict, when in actuality it may not have been in the addict's total control.<sup>152</sup> Many even think that addiction shows a weak character or suggests that there is a flaw within that individual that cannot be fixed.<sup>153</sup> This perception that the addict is weak or flawed can negatively impact the individual's self-perception and lead to the individual hiding the drug use and struggling to get clean.<sup>154</sup> This not only affects the person when he or she is trying to get clean, but also when the individual is trying to remain clean. Because of Post-Acute Withdrawal Syndrome ("PAWS"),<sup>155</sup> the individual who is now clean may experience a desire to relapse and may be scared to seek help if people believe he or she is weak or flawed.<sup>156</sup> Also, the individual may be worried about losing his or her insurance, child custody, parental rights, or employment.<sup>157</sup> Insurance providers can refuse to cover treatment programs, parents may be viewed as neglectful and

<sup>151</sup> *Stigma and People Who Use Drugs*, DRUG POLY ALLIANCE, [http://www.drugpolicy.org/sites/default/files/DPA\\_Fact\\_Sheet\\_Stigma\\_and\\_People\\_Who\\_Use\\_Drugs.pdf](http://www.drugpolicy.org/sites/default/files/DPA_Fact_Sheet_Stigma_and_People_Who_Use_Drugs.pdf) (last visited Feb. 27, 2017).

<sup>152</sup> See Evelyn Miwa, *Time to Remove the Negative Lens of Stigma*, DRUG POLY ALLIANCE (July 22, 2015), <http://www.drugpolicy.org/blog/time-remove-negative-lens-stigma>. This article suggests that drug use is often heavily influenced by social determinants of health ("SDH"). *Id.* SDH are the conditions in which people are born, grow, work, live, and age, and the wider set of forces and systems shaping the conditions of daily life. See *Social Determinants of Health*, WORLD HEALTH ORG., [http://www.who.int/social\\_determinants/en/](http://www.who.int/social_determinants/en/) (last visited Feb. 24, 2017). These forces and systems include economic policies and systems, development agendas, social norms, social policies, and political systems. See *id.*

<sup>153</sup> David L. Rosenbloom, *Coping with the Stigma of Addiction*, REALTImERECOVERY.NET (May 11, 2015), <http://realtimerecovery.net/coping-with-the-stigma-of-addiction/>.

<sup>154</sup> See *id.*

<sup>155</sup> See Erik MacLaren, *Post-Acute Withdrawal Syndrome*, DRUGABUSE.COM, <http://drugabuse.com/library/post-acute-withdrawal-syndrome/> (last visited Oct. 22, 2018) ("[PAWS] refers to a constellation of symptoms experienced by some individuals who are addicted to alcohol or certain drugs after a prolonged period of withdrawal.")

<sup>156</sup> See Rosenbloom, *supra* note 153.

<sup>157</sup> See *Stigma and People Who Use Drugs*, *supra* note 151; *Drug Use Hurts Kids*, NAT'L INST. ON DRUG ABUSE, <https://easyread.drugabuse.gov/content/effects-drugs> (last visited Oct. 22, 2018). This article discusses the effects that drug use has on an individual's family and personal life. See *id.* Drug abuse can affect all facets of the individual's life as it can endanger the children; financially cripple the family; leave the individual unable to work; be detrimental to the mental health and physical health of the user; and hurt relationships between friends and family. See *id.*

labeled as “bad” moms or dads,<sup>158</sup> and most employees can be terminated for drug use as it is not protected by the Americans with Disabilities Act.<sup>159</sup> The government even recognizes that the stigma of drug use has led to societal detriment as it prevents people from getting treatment, some doctors will refuse to treat, and some pharmaceutical companies will not work towards developing new methods to treat addiction.<sup>160</sup> If an individual is also declared mentally incapacitated, the person will face not only the stigma of being a drug user, but also additional negative stigma about being mentally incapacitated and having a mental illness. Those who are aware of the AIP designation may have negative perceptions of the individual’s inability to take care of his or her personal, financial, or property needs.<sup>161</sup> Additionally, if people conflate mental illness with being AIP, those individuals face even more stigma. Studies have found three main stigmas surround mental illness: (1) the person should be feared; (2) the person is irresponsible and needs to be taken care of by others; and (3) the person is childlike and needs to be cared for.<sup>162</sup> Further, mental illness stigma can lead to trouble finding employment, education, housing, and health insurance, and can lead to bullying and harassment.<sup>163</sup>

