

# The Association Between Contemporaneous Intoxication and the Exercise of Judicial Discretion: Implications for Sentencing Policy

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## ABSTRACT

*A growing amount of anecdotal and descriptive evidence underscores the high prevalence of alcohol and substance abuse among justice-involved populations. In addition to contributing to higher rates of mortality, addiction is often discussed as a factor that both contributes to criminal acts and, especially with regard to non-violent offenses, the scope of mass punishment. However, it is not as apparent how problems of addiction should shape outcomes like criminal sentencing. A foundational challenge is the lack of current empirical knowledge on the extent to which individuals are intoxicated at the time they commit offenses leading to imprisonment and how judges may respond. In this review, we first identify relationships between active drug usage and criminal activity using population-representative survey data collected from a sample of newly incarcerated persons (N=2,135). Respondents self-reported their alcohol and drug use at the time of the crimes that resulted in their incarceration. We then link these data to sentencing outcomes to explore how judges may have exercised their discretion in sentencing these individuals. In doing so, we explore if sentences for individuals using drugs and/or alcohol at the time of their commitment offense received sentences above, within, or below the ranges recommended in the state sentencing guidelines. In examining these unique data, we describe the nature of the relationship between types of crimes (e.g., violent, property), drug usage (e.g., alcohol, opioids), and sentence length. The findings provide new evidence for some relationships between substance use and criminal acts leading to*

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*incarceration. Of particular relevance, we identify several associations between intoxication and crime, though the magnitude and significance vary by both offense and drug type. We consider these findings in light of modern sentencing policy, including the exercise of discretion and the scope and applicability of mitigating factors relevant to addiction.*

## INTRODUCTION

When intoxicated people commit crimes, how does—and should—the law respond? Much of the discussion of this issue revolves around criminal liability (that is, guilt or innocence) or the wisdom of alternative responses, primarily drug courts,<sup>1</sup> diversionary programs away from incarceration and into residential treatment,<sup>2</sup> and in-prison substance abuse treatment programming.<sup>3</sup> Those are important conversations, but they do not address the interaction between contemporaneous intoxication<sup>4</sup> and punishment in traditionally processed cases where the defendant is found, or pleads, guilty and then enters the penal system. How does—and should—the trial judge consider contemporaneous intoxication at sentencing as a general matter? This Article explores that question and more through the perspective provided using a unique set of data that links contemporaneous intoxication to sentencing outcomes among a sample of cases from Pennsylvania.

We examine two historically under-explored issues. First, we seek to provide new estimates, derived from self-reported data, on the number of people incarcerated in Pennsylvania who were using drugs or alcohol at the time they committed the offense(s) for which they were subsequently incarcerated. We then provide new empirical data from Pennsylvania on the potential—and complex—relationships between contemporaneous intoxication and the exercise of judicial discretion at sentencing.

We begin by offering a background on the current carceral landscape, both in sheer size and how it relates to the number of individuals who were using drugs and alcohol at the time of their offenses. We then recap some sentencing fundamentals

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<sup>1</sup> See generally Douglas B. Marlowe, *The Verdict on Adult Drug Courts*, 51 *ADVOCATE* 14 (2008) (“Drug courts are special criminal dockets that provide community-based supervision and substance abuse treatment to nonviolent, drug-involved offenders in lieu of prosecution or incarceration.”).

<sup>2</sup> See generally Michelle A. Lang & Stephen Belenko, *Predicting Retention in a Residential Drug Treatment Alternative to Prison Program*, 19 *J. SUBSTANCE ABUSE TREATMENT* 145 (2000).

<sup>3</sup> See generally Wayne N. Welsh, Gary Zajac & Kristofer B. Bucklen, *For Whom Does Prison-based Drug Treatment Work? Results from a Randomized Experiment*, 10 *J. EXP. CRIMINOLOGY* 151 (2014).

<sup>4</sup> This Article embraces the dominant view that “intoxication” is not confined to alcohol. See JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 301 (8th ed. 2018) (stating that, “[T]he law pertaining to intoxication does not distinguish between alcohol and other foreign substances, including prescribed medications and illegal drugs.”). Indeed, the Model Penal Code definition seems useful: “‘intoxication’ means a disturbance of mental or physical capacities resulting from the introduction of substances into the body.” MODEL PENAL CODE § 2.08(5)(a) (1985).

before diving into the distinct challenges of aggravating and mitigating circumstances generally and contemporaneous intoxication in particular. Next, we describe the thin existing empirical portfolio, especially within the United States, of examinations of sentencing individuals who were intoxicated at the time of their offense. At that point, we turn to the distinctive survey data underlying our study, placing it into context jurisdictionally. Finally, we offer policy guidance and recommendations for guiding future research.

## I. SETTING THE SCENE

### A. *The State of Incarceration*

In the United States, there were about 6,344,000 people were under correctional supervision of some kind in December 2019. While the majority of these people were under some form of community supervision, about 1.4 million people were incarcerated in jails and prisons across the country.<sup>5</sup> Though these numbers reflect a decrease of 17% from the size of the penal population at the apex reached in 2009, the American prison population had still increased by almost 500% over the course of the prior decades. This has resulted in a rate of correctional supervision that, by almost every measure, is unrivaled within the modern world.<sup>6</sup>

There are myriad factors that may have contributed to this explosive growth. The influences of persistent racial and socioeconomic disparities, as reflected in unequal access to education, housing and employment are often cited as system-wide contributors.<sup>7</sup> Others have noted the self-reinforcing and cyclical nature of patterns of incarceration, especially among disadvantaged communities, many of which have been reinforced by recent policies that encourage the disenfranchisement of formerly incarcerated people,<sup>8</sup> discrimination in hiring and employment,<sup>9</sup> and fail

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<sup>5</sup> Elizabeth Ann Carson, *Prisoners in 2019*, BUREAU OF JUST. STAT. (October 2020), <https://bjs.ojp.gov/content/pub/pdf/p19.pdf> [<https://perma.cc/84MZ-CWSQ>]; Todd D. Minton, Lauren G. Beatty & Zhen Zeng, *Correctional Populations in the United States, 2019 – Statistical Tables*, BUREAU OF JUST. STAT. (July 2021), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/cpus19st.pdf> [<https://perma.cc/QJ22-ACXR>].

<sup>6</sup> See, e.g., David Garland, *Penal Controls and Social Controls: Toward a Theory of American Penal Exceptionalism*, 22 PUNISHMENT & SOC'Y 321 (2020); Kevin R. Reitz, *American Exceptionalism in Crime and Punishment: Broadly Defined*, in AMERICAN EXCEPTIONALISM IN CRIME AND PUNISHMENT 1 (Kevin R. Reitz ed., 2017).

<sup>7</sup> See Becky Pettit & Bruce Western, *Mass Imprisonment and the Life Course: Race and Class Inequality in US Incarceration*, 69 AM. SOC. REV. 151 (2004).

<sup>8</sup> See JEFF MANZA & CHRISTOPHER UGGEN, *LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY* (2006); Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147 (2004).

<sup>9</sup> See DEVAH PAGER, *MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION* (2007); Megan C. Kurlychek, Robert Brame & Shawn D. Bushway, *Scarlet Letters*

to address the pervasive effect of publicly accessible criminal history information.<sup>10</sup> More broadly, scholars, including Michelle Alexander, have argued that the growth of the prison population was the natural, and perhaps intended, result of a range of public policies intended to reinforce long-standing segregationist policies.<sup>11</sup>

Within the criminal justice context, changes in sentencing policies, especially for certain types of offenses, have been identified as a potentially meaningful contributor to mass incarceration. Marc Mauer, for example, has argued that the higher crime rates observed in the 1960s led to a repudiation of indeterminate sentencing practices that, in turn, disallowed judges from considering the circumstances of the individual at sentencing.<sup>12</sup> Professor Tonry specifically notes that the “War on Drugs” and the policies it engendered were a major contributing factor in the explosive growth of prison populations.<sup>13</sup> In fact, some have directly linked the Nixonian and Reagan-era drug policies to those of the Jim Crow era in as much as their disparate impact on Black Americans was either foreseeable or intentional.<sup>14</sup> Professor Pfaff, however, argues that the increases in the number of drug crimes, and the number of people being arrested and convicted for drug-related offenses were not sustained for the length of time that would have been necessary to be a direct contributor to prison population growth.<sup>15</sup> However, he acknowledges, there is a meaningful potential that the effects may have been indirect and contributed to prison populations by impacting the social environments and legal context for individuals caught up in the shift towards a more punitive approach to drug use and addiction.<sup>16</sup>

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*and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL’Y 483 (2006).

<sup>10</sup> See SARAH ESTHER LAGESON, DIGITAL PUNISHMENT: PRIVACY, STIGMA, AND THE HARMS OF DATA-DRIVEN CRIMINAL JUSTICE (2020); Gabriel J. Chin, *Race, the War on Drugs, and the Collateral Consequences of Criminal Conviction*, 6 J. GENDER, RACE & JUST. 253 (2002).

<sup>11</sup> Michelle Alexander, *The New Jim Crow*, 9 OHIO ST. J. CRIM. L. 7 (2011); Katie R. Eyer, *The New Jim Crow Is the Old Jim Crow*, 128 YALE L.J. 1002 (2019). See also Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” Was a “War on Blacks,”* 6 J. GENDER RACE & JUST. 381 (2002).

<sup>12</sup> Marc Mauer, *The Causes and Consequences of Prison Growth in the United States*, 3 PUNISHMENT & SOC’Y 9 (2001).

<sup>13</sup> Michael Tonry, *Race and the War on Drugs*, 1994 U. CHI. LEGAL F. 25. See also Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980–1996*, 26 CRIME AND JUSTICE: A REVIEW OF RESEARCH 17 (1999).

<sup>14</sup> See Ira Glasser, *American Drug Laws: The New Jim Crow*, 63 ALA. L. REV. 703, 703–04 (2000). See also David Rudovsky, *The Impact of the War on Drugs on Procedural Fairness and Racial Equality*, 1994 U. CHI. LEGAL F. 237, 237–38 (1994).

<sup>15</sup> John F. Pfaff, *Waylaid by a Metaphor: A Deeply Problematic Account of Prison Growth*, 111 MICH. L. REV. 1087, 1087–88 (2013).