Only fifty-seven percent (57%) of adults without mental health symptoms believe people are caring and sympathetic to people with mental illness, while only twenty-five percent (25%) of adults with mental health symptoms believe that people are caring and sympathetic to people with mental illness.<sup>164</sup> Though only slightly

<sup>158</sup> See *Effects of Drugs*, NAT’L INST. ON DRUG ABUSE, <https://easyread.drugabuse.gov/content/effects-drugs> (last visited Oct. 30, 2018).

<sup>159</sup> See Americans with Disabilities Act 42 U.S.C. §§ 12111-12117 (2009).

<sup>160</sup> *Drug Abuse and Addiction: One of America’s Most Challenging Public Health Problems*, NAT’L INST. ON DRUG ABUSE, <https://archives.drugabuse.gov/publications/drug-abuse-addiction-one-americas-most-challenging-public-health-problems/stigma-drug-abuse> (last visited Feb. 27, 2017).

<sup>161</sup> See N.Y. MENTAL HYG. LAW § 81.02(b) (McKinney 2018).

<sup>162</sup> Patrick W. Corrigan & Amy C. Watson, *Understanding the Impact of Stigma on People with Mental Illness*, 1 WORLD PSYCHIATRY 16, 17 (2002).

<sup>163</sup> *Mental Health: Overcoming the Stigma of Mental Illness*, MAYO CLINIC (May 24, 2014), <http://www.mayoclinic.org/diseases-conditions/mental-illness/in-depth/mental-health/art-20046477>.

<sup>164</sup> *Data on Behavioral Health in the United States*, AM. PSYCHOL. ASS’N, <https://www.apa.org/helpcenter/data-behavioral-health.aspx> (last visited Oct. 15, 2018).

above half of adults believe people are supporting and helpful to those with mental illness, those who suffer from it perceive that there is even less support.<sup>165</sup> This self-doubt and perception of little support will only hinder an individual in recovery.

The current system leaves individuals with very little options for recovery that do not leave them without another stigma to overcome. Entering the criminal justice system leaves the individual with a criminal record and potentially no drug rehabilitation. If the person is lucky to have been entered into a diversionary program, he or she may not have a criminal record, but the constant threat of imprisonment is looming in the background. Either way, the person is left feeling like a criminal as he or she is being punished. The alternative option, to bring the individual to court to be declared mentally incompetent, forces family and friends to argue the individual is mentally unfit to take care of him or herself.<sup>166</sup> This is a hard process that is not desirable and can leave the person declared mentally incompetent with a further stigma. A better system would allow for treatment without treating the person like a criminal or declaring them mentally unfit to take care of their own person.

### PART III: DECRIMINALIZATION OF HEROIN USE AND CREATING A MEDICAL DEPENDENT STANDARD

To help individuals trying to beat their addiction and to avoid some of the negative stigma that results from criminal incarceration or mental incapacitation, heroin use should be decriminalized and dealt with in the civil court system with the creation of a medical dependent standard. The creation of a medical dependent standard and the civil proceeding after the individual is caught would allow those who test positive for opioid use (heroin) to be classified as medically dependent, so a medical guardian can make relevant medical decisions for the individual. A medical dependent standard will allow individuals, upon completion of treatment, the ability to return to a normal life with little to no stigma.

<sup>165</sup> *See id.*

<sup>166</sup> *See* N.Y. MENTAL HYG. LAW § 81.02.

A. *“Arrest” & Court Proceedings Under a Medical Dependent Standard*

With decriminalization, individuals who are caught using heroin, in possession of heroin, or purchasing heroin would not be arrested, but rather processed civilly. To clarify, this will only apply to individuals with minor possession. Those who are able to be charged with intent to distribute heroin (people supplying/selling heroin) would not be eligible for this program. Furthermore, any other crime the individual commits, even if related to the drug use (i.e. larceny, burglary, robbery etc.), can still be prosecuted in the criminal justice system.