<sup>16</sup> John F. Pfaff, *Escaping from the Standard Story: Why the Conventional Wisdom on Prison Growth is Wrong, and Where We Can Go From Here*, 26 FED. SENT’G REP. 265, 269 (2014).

Despite these ongoing debates about their relationship to the trajectory of prison population growth, the impact of those policies with regard to drug-related offenses has become more readily apparent. In this way, the macro-level shifts in arrests for drug offenses provide a context for the current inquiry. In 2019, for example, the FBI estimates that 1,558,862 Americans were arrested for offenses categorized as “drug abuse violations,”<sup>17</sup> a number that has been increasing since 2015 after declining over the decade prior.<sup>18</sup> These arrests often result in significant prison time for the subset of individuals who are eventually convicted. Changes to legislation surrounding drug-related mandatory minimum sentences and other policies that impact how drug offenses are sentenced have resulted in increases in the length of time that people incarcerated for drug offenses typically serve.<sup>19</sup> It is perhaps unsurprising, therefore, that individuals who use drugs and/or alcohol or engage in drug-related activities make up a significant portion of the prison population. In 2019, about 46% of all people incarcerated within the federal prison system and 14% of people incarcerated at the state level were serving time for a drug-related crime.<sup>20</sup> In Pennsylvania, 21.4% of the people incarcerated in 2019 were serving sentences for narcotic-related offenses.<sup>21</sup> At the same time, people who use drugs, especially opioids, have a relatively high likelihood of incarceration, increasing the chance that they will return to prison in the future.<sup>22</sup> It is also worth noting that people who use drugs are also arrested for non-drug-related offenses at an increased rate,<sup>23</sup> further complicating this relationship.<sup>24</sup> While addiction, regular substance abuse, and contemporaneous drug use during a criminal offense are not analogous, they share

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<sup>17</sup> Criminal Justice Information Services Division, *Crime in the United States 2019*, FEDERAL BUREAU OF INVESTIGATION (2019), <https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/tables/table-29> [<https://perma.cc/D2UK-8HEA>].

<sup>18</sup> See generally Joseph E. Kennedy, Isaac Unah & Kasi Wahlers, *Sharks and Minnows in the War on Drugs: A Study of Quantity, Race and Drug Type in Drug Arrests*, 52 U.C. DAVIS L. REV. 729 (2018).

<sup>19</sup> See Patti B. Saris, *A Generational Shift for Federal Drug Sentences*, 52 AM. CRIM. L. REV. 1 (2015).

<sup>20</sup> Carson, *supra* note 5, at 1.

<sup>21</sup> PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ANNUAL STATISTICAL REPORT 8 (2019), <https://www.cor.pa.gov/About%20Us/Statistics/Documents/Reports/2019%20Annual%20Statistical%20Report.pdf> [<https://perma.cc/S23N-P7GK>].

<sup>22</sup> See Louisa Degenhardt et al., *Imprisonment of Opioid-dependent People in New South Wales, Australia, 2000–2012: A Retrospective Linkage Study*, 38 AUSTL. & N.Z. J. PUBLIC HEALTH 165 (2014) (estimating 25% of people with an opioid addiction are arrested each year and that 37% of people with opioid use disorder were incarcerated over a 12 year period).

<sup>23</sup> See Lana Harrison & Joseph Gfroerer, *The Intersection of Drug Use and Criminal Behavior: Results from the National Household Survey on Drug Abuse*, 38 CRIME & DELINQ. 422 (1992).

<sup>24</sup> See Bruce L. Benson, Hjoong Kim, David W. Rasmussen & Thomas W. Zuehlke, *Is Property Crime Caused by Drug Use or by Drug Enforcement Policy?*, 24 APPLIED ECONOMICS 679 (1992).

some common foundations<sup>25</sup> within our current understanding of the relationship between drugs and justice system involvement.<sup>26</sup> We now discuss the state of knowledge regarding substance use at (or around) the time of criminal activity to better understand the scope of this behavioral pattern as a precursor to our consideration of its influence at sentencing.

### B. *Drug Use, Crime, and Incarceration*

Intoxication is correlated with criminal activity, both empirically and in the mind of the general public.<sup>27</sup> A fundamental concern when considering the connection between policies focused on substance abuse within this contemporary context of incarceration rates is how many individuals in prison were intoxicated at the time of their offense. The most common way that these estimates are produced is to directly query the only people who have this information: the individuals accused or convicted and currently punished for crimes.

A 2004 report, the most recent available, published by the Bureau of Justice Statistics (BJS) on data from the Survey of Inmates in State and Federal Correctional Facilities includes self-reported responses gathered from recently (<3 months) incarcerated people.<sup>28</sup> The report found that 32% of people incarcerated in the federal system and 26% of people incarcerated within state systems reported using drugs at the time of their offense.<sup>29</sup> Results showed that for people incarcerated at the state level, 15.4% of respondents were using marijuana at the time of their offense, 11.8% were using crack or cocaine, and 4.4% were using opioids; proportions at the federal level were largely similar.<sup>30</sup> Data from this survey also

<sup>25</sup> See generally Nick Heather, *A Conceptual Framework for Explaining Drug Addiction*, 12 J. PSYCHOPHARMACOLOGY 3 (1998) (discussing a framework for distinguishing addiction from regular substance abuse); Hélio Manhica et al., *Association Between Poverty Exposure During Childhood and Adolescence, and Drug Use Disorders and Drug-related Crimes Later in Life*, 116 ADDICTION 1747, 1753 (2021) (“[P]overty during childhood and adolescence were associated with a higher risk of drug use disorders and drug crime convictions in young adulthood.”).

<sup>26</sup> See Helene Raskin White & D.M. Gorman, *Dynamics of the Drug-Crime Relationship*, in CRIMINAL JUSTICE 2000, VOLUME 1: THE NATURE OF CRIME: CONTINUITY AND CHANGE 151 (2000).

<sup>27</sup> See, e.g., Gavin Dingwall & Laurence Koffman, *Determining the Impact of Intoxication in a Desert-based Sentencing Framework*, 8 CRIMINOLOGY & CRIM. JUST. 335 (2008) (“There is a strong and persistent belief that alcohol is a major cause of criminal behaviour (citation omitted). This believe is over-simplistic: the significant correlation that exists between drunkenness and offending fails to establish a causal nexus” (citation omitted).); Nicola Padfield, *Intoxication as a Sentencing Factor: Mitigation or Aggravation?*, in MITIGATION AND AGGRAVATION AT SENTENCING 81 (Julian V. Roberts, ed., 2011) (“The criminogenic effect of alcohol is well known....”).

<sup>28</sup> Christopher J. Mumola & Jennifer C. Karberg, *Drug Use and Dependence, State and Federal Prisoners, 2004*, BUREAU OF JUST. STAT. (October 2007), <https://bjs.ojp.gov/content/pub/pdf/dudsfp04.pdf> [<https://perma.cc/GQX4-JSSN>].

<sup>29</sup> *Id.* at 1.

<sup>30</sup> *Id.* at 2 tbl.1.

suggest that there was variation in offense type among persons reporting contemporaneous drug use. At the state level, 27.7% of violent offenses, 38.5% of property offenses, 43.6% of drug offenses, and 25.4% of public order offenses took place while the individual was using drugs of some kind.<sup>31</sup>

A special report published by BJS in 2005 also provides relevant estimates. Using data from the Survey of Inmates in Local Jails conducted in 2002, BJS focused its efforts on individuals incarcerated in local-level jails and concluded that two-thirds of these individuals had abused alcohol or drugs before their incarceration.<sup>32</sup> Of the people in the study who were post-conviction and serving their sentence in jail, 50% were intoxicated in some way at the time of their offense.<sup>33</sup> There was some slight variation by offense: 47% of violent convictions, 47% of property convictions, 52% of drug convictions, and 37% of public order convictions stemmed from activities that reportedly took place while the individual was intoxicated in some way.<sup>34</sup>

More recently, a longer-term analysis of data from the 2007 and 2008–09 iterations of the National Inmate Survey has underscored the similarities in the prevalence of substance use—but not alcohol—at the time of a criminal act between the state system, where post-conviction sentences are generally longer, and local jails, populated by pre-trial detainees and individuals with shorter sentences.<sup>35</sup> The authors of the report concluded that 42% of people incarcerated at the state level and 37.2% of post-sentence people incarcerated in jails were using drugs at the time of their offense.<sup>36</sup> Overall, rates of use were slightly higher, though comparable, at the state level for marijuana use (22.4% at the state prison level and 18.9% in jails) and cocaine (15.8% vs. 13.3%).<sup>37</sup> The jail sample reported slightly higher levels of heroin or opiate use (6.8% vs. 7.9%), though the difference is similarly small.<sup>38</sup>

The data also allow for an important distinction: they highlight the differences between the group of people who were sentenced for a drug offense, the most visible subgroup in most sentencing data, and those individuals who use drugs and those who commit an offense in support of their drug use habits. In this analysis, 21.3%

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<sup>31</sup> *Id.* at 5 tbl.4.

<sup>32</sup> Jennifer C. Karberg & Doris J. James, *Substance Dependence, Abuse, and Treatment of Jail Inmates, 2002*, BUREAU OF JUST. STAT. (July 2005), <https://bjs.ojp.gov/content/pub/pdf/sdatji02.pdf> [<https://perma.cc/GMV3-M8PG>].

<sup>33</sup> *Id.* at 1.

<sup>34</sup> *Id.*

<sup>35</sup> Jennifer Bronson, Jessica Stroop, Stephanie Zimmer & Marcus Berzofsky, *Drug Use, Dependence, and Abuse Among State Prisoners and Jail Inmates, 2007–2009*, BUREAU OF JUST. STAT. (June 2017), <https://mronline.org/wp-content/uploads/2018/01/dudaspi0709.pdf> [<https://perma.cc/S8X3-U48A>].