To transition from criminal punishments to rehabilitation programs, diversion courts would be moved from the criminal system to the civil system in order to process these individuals. Instead of being arrested, they would be issued a citation referring them to the civil diversion or drug court.<sup>167</sup> Now individuals caught using, in possession, or purchasing heroin would not be handcuffed, arrested, and processed, but instead their information would be recorded, and they would be issued a citation to appear at the diversion court at a certain time.<sup>168</sup> Very similar to minor possession charges of marijuana in New York City,<sup>169</sup> heroin would now be treated in the same regard when it comes to enforcement. The difference would be that instead of paying a fine for possession, the individual would have to appear in front of a civil court at a later date where his or her status as medically dependent will be determined. The time frame that the individual would have to appear would be thirty-six hours.<sup>170</sup>

<sup>167</sup> See *Drug Treatment Courts*, *supra* note 87. This system could be moved from the criminal system to the civil system. The only difference would be that there would be no criminal punishment, and instead the court could rely on civil remedies.

<sup>168</sup> This process would be similar to how New York City no longer arrests individuals for possession of 25 grams of marijuana or less but instead issues them a non-criminal violation citation. See N.Y. Penal Law §§ 221.00-221.30, 80.05(4) (McKinney 2018). The difference would be instead of a fine (like New York City imposes), the individual would be ordered to appear at the diversion court. See also Tina Moore et al., *NYPD to stop Arresting for Minor Marijuana Possession, Will Issue Tickets Instead*, N.Y. DAILY NEWS (Nov. 11, 2014, 9:36 AM), <http://www.nydailynews.com/new-york/nyc-crime/nypd-stop-arrests-low-level-marijuana-charges-source-article-1.2005222>.

<sup>169</sup> See Moore et al., *supra* note 168.

<sup>170</sup> This time frame was chosen as many tests will not detect heroin in the individual's system after two days. See *How Long Does Heroin Stay in Your System?*, AM. ADDICTION

The information<sup>171</sup> about the individual would be transmitted to the diversion or drug court within the municipality where the individual was caught using, buying, or in possession of heroin. If the individual does not appear at the drug or diversion court within thirty-six hours of the summons being issued, the drug court or diversion court would issue a civil contempt order for the individual's arrest.<sup>172</sup> This process could be analogized to when an individual who has been ordered, by subpoena, to be a witness at a civil trial fails to appear, the court has the power to issue a civil contempt order for the person to be forcefully brought to court.<sup>173</sup>

The individual would have the right to have an attorney present during the proceedings, whether it be an employee of the state or a private attorney. While there is no right to have an attorney appointed in a civil proceeding, under this standard it would be important to have either an attorney present to guide them through the process or a state representative. While an attorney would be preferred, in the absence of an attorney, a state representative, well-versed in the law, should be available to guide them through the hearings and medical dependency process. At this hearing, the court would order a drug test to be conducted to detect the presence of heroin and opioids. Ideally, a urine and hair sample would be taken as a urine sample can show heroin and/or opioids generally used within two days while a hair follicle test can detect heroin and/or opioids that has were used within three months.<sup>174</sup>

While each proceeding would be very fact specific, the more evidence that the individual uses and abuses opioids, the more the court can determine the basis to declare the individual medically

CTR., <http://americanaddictioncenters.org/heroin-treatment/how-long-in-system/> (last updated Oct. 21, 2018). A longer waiting period would allow for the drug to run its course and not be detected by many drug tests. This thirty-six-hour time period would allow individuals caught using heroin to be tested when the opioid could still be detected in their system. Conducting the test within this time period would allow for the most accurate information and evidence to be obtained about that individual's drug use at the time he or she was observed. *See id.*

<sup>171</sup> This information would include the name, date of birth, address, workplace, and emergency contact. This information could then be used to find them if they fail to appear.

<sup>172</sup> *See* N.Y. JUD. LAW § 753(A)(5), (8) (McKinney 2016).