<sup>36</sup> *Id.* at 6 tbl.6.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

of state prisoners said their primary offense was committed to “get money for drugs or to obtain drugs;”<sup>39</sup> a larger group, comprised of 58.5% of individuals, met the criteria for drug dependence or abuse.<sup>40</sup> Though that rate rises to 66.9% when considering people incarcerated for a drug offense, it still falls short of complete overlap.<sup>41</sup> In fact, people incarcerated for a property offense were more likely to meet the threshold criteria for dependence or abuse, even more so than those incarcerated for a drug-related crime.<sup>42</sup> These data indicate that within this current policy landscape of drug use laws and criminal sentencing, conviction offense is a decent—but far from perfect—proxy for addiction and/or contemporaneous drug usage.

Using data from the 1997 administration of the Survey of Inmates in State Correctional Facilities, Professor Belenko and Jordon Peugh produced estimates of the percentages of people incarcerated at the state level who had been involved with drugs prior to their crime and sentence.<sup>43</sup> Using interview data collected from a random sample of individuals from 1,409 state prisons across the country, they examined drugs use patterns, the severity of addiction, the need for treatment, and the availability of resources.<sup>44</sup> It was determined that, of the individuals who self-reported having a substance abuse problem (n= 14,285), 51% reported having been under the influence of alcohol or drugs at the time of their crime. Importantly, only 24% of these respondents indicated that they had been convicted of a drug law violation.<sup>45</sup>

Other efforts to collect data from individuals about the nexus between their criminal activity and substance abuse were undertaken as part of the Arrestee Drug Abuse Monitoring (ADAM) programs, a federally run initiative in a small number of selected major metropolitan areas.<sup>46</sup> As part of the program, recently arrested individuals were interviewed about their drug-taking behaviors, completed a survey, and were subject to a drug screening conducted via urinalysis. An examination of these data shows that, of the ADAM arrestees between 2002 and 2008, 42.4% had used marijuana within the past month, 12.9% has used crack cocaine, 20.1% had used powder cocaine, 4.4% had used heroin, and 44.9% reported heavy alcohol use

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<sup>39</sup> *Id.* at 6 tbl.7.

<sup>40</sup> *Id.* at 3 tbl.1.

<sup>41</sup> *Id.* at 3 tbl.2.

<sup>42</sup> *Id.* at 1.

<sup>43</sup> Stephen Belenko & Jordon Peugh, *Estimating Drug Treatment Needs Among State Prison Inmates*, 77 DRUG AND ALCOHOL DEPENDENCE 269 (2005).

<sup>44</sup> *Id.* at 271.

<sup>45</sup> *Id.* at 274 tbl.2.

<sup>46</sup> See, e.g., OFFICE OF NATIONAL DRUG CONTROL POLICY, ADAM II 2013 ANNUAL REPORT (January 2014), [https://www.abtassociates.com/sites/default/files/migrated\\_files/91485e0a-8774-442e-8ca1-5ec85ff5fb9a.pdf](https://www.abtassociates.com/sites/default/files/migrated_files/91485e0a-8774-442e-8ca1-5ec85ff5fb9a.pdf) [<https://perma.cc/4SZT-2444>].



in the month prior to their arrest.<sup>47</sup> Other research, focused more narrowly on alcohol use, determined that about one-quarter of violent offenses (23% of females, N=6,659; 26% of male, N=20,612), approximately one-fifth of property offenses (14% of females, 18% of males), and nearly two-thirds of other offenses (which includes DUI/DWI) (61% of females, 64% of males) took place while the perpetrator was “under the influence” of alcohol.<sup>48</sup> A meta-analysis of studies employing methodologies similar to that of ADAM, many of which were primarily conducted at the entry to the criminal justice system, reinforces the idea that there is substantial variation in patterns of contemporaneous intoxication in analyses of data obtained using similar methods. Within the 13 included studies, estimates of the rate of alcohol abuse among recently incarcerated males varied between 17.7% and 30.0%. An estimate of the overall rates of drug dependence among males in the eight included studies ranged from 10% to 48%.<sup>49</sup>

Finally, Gary Zajac and colleagues detail the results of an internal survey conducted by the Pennsylvania Department of Corrections.<sup>50</sup> They explain that to understand the scope and impact of the opioid crisis the agency surveyed about 1,800 recently committed individuals and found “that 22.2% of the inmates were under the influence of opioids at the time of their most recent offense, with 14.1% indicating that opioids were the only substance they were using. Moreover, 15.2% indicated that they committed their current crime to acquire funds to support their [opioid use disorder].”<sup>51</sup>

While valuable, these estimates on the prevalence of drug use by incarcerated people have substantial limitations in what insight they provide into the use of drugs and alcohol during criminal activity. The BJS surveys, though they do query these issues directly, were last administered in the early-to-mid 2000s. Those survey data are relatively old; recent changes in overall drug use patterns, including the impact of the ongoing opioid epidemic,<sup>52</sup> are likely to have influenced these rates over time.

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<sup>47</sup> Pamela K. Lattimore, Danielle M. Steffey, Joseph Gfroerer, Jonaki Bose, Michael R. Pemberton & Michael A. Penne, *Arrestee Substance Use: Comparison of Estimates from the National Survey on Drug Use and Health and the Arrestee Drug Abuse Monitoring Program*, CBHSQ Data R. 1, 9 fig.1 (2014).

<sup>48</sup> Susan E. Martin, Kendall Bryant & Nora Fitzgerald, *Self-reported Alcohol Use and Abuse by Arrestees in the 1998 Arrestee Drug Abuse Monitoring Program*, 25 ALCOHOL RESEARCH & HEALTH 72, 76 tbl.2 (2001).

<sup>49</sup> *Id.* at 66 fig.2.

<sup>50</sup> Gary Zajac, Samaan Aveh Nur, Derek A. Kreager & Glenn Sterner, *Estimated Costs to the Pennsylvania Criminal Justice System Resulting from the Opioid Crisis*, 25 AM. J. MANAGED CARE SUPPLEMENT S250 (2019).

<sup>51</sup> *Id.* at S254–S255.

<sup>52</sup> See, e.g., Elias Nosrati, Jacob Kang-Brown, Michael Ash, Martin McKee, Michael Marmot & Lawrence P. King, *Economic Decline, Incarceration, and Mortality from Drug Use Disorders in the USA Between 1983 and 2014: An Observational Analysis*, 4 LANCET PUB. HEALTH, e326 (2019); Jonathan P. Caulkins, Anne Gould, Bryce Pardo, Peter Reuter & Bradley D. Stein, *Opioids and the Criminal Justice System: New Challenges Posed by the Modern Opioid Epidemic*, 4 ANN. REV. CRIMINOLOGY 353 (2021); Zajac et al., *supra* note 50.

Federal reports also combine responses from across the country, potentially obscuring local-level variation. The ADAM-related programs have been inactive for over eight years. Collected data are of a non-generalizable nature, even within the jurisdictions in which they were collected. Their estimates focus on arrested persons' drug use—not all of whom will be sentenced—in the month prior to arrest, a period that does not necessarily include the criminal act itself. For these reasons, ADAM-obtained estimates may not be as applicable in a more modern context and to inferences about criminal sentencing. Next, the more robust estimates within the literature on the number of incarcerated people meeting clinical criteria for addiction are informative for the development of policies for drug treatment among an incarcerated population but do not specify the key relationship at issue here—the sentencing of individuals who were intoxicated at the time of the offense. It is certainly the case that people can use drugs without meeting the criteria for addiction, and a diagnosis after the fact does not necessarily indicate the person was using drugs at the time of the offense. Finally, the most recent self-report study from Pennsylvania, discussed *supra*, focused more narrowly on opioids, as the research was conducted to examine the impact of the ongoing epidemic. None of these efforts can appropriately provide drug-specific rates of contemporaneous intoxication and criminal sentencing that can be generalized to the correctional population within a state-wide criminal justice system, an effort we seek to undertake here. This foundational yet thus far elusive knowledge is critical to addressing addiction as a part of more general efforts to address the physical and mental challenges of incarcerated people and in efforts to resolve broader inequalities within the criminal justice and public health systems.<sup>53</sup> Embarking on these treatment initiatives, especially in an evidence-based manner, requires this more straightforward understanding of the scope of addiction within correctional systems and, as we now discuss, the extent to which these issues are—or are not—implicated in the judicial processes through which individuals are incarcerated.

## II. SENTENCING INTOXICATION

### A. *The Legal Landscape*

As Professor Dressler notes, “Intoxicants distort judgment. They also reduce an actor’s ability to control his aggressive feelings and anti-social impulses, resulting in criminal conduct, especially of a violent nature.”<sup>54</sup> For that and other reasons,

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<sup>53</sup> Stuart A. Kinner & Jesse T. Young, *Understanding and Improving the Health of People Who Experience Incarceration: An Overview and Synthesis*, 40 EPIDEMIOLOG. REV. 4 (2018).

<sup>54</sup> DRESSLER, *supra* note 4, at 301. See also Charles J. Felker, *A Proposal for Considering Intoxication at Sentencing Hearings: Part I*, 53 FED. PROBATION 3, 5 (1989).

voluntary intoxication<sup>55</sup> at the time of the offense is rarely a full defense to a criminal charge in the United States.<sup>56</sup> Dressler observes that in addition to affording “wrongdoers very little opportunity to avoid conviction on the basis of intoxication, ... the modern legislative trend is to reduce the scope of any intoxication defense still further.”<sup>57</sup> The drug court movement, while growing, still does not capture—and is not designed to capture—every individual who commits an offense while intoxicated. In other words, sentencing judges in criminal courts of general jurisdiction will be faced with the decision of how, if at all, to consider the fact of intoxication while crafting a criminal sanction.<sup>58</sup> This ideological tension will be exacerbated, especially when dealing with issues of drug use and criminal liability, by the competing approaches taken to ascribing volition and agency to deviant behaviors within the medical and legal literatures.<sup>59</sup>

American judges come to this challenge, under most circumstances, wielding a significant amount of discretion. As former Federal Judge Nancy Gertner wrote in 2021, “All judges say sentencing is the hardest part of their job.”<sup>60</sup> More than sixty years earlier, Judge Irving Kaufman explained that sentencing is “where the judge feels the most ‘alone,’ in part because no other task ‘carries greater potentialities for good or evil than the determination of how society will treat its transgressors.’”<sup>61</sup>

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<sup>55</sup> Another classic area of scholarly and judicial interest in this realm is *involuntary* intoxication. See, e.g., MODEL PENAL CODE § 2.08(4) (1985) (“Intoxication which (a) is not self-induced or (b) is pathological is an affirmative defense if by reason of such intoxication the actor at the time of his conduct lacks substantial capacity either to appreciate its criminality [wrongfulness] or to conform his conduct to the requirements of law.”). Involuntary intoxication is beyond the scope of this Article.