<sup>173</sup> *See id.*

<sup>174</sup> *How Long Does Heroin Stay in Your System?*, *supra* note 170.

dependent.<sup>175</sup> This is why information about how many times the individual has been caught in possession, use, or purchasing heroin is relevant. This information is most important for the court as it goes towards showing an addiction and a history of use that can be used to determine what the appropriate treatment program would be. All this information, after being preserved by the court, could be used in subsequent future hearings to determine whether the individual should be declared medically dependent. The court should also consider the nature of heroin use and the fact that it is highly addictive and causes an immense bodily desire to achieve that feeling again, making it less likely for casual use.<sup>176</sup> If the individual is found to be a chronic user who consistently engages in heroin use, he or she will be deemed medically dependent by the court and appointed a medical guardian.

### *B. The Medical Dependent Standard*

While a medical dependent standard does not currently exist, it will be similar to mental incapacitation but less intrusive on the individual's life in the long-term. The difference between mental incapacitation and this new proposed medical dependent standard will be the presumption on the dependent and allowing the dependent to retain as many rights as possible during the recovery process.<sup>177</sup> This means that once the person completes treatment, the court assumes and has to act based on the presumption that the person is rehabilitated unless shown otherwise. In essence, the medical dependent standard provides the medical guardian the same control over the medically dependent individual as a parent would have over the medical treatment decisions for a child under the age of eighteen.<sup>178</sup> Additionally, the process for

<sup>175</sup> See *infra* Part III(B) (discussing the specifics of the medical dependent standard).

<sup>176</sup> See *The Addictive Nature of Heroin*, PAT MOORE FOUND., <https://www.patmoorefoundation.com/blog/addictive-nature-heroin> (last visited Feb. 27, 2017) (explaining how the brain "begs" the body to engage in subsequent heroin use in order to achieve that pleasure response); *Heroin*, *supra* note 17 (describing the immense drug-seeking nature and craving for heroin regardless of the consequences).

<sup>177</sup> See *infra* Part III(B).

<sup>178</sup> See N.Y. PUB. HEALTH LAW § 2504(2) (McKinney 2005) (listing the abilities of individuals to consent to medical procedures for their children).

declaring someone medically dependent would be quicker than a mental incapacitation trial as the evidence required is showing that the person uses heroin and/or opioids. Also, a showing will be made that the person has abused opioids in the past, this is not a one-time event, and the person is in need of treatment. This would come down to a case by case analysis of the facts to determine whether the individual has a substance abuse problem and is in need of treatment.

The guardian, like a parent, would decide what is the appropriate treatment program and method for the dependent and force the individual to enter the program. Similar to mental incapacitation, the court would want to grant as little rights as possible to the medical guardian. For example, if the person is placed in a rehabilitation or treatment facility that allows the person the freedom to work during the program, similar to a work release program, the individual will most likely be fit enough to control finances. Thus, the medical guardian would not have to control that aspect of the individual's life during treatment.

Similar to medical guardians for mental incapacitation, the individual who is appointed as the medical guardian must act in the best interest of the medically dependent person.<sup>179</sup> The goal would be to enable family or a concerned friend to force the individual into a treatment center and to get him or her help as early as possible before long term effects start to develop<sup>180</sup> or before the person has a fatal overdose.<sup>181</sup> The reason for this new standard is to have an easier pathway for family and friends to get their loved one help, without having to resort to labeling the person as mentally incapacitated. To assist the guardian in making the appropriate decisions, it would be important to provide access to an Office of Alcoholism and Substance Abuse Services ("OASAS") Certified Drug Counselor ("CASAC") to provide

<sup>179</sup> See N.Y. MENTAL HYG. LAW § 81.20(a) (McKinney 2018).

<sup>180</sup> See *What Are the Long Term Effects of Heroin Use?*, NAT'L INST. DRUG ABUSE, <https://www.drugabuse.gov/publications/research-reports/heroin/what-are-long-term-effects-heroin-use> (last updated June 2018).

<sup>181</sup> See Jen Christensen, *How Heroin Kills You*, CNN, <http://www.cnn.com/2014/02/04/health/how-heroin-kills/> (last updated Aug. 29, 2014, 3:24 PM) (describing how heroin affects the body and what exactly occurs during an overdose which will lead to the individual's death).

information on available treatment to determine what method or path would best suit the interest of the medical dependent.<sup>182</sup>

Medical guardians would have to comply with similar requirements as AIPs' guardians, such as educational requirements, testing, and filing reports periodically with the court to update it on the individual's status.<sup>183</sup> This section of the law could almost mirror sections 81.06-81.44 of New York Mental Hygiene law, which lists the requirements of AIP guardians.<sup>184</sup> The ideal guardian would be a family member, but a similar concerned party, as provided in the mental health law, will be assigned if the family members are not qualified.<sup>185</sup> Also, a medical guardian can be suspended, terminated, modified, or removed in the same fashion as a guardianship for AIPs.<sup>186</sup>

The potential problem with this standard is that it is very intrusive to individuals' lives. But it is no more intrusive than the current system. Medical dependents are likely going to be forced into a treatment facility.<sup>187</sup> Treatment can range anywhere from less than ninety days to beyond, depending on the severity of the individuals' addiction, but it is recommended that treatment lasts over ninety days for the best results.<sup>188</sup> Similar to mental incapacitation, during the period of treatment, the person will not have control over where he or she stays, and the medical guardian will be responsible for choosing the appropriate place, along with controlling the dependent's finances, if necessary.<sup>189</sup> However, the

<sup>182</sup> See *Credentialed Alcoholism and Substance Abuse Counselor (CASAC)*, N.Y. ST. OFF. ALCOHOLISM & SUBSTANCE ABUSE SERV., <https://www.oasas.ny.gov/sqa/credentialing/CASACCover.cfm> (last visited Feb. 27, 2017).

<sup>183</sup> See MENTAL HYG. LAW §§ 81.31, 81.39(b).

<sup>184</sup> See *id.* §§ 81.06-81.44 (listing how an individual becomes a guardian, when an individual is deemed to require guardianship, the area and scope of guardianship, reimbursement, filing requirements, discharge and removal, and generally, all the regulatory and statutory requirements and implications of being a guardian of a person declared mentally incapacitated).

<sup>185</sup> See *In re Joseph V.*, 762 N.Y.S.2d 669, 671 (N.Y. App. Div. 2003).

<sup>186</sup> See N.Y. MENTAL HYG. LAW §§ 81.35-81.37.

<sup>187</sup> See *How Long Does Drug Addiction Treatment Usually Last?*, NAT'L INST. DRUG ABUSE, <https://www.drugabuse.gov/publications/principles-drug-addiction-treatment-research-based-guide-third-edition/frequently-asked-questions/how-long-does-drug-addiction-treatment> (last updated Jan. 2018) (suggesting that three months to twelve months results in better outcomes for drug rehabilitation in the long term).

<sup>188</sup> See *id.*

<sup>189</sup> See N.Y. MENTAL HYG. LAW §§ 81.21-81.22.

standard differs from mental incapacitation, as the dependent has the presumption that he or she no longer requires a medical guardian after successfully completing the rehabilitation program.<sup>190</sup> Unlike mental incapacitation, this time-bar will prevent the dependent status from continuing any longer than necessary. As long as the individual goes through the treatment program successfully and complies with the terms of the program (i.e. refraining from drug use, passing drug tests, going to therapy, etc.), the individual will be presumed medically independent unless the guardian can show, through clear and convincing evidence, that the individual<sup>191</sup> is likely to relapse into drug use or is planning on abusing drugs again. The medical guardian needs to prove this, unlike in mental incapacitation where AIPs must prove their competence.<sup>192</sup> Combined with the time-bar, this will make it even less intrusive than mental incapacitation over time.

While intrusive, the medical dependent standard is designed to be a time-barred and limited designation that will not follow the individual, as he or she has the presumption of rehabilitation once the treatment program is completed. It further allows individuals to be presumed competent once treatment is completed and leaves them without a criminal record, ultimately providing the individuals with little to no stigma and the greatest chance of integrating back into a normal life.

#### PART IV: IMPLEMENTATION OF THE MEDICAL DEPENDENT STANDARD AND ITS BENEFITS

The current system can be modified to accommodate the medical dependent standard by converting the drug courts from criminal to civil and changing the remedies and enforcement of orders. Within this system, the burden of proof will be altered to favor the person in treatment. While these conversions are costly, they can be implemented efficiently to minimize the expenses and will provide the greatest results.