<sup>56</sup> See, e.g., 18 PA. CONS. STAT. § 308 (1976) (“Neither voluntary intoxication nor voluntary drugged condition is a defense to a criminal charge, nor may evidence of such conditions be introduced to negative the element of intent of the offense, except that evidence of such intoxication or drugged condition of the defendant may be offered by the defendant whenever it is relevant to reduce murder from a higher degree to a lower degree of murder.”); *Reid v. True*, 349 F.3d 788, 800 (4th Cir. 2003) (stating that, “[u]nder Virginia law, voluntary intoxication does not excuse any crime,” although noting that a highly intoxicated person may not be able to form premeditation or deliberation necessary for certain types of murder); Meghan P. Ingle, *Law on the Rocks: The Intoxication Defenses Are Being Eighty-Sixed*, 55 VAND. L. REV. 607 (2002); Jerome Hall, *Intoxication and Criminal Responsibility*, 57 HARV. L. REV. 1045 (1944).

<sup>57</sup> DRESSLER, *supra* note 4, at 301. See also *Montana v. Egelhoff*, 518 U.S. 37 (1996).

<sup>58</sup> See, e.g., Dingwall & Koffman, *supra* note 27, at 336 (“Intoxication is far more relevant and pervasive an issue at the sentencing stage.”); GAVIN DINGWALL, *ALCOHOL AND CRIME* 170 (2006) (noting that “intoxication is usually only of practical relevance at the sentencing stage”).

<sup>59</sup> See Stephen J. Morse, *Hooked on Hype: Addiction and Responsibility*, 19 LAW AND PHIL. 3, 6 (2000) (“Criminal law’s concept of the person is the antithesis of the medical model’s mechanistic concept.”).

<sup>60</sup> Nancy Gertner, *Unfinished Business*, INQUEST (Aug. 3, 2021), <https://inquest.org/nancy-gertner-unfinished-business/> [https://perma.cc/VU33-7RFM].

<sup>61</sup> Irving R. Kaufman, *Sentencing: The Judge’s Problem*, 24 FED. PROBATION 3, 3 (1960). See also Padfield, *supra* note 27, at 93 (commenting that, “judges and magistrates are faced with difficult human decisions”).

For much of the twentieth century, judges possessed vast discretion to mete out sentences predicated on the facts, as they informally found them, within capacious statutory ranges set by the legislature, and appellate review was largely unavailable.<sup>62</sup> This extraordinary authority was muted in practice because virtually all sentences were indeterminate by the middle of the twentieth century.<sup>63</sup> “Indeterminate sentencing meant that there was discretionary parole release authority, often vested in a parole board acting long after the judge imposed the sentence. As such, the actual amount of time served by a defendant depended on the independent and often disconnected actions of both the ... judge at the front-end and the parole board at the back-end.”<sup>64</sup> However, the sentencing judge still set the terms of the sentence, and a jury’s verdict of guilt (or a defendant’s guilty plea) was all that was required to authorize all punishments for the maximum length of time established by the legislature.

This broad, unguided judicial discretion resulted in problematic and unjustified disparities in sentences. “Indeed, rather than reflect legally relevant criteria, these disparities too often were correlated with constitutionally suspect variables such as race.”<sup>65</sup> In response to claims that this approach was lawless,<sup>66</sup> a number, but still a minority, of American jurisdictions adopted sentencing guidelines. These guideline jurisdictions try to channel—to varying degrees—judicial discretion. Some approaches are more restrictive than others, but none of them fully extinguish judicial discretion. So, despite decades of sentencing reform, judges must still confront the question of how to respond to a defendant who was intoxicated while committing the offense before the court.

Of course, judicial responses to intoxication are influenced by the views held by the legislature—and thus the public—on these matters.<sup>67</sup> As noted above, voluntary intoxication as a complete defense to conviction is a narrow and, in many jurisdictions, shrinking option, reflecting a severe and strict approach to criminal

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<sup>62</sup> See, e.g., Steven L. Chanenson, *Booker on Crack: Sentencing’s Latest Gordian Knot*, 15 CORNELL J. LAW & PUB. POL’Y 551 (2006).

<sup>63</sup> Steven L. Chanenson & Kristi Arty, *Unfinished Innovation: American Sentencing Guidelines*, in HANDBOOK OF ISSUES IN CRIM. JUST. REFORM IN THE UNITED STATES 113 (E. Jeglic & C. Caulkins, eds., 2021).

<sup>64</sup> Chanenson, *supra* note 62, at 554 n.16.

<sup>65</sup> *Blakely v. Washington*, 542 U.S. 296, 314 (2004) (citations omitted).

<sup>66</sup> See, e.g., MARVIN E. FRANKEL, *CRIM. SENTENCES: LAW WITHOUT ORDER* (1973).

<sup>67</sup> See, e.g., Ian Keith Belton, *The Role of Personal Mitigating Factors in Criminal Sentencing Judgments: An Empirical Investigation* 27 (March 2018) (Ph.D. thesis, Middlesex University), <https://eprints.mdx.ac.uk/24094/> [<https://perma.cc/46DD-73TC>] (asserting “there are several bases for arguing that public opinion on sentencing matters”); Julian V. Roberts, Mike Hough, Jessica Jacobson & Nick Moon, *Public Attitudes to Sentencing Purposes and Sentencing Factors: An Empirical Analysis*, 11 CRIM. L. REV. 771, 771 (2009) (stating “it is important to ensure that there is an appropriate relationship between public opinion and sentencing practice”).

responsibility.<sup>68</sup> In contrast, American attitudes toward drug crimes and at least addiction-fueled, nonviolent criminal conduct have become more lenient.<sup>69</sup> This shift could help to explain the rise of adult drug courts, which now number in excess of 2,000 across the United States.<sup>70</sup>

For purposes of this Article, the core question for the sentencing judge is whether, and if so how, to factor contemporaneous intoxication into the discretionary sentencing process. As Charles Felker put it more than thirty years ago: “If an offender was intoxicated at the time he committed a crime, should his intoxication be an aggravating factor, a mitigating factor, or not relevant in his sentencing proceeding?”<sup>71</sup> The answer—let alone a coherent reason for an answer—is often unclear. Are judges provided with a clear policy or jurisprudential vision? Not especially. Can richer data help judges and scholars better understand this complicated relationship? We think so.

### B. *The Dueling Puzzles of Intoxicated Mitigation and Aggravation*

Questions of aggravation and mitigation in general, and the role of intoxication at the time of the offense in particular, are both under-theorized and under-

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<sup>68</sup> See Chad J. Layton, *No More Excuses: Closing the Door on the Voluntary Intoxication Defense*, 30 J. MARSHALL L. REV. 535, 537 (1997); Michael R. MacIntyre et al., *Voluntary Intoxication, Homicide, and Mens Rea: Past, Present, and Future*, 39 BEHAV. SCI. L. 150, 151 (2021).

<sup>69</sup> See, e.g., Ryan S. King & Marc Mauer, *Distorted Priorities: Drug Offenders in State Prisons*, THE SENT'G PROJECT (Sept. 2002), <https://www.sentencingproject.org/wp-content/uploads/2016/01/Distorted-Priorities-Drug-Offenders-in-State-Prisons.pdf> [<https://perma.cc/HL37-5AW4>]; Douglas A. Berman, *Turning Hope-and-Change Talk into Clemency Action for Nonviolent Drug Offenders*, 36 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 59 (2010); Lincoln B. Sloas & Cassandra A. Atkin-Plunk, *Perceptions of Balanced Justice and Rehabilitation for Drug Offenders*, 30 CRIM. JUST. POL'Y REV. 990 (2019); PEW RSCH CENTER, *AMERICA'S NEW DRUG POLICY LANDSCAPE* (April 2, 2014), <https://www.pewresearch.org/politics/2014/04/02/section-1-perceptions-of-drug-abuse-views-of-drug-policies/> [<https://perma.cc/7QYC-ECS8>] (“More than six-in-ten (63%) say that state governments moving away from mandatory prison terms for non-violent drug crimes is a good thing, while just 32% say these policy changes are a bad thing. This is a substantial shift from 2001 when the public was evenly divided (47% good thing vs. 45% bad thing).”). Cf. Padfield, *supra* note 27, at 94 (describing a study of the British public that “found that there was clearly ambivalence . . . about the issue of intoxication” at the time of the offense) (citing Roberts et al., *supra* note 67, at 776). As Professor Padfield summarized it this way: “[i]n answer to a question whether they thought the fact that the offender was drunk made the crime more serious, 24 per cent of respondents thought that it always increases seriousness, 26 per cent that it often increases seriousness, 20 per cent that it sometimes increases seriousness and 29 per cent that it makes no difference.” *Id.*

<sup>70</sup> NATIONAL DRUG COURT RESOURCE CENTER, *TREATMENT COURTS ACROSS THE UNITED STATES* 3 (2020), [https://ndcrc.org/wp-content/uploads/2021/08/2020\\_NDCRC\\_TreatmentCourt\\_Count\\_Table\\_v8.pdf](https://ndcrc.org/wp-content/uploads/2021/08/2020_NDCRC_TreatmentCourt_Count_Table_v8.pdf) [<https://perma.cc/V4UQ-4PYH>].

<sup>71</sup> Felker, *supra* note 54, at 5. See also Padfield, *supra* note 27, at 81 (asking the same question).

explored.<sup>72</sup> We are far from the first to lament this state of affairs. Professor Dingwall observed:

Given the large number of defendants who raise intoxication as a mitigating factor at the sentencing stage, the paucity both of a guiding approach and of academic attention to the issue is alarming.<sup>73</sup>

More recently, Professor Padfield stated this issue has been “largely ignored,” and that “judges and academics have given much less thought to the impact of alcohol as a mitigating or aggravating factor in sentencing.”<sup>74</sup>

Among the various questions is how intoxication interacts with the traditional purposes of sentencing.<sup>75</sup> The short answer is that it is a messy and murky connection at best. One could, for example, link intoxication to retribution. A common argument might be that a person “who commits a crime impulsively because he is intoxicated is less culpable than one who commits a crime through dispassionate planning,”<sup>76</sup> and, on the other hand, the inverse is also viable to some, depending on the circumstances.<sup>77</sup> A retributive thread also appears to undergird the pro-aggravation approach to intoxication taken in England and Wales.<sup>78</sup> That theoretical justification has not, however, been universally embraced.<sup>79</sup> “In order to justify increasing the sentence on a retributive basis, one would need to argue that the fact of the offender’s

<sup>72</sup> See, e.g., ANDREW ASHWORTH, *SENT’G AND CRIM. JUST.* 156 (5th ed. 2010) (“The concepts of aggravation and mitigation have tended to attract little close examination or theoretical discussion.”); Mirko Bagaric, *A Rational Theory of Mitigation and Aggravation in Sentencing: Why Less is More When It Comes to Punishing Criminals*, 62 *BUFF. L. REV.* 1159, 1160 (2014) (describing aggravation and mitigation as “the least developed and settled area of sentencing law”).

<sup>73</sup> DINGWALL, *supra* note 58, at 170.

<sup>74</sup> Padfield, *supra* note 27, at 83 (citations omitted).

<sup>75</sup> See, e.g., Roberts et al., *supra* note 67, at 771 (“Sentencing purposes and sentencing factors are clearly related: whether a given factor is relevant to sentencing will depend on the purpose of sentencing.”); Felker, *supra* note 54, at 6 (asking, in part, about the relationship between intoxication and sentencing purposes).

<sup>76</sup> *Id.* at 9.

<sup>77</sup> See, e.g., *id.* (arguing that people who drink to embolden themselves to follow through on a crime planned while sober could be more culpable); Charles J. Felker, *Considering Offender Intoxication at Sentencing*, 2 *FED. SENT’G REP.* 192, 192–93 (1989).

<sup>78</sup> ASHWORTH, *supra* note 72, at 164–165 (arguing that this approach reflects a “judgment that offenders who voluntarily become intoxicated are more culpable, presumably because they do realize (or ought to realize) that this may lead to uninhibited conduct with unpredictable results”). See also Julian V. Roberts, *Aggravating and Mitigating Factors at Sentencing: Toward Greater Consistency of Application*, 2008 *CRIM. L. REV.* 264, 274 (2008).

<sup>79</sup> See, e.g., Dingwall & Koffman, *supra* note 27, at 342–43; ASHWORTH, *supra* note 72, at 165 (“This may not apply to the ‘out of character’ plea of someone with no history of drunken misbehaviour; and there is an argument that in most cases it should be a neutral, not an aggravating factor.”).

intoxication made the offence more serious.”<sup>80</sup> Others, approaching the issues within a different legal context, have noted that intoxication as an aggravating circumstance can be characterized “as indicative of enhanced culpability (but in ways unrelated to the seriousness of the offence)...”<sup>81</sup> Then perhaps retributivists might be attracted to the idea that contemporaneous intoxication could justify less punishment for the first offense and more for the second offense because the individual did not take advantage of the opportunity provided.<sup>82</sup>

Deterrence, particularly specific deterrence, could try to discourage people from drinking and committing crimes, although “if society’s aim is to deter drinking in general or drinking by problem drinkers, there are many more direct ways to effectuate this goal besides making intoxication at the time of a crime an aggravating factor.”<sup>83</sup> One could also posit that an approach characterized by deterrence theory might lead to contemporaneous intoxication being viewed as a neutral or irrelevant factor.<sup>84</sup> Incapacitation, in a variety of forms, might be attractive to those who focus on the connection between intoxication and criminal behavior, especially if the person in question has a more extensive history of repeated, intoxicated offending.<sup>85</sup> This model would be a way to protect the community by isolating this individual, whether that isolation takes place in a correctional facility or a secure, in-patient treatment center.<sup>86</sup>

A plan for rehabilitation through the potential for treatment could justify a higher or lower or perhaps different type of punishment, including one that may prioritize treatment.<sup>87</sup> A common impulse might be to think primarily of mitigation here. If, however, the individual is not a good candidate for rehabilitation, there is an argument for an aggravated sentence.<sup>88</sup> This may well be the theory that many judges deploy in practice. “It seems that the most crucial point considered by sentencers with respect to both alcohol and drug misuse is whether there are prospects of effective treatment of dependency.”<sup>89</sup>

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<sup>80</sup> Dingwall & Koffman, *supra* note 27, at 342.

<sup>81</sup> Julian V. Roberts & Oren Gazal-Ayal, *Statutory Sentencing Reform in Israel: Exploring the Sentencing Law of 2012*, 46 ISR. L. REV. 455, 466 (2013).

<sup>82</sup> Dingwall & Koffman, *supra* note 27, at 344, 346.

<sup>83</sup> Felker, *supra* note 54, at 8.

<sup>84</sup> *Id.*

<sup>85</sup> Felker, *supra* note 77, at 193.

<sup>86</sup> Felker, *supra* note 54, at 9.

<sup>87</sup> *Cf.* Dingwall & Koffman, *supra* note 27, at 345 (“Although there may be strong utilitarian reasons for treating intoxication as an aggravating factor, particularly for those who have previously offended while intoxicated, it was difficult to find a persuasive retributive justification for such a finding.”); Felker, *supra* note 77, at 193.

<sup>88</sup> *Id.*

<sup>89</sup> Jessica Jacobson & Mike Hough, *Mitigation: The Role of Personal Factors in Sentencing*, PRISON REFORM TRUST 10 (2007), <https://eprints.bbk.ac.uk/id/eprint/22245/> [<https://perma.cc/4KDE->

### C. Responses to Intoxication at Sentencing: Policy and Practice

We believe it is instructive to consider how different stakeholders, especially sentencing policy bodies and sentencing courts (to whose discretionary actions we have linked our survey data from incarcerated people), have approached the sentencing of individuals who committed their offenses while intoxicated. There is not a great deal of helpful guidance. As noted above, legislatures often afford sentencing judges considerable latitude in what kind of information they may consider and how they may interpret that information about contemporaneous intoxication. Indiana, for example, has a statutory provision entitled, “Considerations in imposing sentence.”<sup>90</sup> It lists eleven aggravating factors and thirteen mitigating factors, none of which address contemporaneous intoxication.<sup>91</sup> There is, however, a catch-all provision, which allows the judge to—in essence—exercise her discretion irrespective of those twenty-four aggravating and mitigating factors.<sup>92</sup> The federal analog provides that, “No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”<sup>93</sup>

American sentencing statutes and guidelines have not really filled this void. The Minnesota Sentencing Guidelines Commission offers a suggested list of fourteen aggravating and eight mitigating reasons to depart from the guidelines.<sup>94</sup> Like the Indiana statute, it is not exhaustive and does not include intoxication. In fact, the comment to the identified factors goes even farther and expresses a firm view:

The factors are intended to describe specific situations involving a small number of cases. The Commission rejects factors that are general in nature, and that could apply to large numbers of cases, such as intoxication at the time of the offense.<sup>95</sup>

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KA2U]. See also Padfield, *supra* note 27, at 93 (“Perhaps this is the key: whether the sentencer believes that the defendant can address his or her alcohol problems.”); Belton, *supra* note 67, at 151–52.

<sup>90</sup> IND. CODE § 35-38-1-7.1 (2017).

<sup>91</sup> IND. CODE § 35-38-1-7.1(a)–(b) (2017).

<sup>92</sup> IND. CODE § 35-38-1-7.1(c) (2017) (“The criteria listed in subsections (a) and (b) do not limit the matters that the court may consider in determining the sentence.”).

<sup>93</sup> 18 U.S.C. § 3661.

<sup>94</sup> MINNESOTA SENTENCING GUIDELINES COMMISSION, MINNESOTA SENTENCING GUIDELINES AND COMMENTARY 44–48 (August 1, 2020), <https://mn.gov/msgc-stat/documents/Guidelines/2020/August2020MinnSentencingGuidelinesCommentary.pdf> [https://perma.cc/JK3Y-F5Z4].

<sup>95</sup> *Id.* at 48.



So Minnesota, in essence, expressly tells its judges to ignore contemporaneous intoxication.

The United States Sentencing Guidelines take a similar, although somewhat less muscular view concerning mitigation, but not aggravation, in a policy statement. They also do not explicitly address contemporaneous intoxication, instead using the language of “dependence or abuse.”<sup>96</sup> When originally implemented in 1987, it provided, in relevant part: “Drug dependence or alcohol abuse is not a reason for imposing a sentence below the guidelines.”<sup>97</sup> The current version states that, “Drug or alcohol dependence or abuse ordinarily is not a reason for a downward departure.”<sup>98</sup>

The Pennsylvania Sentencing Guidelines, perhaps reflecting the more common approach, explicitly leave the determination of what is an aggravating and a mitigating circumstance to the sentencing judge. The relevant part of those guidelines state: “Unless otherwise prohibited by statute, when the court determines that an aggravating circumstance is present, ... the court may impose an aggravated sentence.”<sup>99</sup> There is a mirror-image provision for mitigating circumstances.<sup>100</sup> In the commentary to this provision, the Commission explains its thought process:

In 1994 after great debate, the Commission decided not to include a list of suggested aggravating or mitigating factors for most offenses in the text of the guidelines. The Commission chose to remove all references to appropriate aggravating and mitigating circumstances and removed some cautionary statements that were previously included in the guidelines, as well as a list of aggravating and mitigating factors for the court to consider when sentencing Controlled Substance Act violations. Any legally cognizable criteria not specifically considered in the guidelines may continue to be used as reasons for imposing an aggravated or mitigated sentence.<sup>101</sup>

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<sup>96</sup> White & Gorman, *supra* note 26.

<sup>97</sup> U.S. SENT’G COMM’N, FEDERAL SENTENCING GUIDELINES MANUAL § 5H1.4 (1987).