<sup>190</sup> See *supra* p. 27.

<sup>191</sup> This is the same burden of proof used to declare an individual mentally incapacitated. See N.Y. MENTAL HYG. LAW § 81.02(b).

<sup>192</sup> See N.Y. MENTAL HYG. LAW § 81.36(d).

### A. *Converting the Court System*

An integral part of this proposal is moving the drug and diversion courts from criminal courts to civil courts. This sounds like a major overhaul of the judicial system, but in actuality, it is only the title of the court that changes, along with the remedies provided. The drug courts are designed to shift and divert people from jail into rehabilitation.<sup>193</sup> The major difference between this proposal and the current system is that there will be no criminal punishment if an individual fails a rehabilitation program.<sup>194</sup> Instead, the individual's time as a medical dependent will be extended, making the time in treatment longer. There will not be any additional burden on the current system in the sense of the amount of cases and individuals being processed. These individuals are already being processed through the drug court; the only difference is that, in this proposed system, they are not arrested and processed criminally. Instead they appear in court voluntarily or are mandated to appear via a contempt order.

Further, the structure for enforcement is already in place. The court system already has the process in place for issuing civil contempt orders,<sup>195</sup> ordering people into treatment,<sup>196</sup> declaring individuals mentally incapacitated, and assigning guardianships.<sup>197</sup> Even though the person would be forcibly brought to court, this would be a non-criminal charge, as it would be a civil contempt order, not an arrest warrant. Police would be able to issue the citations during the regular course of their patrols and investigations. Also, since fewer resources would be required because the police would no longer be actively trying to arrest individuals using heroin, more resources could be focused on arresting suppliers and dealers of the dangerous drug.<sup>198</sup> During

<sup>193</sup> See *Drug Treatment Courts*, *supra* note 87.

<sup>194</sup> See N.Y. CRIM. PROC. LAW § 216.05(9)(c) (McKinney 2016).

<sup>195</sup> See N.Y. JUD. LAW § 753(A) (McKinney 2016).

<sup>196</sup> See generally CRIM. PROC. LAW § 216.05. This criminal procedure would have to be incorporated into an analogous civil procedure law in order to be used in civil courts.

<sup>197</sup> See N.Y. MENTAL HYG. LAW § 81.02.

<sup>198</sup> See *Legalization Will Reduce Crime, Free Up Police Resources*, CNBC, <http://www.cnbc.com/id/36201668> (last updated Apr. 20, 2011, 1:34 PM). With police no longer looking for drug users, they would be able to devote their resources towards finding suppliers and dealers. Resources could now be spent on sting operations, undercover work, and surveillance activity. By decriminalizing heroin use, a person is given a citation to

the arrests of suppliers and dealers, the police could issue these citations for those who are unfortunate enough to be addicted to heroin and at the scene purchasing the drug during the raid or arrest. While this proposed medical dependency standard cannot stop people from relapsing, it does provide those who fully recover a chance to find employment or educational opportunities without the hindrance of a criminal record and removes the constant threat of imprisonment looming over them.

*B. Burdens of Proof and Presumption of the Medical Dependent and the Medical Guardian*

This Note suggests that the current standard of guardianship should apply to these medical dependents, except for the presumption and burden of proof required in cases of heroin use. As discussed earlier in this Note, a person declared AIP has to show that he or she has regained enough competence to regain control over each aspect of his or her life.<sup>199</sup> For example, the person must show he or she is competent enough to control his or her finances again, or his or her living situation. The burden rests on the person declared AIP, whereas, in the medical dependent standard, the burden would rest upon the medical guardian.<sup>200</sup> After the completion of the treatment process, the medical dependent would gain medical independence, unless the guardian can show a likelihood of relapse or that the individual has not recovered.

The medical guardian would be chosen similarly to the current method. As in cases of mental incapacitation, the ideal medical guardian for a medically dependent person would be a family member or close friend.<sup>201</sup> However, if there is no family member or a friend willing or qualified, the court will have to assign a medical guardian. This would be the same process for when an individual is declared mentally incapacitated. The court would

appear, instead of being, arrested, processed, and booked for a drug possession, which would take a fraction of the time.

<sup>199</sup> See *supra* p. 19 and note 136.

<sup>200</sup> See N.Y. MENTAL HYG. LAW § 81.36(d).

<sup>201</sup> See *In re Joseph V.*, 762 N.Y.S.2d 669, 671 (N.Y. App. Div. 2003).

appoint him or her a guardian,<sup>202</sup> which could be a non-profit or some other organization.<sup>203</sup> States also have guardianship services, along with local government social services, that can help provide people with guardianship needs.<sup>204</sup> These public and private agencies can help individuals find guardians or serve as guardians themselves in order to help the person through recovery.

### *C. Costs and Treatment*

Critics of this proposal will emphasize the cost of providing treatment services to all these people. While this is a valid point because it can be expensive to get people treatment, it can also be very expensive to incarcerate them.<sup>205</sup> The goal of this system is that once these individuals are heroin free and do not have a criminal record, they will be able to find gainful employment and make up for the costs through property taxes, sales tax, and income tax. This would offset the costs of treatment and, hopefully in the long-term, surpass the rehabilitation costs. Also, by transitioning out of the criminal system, it will reduce costs in other places that can potentially offset the increased monies spent on treatment facilities. In 2013, the New York Times found that in New York City alone, it costs approximately \$168,000 annually per inmate, with New York State averaging \$60,000 per year to house an inmate.<sup>206</sup> Drug rehabilitation programs can range from free to north of \$25,000 per month.<sup>207</sup> However, the rehabilitation

<sup>202</sup> See MENTAL HYG. LAW § 81.19.

<sup>203</sup> See *id.*; *Guardianship Services*, NYSARC.ORG, <http://nysarc.org.s109594.gridserver.com/supports-and-services/guardianship-services/> (last visited Feb. 27, 2017) (providing an example of a non-profit organization that provides guardianship services).

<sup>204</sup> See generally Sia Arnason et al, *Guide to Guardianship*, NASSAUCOUNTYNY.GOV, <http://nycourts.gov/ip/gan/manual/index.shtml> (last visited Feb. 27, 2017); *Adult Services*, NASSAUCOUNTYNY.GOV, <https://www.nassaucountyny.gov/1896/Adult-Services> (last visited Feb. 27, 2017) (showing that the Nassau County Department of Social Services is an example of local government's social services department that is established to help members of the community).

<sup>205</sup> See Marc Santora, *City's Annual Cost Per Inmate is \$168,000, Study Finds*, N.Y. TIMES (Aug. 23, 2013), [http://www.nytimes.com/2013/08/24/nyregion/citys-annual-cost-per-inmate-is-nearly-168000-study-says.html?\\_r=0](http://www.nytimes.com/2013/08/24/nyregion/citys-annual-cost-per-inmate-is-nearly-168000-study-says.html?_r=0); Leah Miller, *How Much Does Rehab Cost?*, REHABS.COM, <http://www.rehabs.com/about/how-much-does-rehab-cost/> (last visited Feb. 27, 2017).

<sup>206</sup> See Santora, *supra* note 205.

<sup>207</sup> See Miller, *supra* note 205.

centers that cost tens of thousands of dollars per month are ultra-luxury and designed for those who want to get clean but still want to maintain an extremely luxurious lifestyle.<sup>208</sup> Typical inpatient rehabilitation programs cost between \$14,000 and \$27,000 per month.<sup>209</sup>

While this is still extremely costly, it has the potential to cost less than incarcerating the individuals in some places in New York State.<sup>210</sup> Furthermore, individuals with insurance may have this cost reduced.<sup>211</sup> In the past, there was an issue that insurance companies would not cover treatment programs, but New York State has introduced legislation that will require a minimum of sixty days of coverage provided by private insurers; then if the attending physician does not clear the individual, the coverage will be extended for thirty more days, for a total of ninety days of private coverage.<sup>212</sup> After the sixty or ninety days, the coverage does not end either: it will slowly transition from the private coverage over to Medicaid, with the cost taken by the state and not the individual counties.<sup>213</sup> Another bill was introduced that requires insurance providers to cover opioid-addiction treatment medications as well.<sup>214</sup>

Further, there may be some concern that this proposal could reduce the amount of probation officers required as there will be less individuals being processed through the criminal justice system. However, probation officers could transition into serving the role of medical guardian for the individual drug user. Probation officers are already well suited and qualified to engage in monitoring and making sure the individual is adhering to the conditions of the treatment program.<sup>215</sup> Many will already have

<sup>208</sup> *See id.*

<sup>209</sup> *Id.*

<sup>210</sup> *See* Santora, *supra* note 205; Miller, *supra* note 205.