<sup>98</sup> U.S. SENT’G COMM’N, FEDERAL SENTENCING GUIDELINES MANUAL § 5H1.4 (2011). The “departure” language was added in 2003 and the word “ordinarily” was added in 2010. The federal guidelines also note that, “Substance abuse is highly correlated to an increased propensity to commit crime. Due to this increased risk, it is highly recommended that a defendant who is incarcerated also be sentenced to supervised release with a requirement that the defendant participate in an appropriate substance abuse program.” *Id.*

<sup>99</sup> 204 PA. CODE § 303.13(a) (1982).

<sup>100</sup> 204 PA. CODE § 303.13(b) (1982).

<sup>101</sup> PA. COMM’N ON SENT’G, SENT’G GUIDELINES IMPLEMENTATION MANUAL 226 (7th ed. 2012). Originally, the Pennsylvania Commission created a “list of exclusive reasons for sentencing in the aggravated and mitigated ranges.” JOHN H. KRAMER & JEFFERY T. ULMER, SENT’G GUIDELINES: LESSONS FROM PA. 31 (2009).

Pennsylvania, through several provisions, does mandate that the sentencing judge explain her reasons for imposing all sentences, but that requirement is heightened when imposing an aggravated or mitigated sentence.<sup>102</sup> For example, one Guideline instructs as follows: “When the court imposes an aggravated or mitigated [range] sentence, it shall state the reasons on the record and on the Guideline Sentence Form, a copy of which is electronically transmitted to the Commission on Sentencing....”<sup>103</sup> Although the requirement of providing reasons can be enforced strictly at times,<sup>104</sup> those explanations are not always the most illuminating.<sup>105</sup>

In its Annual Reports, the Pennsylvania Commission on Sentencing catalogs reasons for departing above and below its guidelines. In 2019, departures above the guidelines were most often explained by recommendations from the prosecutor, while departures below the guidelines were most often explained by plea agreements.<sup>106</sup> Twenty-one of the 1,850 reasons provided for departures above the guidelines were because the “Offender has drug or alcohol dependency” and ninety-six were because of “Treatment/Specialty Court.”<sup>107</sup> Ninety-eight of the 9,951 reasons provided for departures below the guidelines were because the defendant needed treatment, and seventeen were because of the defendant’s “Progress in rehabilitation.”<sup>108</sup> The 2019 report also included Commission on Sentencing data concerning aggravated and mitigated sentences. The most frequently provided reason for imposing an aggravated or a mitigated sentence was the recommendation of the prosecutor.<sup>109</sup> Eight of the 2,207 reasons provided for sentences in the aggravated range were because the “Offender is a drug abuser/drug dependent” and

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<sup>102</sup> See, e.g., 42 PA. CONS. STAT. § 9721(b) (2021); 204 PA. CODE § 303.1(d) (2021); 204 PA. CODE § 303.13(c) (2021).

<sup>103</sup> *Id.* The Commentary to this provision notes as follows: “The court is encouraged to provide specific reasons for imposing an aggravated or mitigated sentence, and is [statutorily] required to provide such reasons for sentences that depart from the guidelines.” PA. COMM’N ON SENT’G, *supra* note 101, at 231.

<sup>104</sup> *Commonwealth v. Mrozik*, 213 A.3d 273, 278 (Pa. Super. Ct. 2019) (vacating a sentence and remanding for resentencing because judge did not provide reasons for imposing a sentence in the aggravated range); cf. 42 PA. CONS. STAT. § 9721(b) (requiring a sentence imposed outside of the guidelines to be vacated if “a contemporaneous written statement of the reason or reasons for the deviation from the guidelines” is not provided).

<sup>105</sup> Cf. *Commonwealth v. Hill*, 629 A.2d 949, 953 (Pa. Super. Ct. 1993) (noting that “a discourse on the court’s sentencing philosophy, as it applies to the defendant before it, is not required.”).

<sup>106</sup> PA. COMM’N ON SENT’G, 2019 ANNUAL REPORT 54–55 (2020); see also *id.* at 17.

<sup>107</sup> *Id.* at 54. The Commission also noted that, “More than one reason may be reported for a single offense.” *Id.*

<sup>108</sup> *Id.* at 55. The Commission also noted that, “More than one reason may be reported for a single offense.” *Id.*

<sup>109</sup> Pennsylvania Commission on Sentencing 2019 aggravated range reasons data set (on file with authors).

17 were because of “Drug Court.”<sup>110</sup> Twenty-six of 2,699 reasons provided for sentences in the mitigated range were because the “Offender is drug dependent/needs treatment” and eleven were because of “Drug Court.”<sup>111</sup>

The picture across the Atlantic is quite different. The Sentencing Council of England and Wales views committing an offense under the influence of alcohol or drugs as an aggravating factor. It provides as follows:

The fact that an offender is voluntarily intoxicated at the time of the offence will tend to increase the seriousness of the offence provided that the intoxication has contributed to the offending.

This applies regardless of whether the offender is under the influence of legal or illegal substance(s).

In the case of a person addicted to drugs or alcohol the intoxication may be considered not to be voluntary, but the court should have regard to the extent to which the offender has sought help or engaged with any assistance which has been offered or made available in dealing with the addiction.

An offender who has voluntarily consumed drugs and/or alcohol must accept the consequences of the behaviour that results, even if it is out of character.<sup>112</sup>

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<sup>110</sup> Pennsylvania Commission on Sentencing 2019 aggravated range reasons data set (on file with authors).

<sup>111</sup> Pennsylvania Commission on Sentencing 2019 aggravated range reasons data set (on file with authors).

<sup>112</sup> SENTENCING COUNCIL FOR ENG. AND WALES, GENERAL GUIDELINE: OVERARCHING PRINCIPLES (Oct. 1, 2019), <https://www.sentencingcouncil.org.uk/overarching-guides/crown-court/item/general-guideline-overarching-principles/> [<https://perma.cc/G37B-SDEJ>]. This seems similar to the legislative approach in the Australian jurisdictions of New South Wales and Queensland. Luke McNamara, Julia Quilter, Kate Seear & Robin Room, *Evidence of Intoxication in Australian Criminal Courts: A Complex Variable with Multiple Effects*, 43 MONASH U. L. REV. 148, 174–5 (2017) (stating that in New South Wales and Queensland NSW and Queensland “courts have been given legislative guidance on the relevance of intoxication to sentencing—in the form of express statements that self-induced intoxication is a *not* a mitigating factor. In all other jurisdictions, common law sentencing principles inform the decision as to what significance, if any, should be attached to offender intoxication.”) (citations omitted) (emphasis in original); *cf. id.* at 174–75 (describing cases various Australian jurisdictions in which the “‘general rule’ [is] that intoxication *per se* does not operate as a mitigating factor”) (citations omitted); *see also* Bagaric, *supra* note 72, at 1225 (“There is in fact a powerful argument for making intoxication an aggravating factor—as is generally the case in Australia.”).

Commentators have characterized this as a tough position. “It is not simply a matter of ruling out mitigation, but rather of emphasizing the aggravating nature of intoxication.”<sup>113</sup> This approach has also been criticized for its ipse dixit nature.<sup>114</sup>

Is there something distinctive about intoxication at the time of the offense that makes this problem so knotty and the official responses so difficult to understand? Academics struggle to find a coherent way to classify intoxication.<sup>115</sup> For example, Professors Jacobson and Hough created a six-factor taxonomy for analyzing sentencing, but found that, “It is difficult to determine where to place factors relating to drug and alcohol misuse in our six-fold categorisation.”<sup>116</sup> This likely flows from the fact that “intoxication can be either a mitigating or an aggravating factor.”<sup>117</sup> Indeed, in some cases, courts describe intoxication as aggravating, and in others, they view it as mitigating.<sup>118</sup> There are even times when courts are opaque about what they are really doing, and “the words used by a court do not always match the eventual sentence imposed.”<sup>119</sup> In fact, Professor Padfield asserts that “the most common scenario is a drunk offender, who drunkenness passes almost without comment.”<sup>120</sup>

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<sup>113</sup> ASHWORTH, *supra* note 72, at 164; *see also* Padfield, *supra* note 27, at 85 (noting that the drafters “did not believe that intoxication ever diminishes the seriousness of an offence”); *cf.* Roberts & Gazal-Ayal, *supra* note 81, at 466 n.33 (describing English guidelines as making intoxication “an aggravating factor, but it may also mitigate sentence—as in the case of a defendant who is unused to drinking and commits and out-of-character offence as a result of a rare episode of drunkenness.”) (citation omitted).

<sup>114</sup> *See, e.g.*, DINGWALL, *supra* note 58, at 127 (discussing earlier, similar recommendation and noting that the drafters “do not justify the approach. It is taken as a given fact.”).

<sup>115</sup> *Cf.* Roberts, *supra* note 78, at 274 (“Another controversial or ambiguous factor is the offender’s level of inebriation at the time of the offence.”).

<sup>116</sup> Jacobson & Hough, *supra* note 89, at 10.

<sup>117</sup> Padfield, *supra* note 27, at 83; *see also* Roberts, *supra* note 78, at 274 (noting that “intoxication may aggravate or mitigate”); Anders Kaye, *Excuses in Exile*, 48 U. MICH. J.L. REFORM 437, 452 (2015) (asserting that “sentencers have nearly unfettered discretion to determine whether a fact is mitigating at all”), *but cf.* Roberts et al., *supra* note 67, at 780 (stating more broadly that “Mitigating and aggravating factors do not represent different sides of the same coin.”). Decades ago, a review of state caselaw “reveal[ed] that judges generally consider intoxication at the time of the crime to be a mitigating circumstance.” Charles J. Felker, *A Proposal for Considering Intoxication at Sentencing Hearings: Part II*, 54 FED. PROB. 3, 6 (1990).

<sup>118</sup> *Compare* Commonwealth v. Russell, No. 1433 EDA 2013, 2014 WL 10914830, at \*3 (Pa. Super. Ct. July 25, 2014) (affirming aggravated range sentence justified, in part, because defendant was “highly intoxicated” at time of offense) (non-precedential opinion), *with* Commonwealth v. Smart, 564 A.2d 512, 514 (Pa. Super. Ct. 1989) (viewing intoxication as a mitigating factor).