<sup>211</sup> *See* ANDREA STEWART-COUSINS ET AL., N.Y. ST. S., NEW YORK'S HEROIN ADDICTION CRISIS 13 (2014), [https://www.nysenate.gov/sites/default/files/New%20York%20Heroin%20Epidemic%20Crisis\\_0.pdf](https://www.nysenate.gov/sites/default/files/New%20York%20Heroin%20Epidemic%20Crisis_0.pdf).

<sup>212</sup> *See id.*; S. 7103, 2013-2014, Legis. Sess. (N.Y. 2014).

<sup>213</sup> STEWART-COUSINS, *supra* note 211, at 13; *see* N.Y. Legis. Sess. 7103.

<sup>214</sup> STEWART-COUSINS, *supra* note 211, at 13; *see* S. 4189, 2013-2014, Reg. Sess. (N.Y. 2013).

<sup>215</sup> *See Probation and Pretrial Officers and Officer Assistants*, USCOURTS.GOV, <http://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and->

experience with individuals who are involved with drug use, considering it is currently a crime, and the additional training required for guardianship can be worked into their periodic exams and educational courses.<sup>216</sup>

While this program is not a cheap alternative to incarceration, the goal is to allow these individuals who overcame addiction the ability to transition back into a normal life. This alternative allows for a way where the individuals can find employment or seek educational opportunities without being hindered by mistakes they might have made in the past.

#### PART V: CONCLUSION

Heroin is an epidemic in the United States and has taken root in New York. Progress has been made towards treating heroin and opioid addiction as a mental health problem, but the safety net beneath it is the criminal justice system. Beating addiction is not easy, and many people do not win this fight on their first attempt. This leaves many with a criminal record and conviction. Then, once released and having overcome the addiction, the person has to bear the added weight of stigma. The medical dependent standard would allow these individuals to enter recovery with as little stigma as possible and with as little record of past use as possible. While the medical dependent standard is not a perfect solution, neither is putting these individuals in jail. No amount of forced incarceration or treatment will be enough, by itself, to overcome heroin addiction. Giving these individuals a criminal record only provides them with a chain that is weighing them down once they successfully beat the addiction, further adding to the stigma that they must try to overcome in order to live a productive life.

The medical dependent standard is meant to give those who win this fight with addiction a fighting chance to live a successful and

pretrial-officers-and-officer (last visited Feb. 27 2017) (detailing probation officers' roles in the supervision of defendants and offenders in the community).

<sup>216</sup> See *Division of Criminal Justice Services*, CRIMINALJUSTICE.NY.GOV, <http://www.criminaljustice.ny.gov/opca/training.htm> (last visited Feb. 27, 2017) (outlining the qualifications and requirements to become a probation officer along with the education and training they go through and are required to continue during their employment).

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productive life—a life where they can find employment, seek higher education, and start or continue to raise a family without a constant shadow looming over them, and without the stigma of being a former drug user or a criminal. While it is very similar to mental incapacitation, the presumption is that once the person completes the program, they are no longer medically dependent. Only through clear and convincing evidence can the guardian extend the dependent’s status, making this system less intrusive than the current standard. Also, it allows the individual to get treatment without the stigma of being “mentally incapacitated,” which implies some sort of mental impairment. Adopting this standard will allow people who beat addiction to live a life that reflects who they are: just a regular person, like you or me.<sup>217</sup>

<sup>217</sup> See generally *New York Heroin Treatment Center and Rehabilitation Programs*, HEROIN.NET, <https://heroin.net/help/new-york/> (last visited Oct. 22, 2018) (providing a comprehensive directory of New York treatment clinics for those struggling with addiction).