<sup>119</sup> Padfield, *supra* note 27, at 86; *see also id.* at 89 (“Even where the Court notes that intoxication is an aggravating factor, it may appear actually to work to reduce the sentence.”).

<sup>120</sup> *Id.* at 90.

When it is discussed, defense lawyers use intoxication differently in seeking mitigation.<sup>121</sup> Professor Rumgay makes the point powerfully:

There is no single intoxication excuse, crudely applied to all alcohol-related offences and offenders. Rather, there is a plurality of intoxication excuses, capitalising on the plurality of lay beliefs about alcohol, selectively and powerfully applied to explain and attribute responsibility for different kinds of criminality. The reach of these lay beliefs, and their moral connotations, is such that even the absence of alcohol from the circumstances of an offence is worthy of mention.<sup>122</sup>

Perhaps this is at the heart of the problem. Contemporaneous intoxication at sentencing is a shape-shifter. One moment, it looms large; the next moment it nearly vanishes. In one case, it prompts a more severe sentence; in the next case, it may be the cause for leniency.

### III. EMPIRICAL DEFICITS

There is relatively little empirical information,<sup>123</sup> especially in the United States, about the interaction between contemporaneous intoxication and sentencing.

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<sup>121</sup> See, e.g., DINGWALL, *supra* note 58, at 156 (“Not only do the justifications for punishment vary but so does the way in which lawyers plead intoxication in mitigation.”); *cf.* ASHWORTH, *supra* note 72, at 170 (“Research shows that in practice the range of factors advanced in mitigation is enormously wide.”) (citation omitted).

<sup>122</sup> JUDITH RUMGAY, *CRIME, PUNISHMENT AND THE DRINKING OFFENDER* 164 (1998); see also DINGWALL, *supra* note 58, at 156 (“[T]he sheer number of lay beliefs about alcohol makes intoxication a nebulous yet useful form of mitigation due to its sheer adaptability.”). The idea that intoxication can have different implications at sentencing was also set forth by the Court of Criminal Appeals of the Northern Territory of Australia when it stated: “The Courts have pointed out that the intoxication of an offender through the consumption of alcohol may constitute an aggravating factor or a mitigating factor depending upon the circumstances of the case. There is no general rule that such intoxication need be one or the other. In some circumstances it may be a neutral factor.” *R v Wilson* [2011] NTCCA 9; 30 NTLR 51, ¶44 (Austl.) (citation omitted); see also McNamara, Quilter, Seear & Room, *supra* note 112, at 175.

<sup>123</sup> See, e.g., Carly Lightowlers & Jose Pina-Sánchez, *Intoxication and Assault: An Analysis of Crown Court Sentencing Practices in England and Wales*, 58 BRIT. J. CRIMINOLOGY 132, 133 (2018) (“Despite the presence of intoxication having an obvious impact on the delivery of sentencing, debate around how intoxication ought to be dealt with (with reference to theories of punishment) and how it should impact on sentencing are relatively lacking, as is empirical study of how cases are dealt with in practice.”) (citations omitted) (emphasis in original); *but see* Carly Lightowlers et al., *Contextual Culpability: How Drinking and Social Context Impact Sentencing of Violence*, 22 CRIMINOLOGY & CRIM. JUST. 1, 1 (forthcoming 2022) (“The controversial effect of intoxication on sentencing outcomes has received renewed attention with a series of new empirical studies.”).

There have been studies in other countries,<sup>124</sup> with England and Wales offering some of the most relevant work.<sup>125</sup> The Crown Court Sentencing Survey (“CCSS”) “collected information directly from judges on the factors taken into account when they imposed a sentence at the Crown Court.”<sup>126</sup> Despite its name, “[t]he CCSS was a census, not a sample survey. For every *new* criminal case sentenced at the Crown Court, the sentencing judge was expected to complete a survey form.”<sup>127</sup> Of particular relevance to this project, the CCSS revealed that “where at least one aggravating factor was taken into account, custody rates were higher than the overall average for these offences. Custody rates [were] 79 per cent for cases in which the ‘offender was under the influence of alcohol or drugs’ [which was] higher than the overall custody rate of 77 per cent for these offences.”<sup>128</sup>

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<sup>124</sup> See, e.g., Kate Warner et al., *Aggravating or Mitigating? Comparing Judges’ and Jurors’ Views on Four Ambiguous Sentencing Factors*, 28 J. OF JUD. ADMIN. 51 (2018) (reporting on Victorian Jury Sentencing Study). Some of these studies focus exclusively on alcohol, unlike the data presented in this paper. See, e.g., Laurent Bègue et al., *The Role of Alcohol Intoxication on Sentencing by Judges and Laypersons: Findings From a Binational Experiment in Germany and France*, 32 INT’L CRIM. JUST. REV. 7, 8 (forthcoming 2022) (using vignettes with a large group of both judges and lay-people and noting, “Contrary to our expectations, we observed that [alcohol] intoxication level did not influence sentencing severity. These results are at odds with many prior vignette studies that reported that third parties assigned less responsibility and blame to drunk perpetrators than to sober ones or, on the contrary, that intoxication increased responsibility and/or blame attributed to an aggressor.”) (citations omitted); W. Andrew Harrell, *Alcohol Use and Prior Alcohol-Related Convictions as Predictors of Probation Officer Perceptions and Sentencing*, 15 INT’L J. OF THE ADDICTIONS 1271, 1275 (1980) (reviewing Canadian presentence reports and concluding that alcohol use during the offense had an indirect—but not direct—influence on sentencing).

<sup>125</sup> See, e.g., Ian K. Belton, *The Role of Personal Mitigating Factors in Criminal Sentencing Judgments: An Empirical Investigation* (Mar. 2018) (Ph.D. dissertation, Middlesex University) (available at Middlesex University Research Repository, <https://eprints.mdx.ac.uk/24094/>) (engaging in multiple studies focused on personal mitigating factors, including addiction, using different methods); Jose Pina-Sánchez et al., *Mind the Step: A More Insightful and Robust Analysis of the Sentencing Process in England and Wales Under the New Sentencing Guidelines*, 20 CRIMINOLOGY & CRIM. JUST. 268 (2020) (using Crown Court Sentencing Survey data); Lightowlers et al., *supra* note 123, at 1 (focusing on alcohol exclusively and using sentencing transcripts); Carly Lightowlers, *Drunk and Doubly Deviant? The Role of Gender and Intoxication in Sentencing Assault Offences*, 59 BRIT. J. CRIMINOLOGY 693 (2019) (using Crown Court Sentencing Survey data); Lightowlers & Jose Pina-Sánchez, *supra* note 123, at 144 (using Crown Court Sentencing Survey data and noting a “reasonably consistent prevalence and influence of the presence of intoxication as an aggravating factor between 2011 and 2014.”).

<sup>126</sup> SENT’G COUNCIL FOR ENG. AND WALES, CROWN COURT SENTENCING SURVEY ANNUAL PUBLICATION 8 (2015); see also ASHWORTH, *supra* note 72, at 165 (noting that “intoxication was the most frequently identified aggravating factor.”); cf. *id.* at 170 (“fail[ing] to find that either being intoxicated while committing a crime or prior alcohol-related convictions were significant predictors of sentence received.”).

<sup>127</sup> SENT’G COUNCIL FOR ENG. AND WALES, *supra* note 126, at 8. In this way, the CCSS demonstrates similarities with the data collecting method of the Pennsylvania Commission on Sentencing through its electronic guidelines forms. See PA. COMM’N ON SENT’G, *supra* note 101, at 32.

<sup>128</sup> SENT’G COUNCIL FOR ENG. AND WALES, *supra* note 126, at 29.

Other empirical research has focused on the differential impact of various drugs of abuse on sentencing. Employing data from the Survey of Inmates of State Correctional Facilities conducted in 1991, Professors Leigey and Bachman note that “inmates who consumed alcohol prior to the commission of their offenses were significantly more likely to be incarcerated for a violent offense (52.9%) than those under the influence of either crack (24.7%) or powder cocaine (28.5%).”<sup>129</sup>

A relatively recent empirical inquiry employed data from the ADAM II study<sup>130</sup> to examine the relationship between dependence, crime type, and severity (N = 3,006).<sup>131</sup> Employing a multivariate logistic regression modeling approach, they found that individuals identified as drug dependent have a higher likelihood of being charged with a felony arrest than non-dependent individuals. Interestingly, individuals identified as being alcohol dependent had a lower probability of being charged with a felony, but, at the same time, greater odds of being arrested for a violent offense. As both felonies and violent charges are associated with an increased likelihood of incarceration and a longer, potentially more punitive punishment, the implications for exposure at sentencing are apparent.

Researchers have also sought to examine the potential impact of alcohol intoxication using a novel pairing of methodologies.<sup>132</sup> First, the authors examined a subset of data from the Survey of Inmates in State and Federal Correction Facilities. When comparing offenses where the perpetrator reported they were intoxicated, crimes they classified as violent (e.g., homicide, assault, and rape) received a 36% shorter sentence (here, about eight years) when compared to those sentences for offenses considered to be non-violent (e.g., larceny, tax evasion, drug possession), after controlling for several covariates. Then, using an experimentally manipulated survey design, they found that survey respondents indicated that “emotionality increases the tendency to use intoxication as a discounting cue,”<sup>133</sup> resulting in a higher acceptance of excuse for the conduct and, in turn, impacting factors relevant during both the sentencing and post-release periods.

Finally, another recent set of studies sought to explore how judges differentially respond at sentencing when the defendant has a history of drug or alcohol use using hypothetical sentencing scenarios. They find that, holding all other case and individual characteristics constant, individuals with substance use disorders of

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<sup>129</sup> Margaret E. Leigey & Ronet Bachman, *The Influence of Crack Cocaine on the Likelihood of Incarceration for a Violent Offense: An Examination of a Prison Sample*, 18 CRIM. JUST. POL’Y REV. 335, 348 (2007).

<sup>130</sup> See *infra* note 32.

<sup>131</sup> Albert M. Kopak et al., *The Connections Between Substance Dependence, Offense Type, and Offense Severity*, 44 J. OF DRUG ISSUES 291 (2014).

<sup>132</sup> Chelsea Galoni et al., *When Does Intoxication Help or Hurt My Case? The Role of Emotionality in the Use of Intoxication as a Discounting Cue*, 6 J OF THE ASS’N FOR CONSUMER RSCH. 342 (2021).

<sup>133</sup> *Id.* at 347.

various types<sup>134</sup> and opioid use disorders specifically,<sup>135</sup> were seen as less capable of logical reasoning and as more likely to re-offend, though not as more dangerous.<sup>136</sup> It is not unlikely, though beyond the scope of these experimental vignette-based studies, to conclude that factors of this nature would exert an upwards pressure on sentencing, especially with regard to the deterrent function of incarceration.<sup>137</sup>

Despite these studies, the empirical cupboard remains largely bare. Professor Padfield's conclusion in 2011 rings true today: "There is very little empirical research into the reality of sentence decision-making; data are not routinely collected which permit ready analysis."<sup>138</sup>

A better grasp of what is happening at sentencing for an intoxicated individual when they commit their crimes can help us understand the wisdom and impact of carceral policies. If we do not know how the system operates, we are not running it; it is running us. "With additional empirical research, it may be possible to identify more reliably when drunkenness currently aggravates a sentence, and when it may mitigate."<sup>139</sup>

#### IV. THE CURRENT SURVEY

This study helps fill this empirical void. It connects a unique survey of people incarcerated in Pennsylvania's state prisons with sentencing data. The result is a novel window into the interaction between contemporaneous intoxication and criminal sentencing.

##### A. *The Pennsylvania Structure*

Data for this project were collected within and from two primary agencies. The first, the Pennsylvania Department of Corrections (PADOC), is responsible for 24 State Correctional Institutions, one boot camp, and 14 state-run community-based facilities.<sup>140</sup> At the conclusion of 2016, around when the survey data were collected, the total residential correctional population within the state-level prison system was

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<sup>134</sup> Alisha Desai, Substance Use Disorder (SUD) and the Criminal Defendant: The Impact of Substance Type on Judges' Sentencing Recommendations (July 2018) (M.S. dissertation, Drexel University).

<sup>135</sup> Alisha Desai et al., *The Impact of Criminal Defendants' Opioid Use Disorder on Judges' Sentencing Recommendations*, 2 J. FOR ADVANCING JUSTICE 55 (2019).

<sup>136</sup> *Id.* at 64.

<sup>137</sup> Felker, *supra* note 54, at 8.

<sup>138</sup> Padfield, *supra* note 27, at 91.

<sup>139</sup> *Id.* at 83.

<sup>140</sup> *About Us*, PA. DEP'T OF CORR., <https://www.cor.pa.gov/About%20Us/Pages/CONTACT%20US%20-%20About%20Us.aspx> (last visited Sept. 29, 2021).



approximately 51,800 individuals.<sup>141</sup> As part of the range of treatment options for individuals with a history and diagnosis of substance abuse, there were, and still are, a range of treatment options available.<sup>142</sup>

The second agency providing data, the Pennsylvania Commission on Sentencing, is one of the oldest sentencing commissions in the United States, having opened its doors in 1979.<sup>143</sup> Pennsylvania has an indeterminate sentencing system along with sentencing guidelines. As such, the sentencing judge “impose[s] a “minimum” and a “maximum” sentence—for example, two to four years.”<sup>144</sup> Pennsylvania’s guidelines, which are advisory,<sup>145</sup> speak only to the minimum sentence.<sup>146</sup> Typically, the minimum sentence must be no more than one-half of the maximum sentence, which allows for a period of post-release supervision.<sup>147</sup> Pennsylvania uses a two-axis grid system with categorical groupings by offense severity along one side (the y-axis) and a measure of criminal history is located on the other (the x-axis).<sup>148</sup> These two factors form a grid and, at the intersection of these two lines, the Commission recommends a range of minimum sentences that constitute the “standard range” for each offense-severity pairing. If the sentencing judge finds a mitigating or aggravating factor, she may impose a sentence within the “aggravated range” or the “mitigated range.”<sup>149</sup> A sentence within any of these three

<sup>141</sup> BUREAU OF PLAN., RSCH. & STATS., PENNSYLVANIA DEPARTMENT OF CORRECTIONS MONTHLY POPULATION REPORT 1 (2016), By the time of this writing in July 2021, the correctional population had decreased to approximately 38,900, a decrease of 33%. BUREAU OF PLAN., RSCH. & STATS., PENNSYLVANIA DEPARTMENT OF CORRECTIONS MONTHLY POPULATION REPORT 1 (2021).

<sup>142</sup> Wayne N. Welsh & Gary Zajac, *A Multisite Evaluation of Prison-Based Drug Treatment: Four-year Follow-up Results*, 93 PRISON J. 251 (2013); Kimberly M. Davidson, *Testing an Interactionist Theory of Treatment Engagement in a Pennsylvania Prison-Based Therapeutic Community*, 47 CRIM. JUST. BEHAV. 1282 (2020).

<sup>143</sup> KRAMER & ULMER, *supra* note 101, at 18–19 (noting that the legislature established the Commission in 1978, but it did not hold its first meeting until 1979).

<sup>144</sup> See Steven L. Chanenson, *The Next Era of Sentencing Reform*, 54 EMORY L.J. 377, 433 (2005).

<sup>145</sup> See, e.g., *Commonwealth v. Yuhasz*, 923 A.2d 1111, 1117 (Pa. 2007) (“Pennsylvania’s statutory sentencing scheme is indeterminate, advisory, and guided.”); *id.* at 1118 (“It is well established that the Sentencing Guidelines are purely advisory in nature.”).

<sup>146</sup> *Commonwealth v. Boyer*, 2004 PA Super 303, ¶ 13 (“[T]he sentencing guidelines provide for minimum and not maximum sentences . . .”) (citation omitted).

<sup>147</sup> See, e.g., 42 PA. CONS. STAT. § 9756(B) (1998) (“The court shall impose a minimum sentence of confinement which shall not exceed one-half of the maximum sentence imposed.”).

<sup>148</sup> PA. COMM’N ON SENT’G, *supra* note 101, at 32 (“The Guidelines assign recommended minimum sentencing ranges based on the offense gravity score (OGS) assigned to the offense and the prior record score (PRS) based on the seriousness and extent of the offender’s criminal history.”).

<sup>149</sup> The Commission describes it this way:

For each combination of OGS and PRS, the Guidelines prescribe three ranges: [(1)] A standard range for use under normal circumstances, [(2)] An aggravated range for use when the Court determines that there are aggravating circumstances/factors that would tend to increase the seriousness of the

ranges is considered to be consistent with the guidelines.<sup>150</sup> If, however, the judge believes that an even more severe or an even less severe sentence is warranted, she may depart from the guidelines and impose a sentence that is characterized as a “departure above” the guidelines or a “departure below” the guidelines. There are different judicial reporting requirements and standards of review (at least in theory) depending on whether the sentence is a departure above or below as opposed to within the mitigated, standard, and aggravated ranges.<sup>151</sup> The options available to the sentencing judge in order from most to least severe are:

- Departure above the guidelines
- Aggravated range
- Standard range
- Mitigated range
- Departure below the guidelines

The judge issues a sentence for each conviction offense that the individual has been convicted of (or pled guilty to). If there are multiple offenses before the court at one time, the judge must determine whether those sentences run concurrently or consecutively. That grouping of sentenced offenses is called a “judicial proceeding.”<sup>152</sup>

## B. *Methods*

Survey data were collected between 12 September and 14 October 2016 by PADO. These surveys were administered as part of a broader effort to better understand patterns of addiction and drug use among the incarcerated population under its oversight (n=2,478). The confidential survey was administered at the two State Correctional Institutions responsible for the intake and orientation processes; one facility was responsible for the intake of newly incarcerated males while the other oversaw an identical process for newly incarcerated females. Administered in a classroom setting along with other screening instruments, respondents completed the survey on their third day of orientation. This method of administration results in a representative sample of individuals that can be generalized to the larger

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offense, and [(3)] A mitigated range for use when the Court determines there are mitigating circumstances/factors that would tend to lessen the seriousness of the crime.

*Id.*

<sup>150</sup> *Id.* at 16 (“A sentence conforms to the Guidelines if it falls within the standard, aggravated or mitigated ranges. Otherwise, if the sentence falls above the aggravated or below the mitigated, the sentence is considered a departure ‘above’ or ‘below’ the Guidelines.”).

<sup>151</sup> 42 PA. CONS. STAT. § 9721 (2021); 42 PA. CONS. STAT. § 9781 (2021).

<sup>152</sup> PA. COMM’N ON SENT’G, *supra* note 101, at 35.

population of people incarcerated with the PADOc system.<sup>153</sup> The survey items asked respondents to indicate the lead or primary crimes they were convicted of that resulted in the term of incarceration that they were beginning at the time of the survey. They were also asked to report if they were under the influence of alcohol and/or any drug(s) at the time of their offense of conviction, with follow-up questions allowing them to specify the type of substance(s) they had been using. Subsequent data cleaning allowed for the classification of offenses into categorical variables based on the nature of the offense and the grouping of the substances of abuse into non-mutually exclusive categorical groups representing the most commonly reported substances.

Self-reported data, as employed here, are potentially subject to several factors that may potentially bias the findings. These influences, though controllable through careful survey design and implementation, can impact responses differentially across substance types and populations.<sup>154</sup> However, previous research on the conformity between reports of arrests among adolescents between self-reported and administrative data suggest that, though some variation may exist, these data have utility in understanding population-wide trends and mechanisms.<sup>155</sup>

Administrative data on sentencing events were provided by the Pennsylvania Commission on Sentencing. This publicly available, but custom-extracted, database contained detailed information regarding convictions and sentences issued to survey respondents between 2012 and 2016. These data are reported to the Commission by sentencing judges, court clerks, or other court staff in each of the 67 counties throughout Pennsylvania. These data included a range of information relevant to the charging, conviction, and sentencing of PADOc survey respondents.

From there, the final analysis dataset was constructed by merging PADOc and Commission data using a crosswalk file, provided by the PADOc, that facilitated the combination of the two data sets on a unique identifier that was assigned to each individual under PADOc supervision and was also included in the Commission-held records. Overall, the merge was successful; 87.7% of survey respondents were linked to their sentencing event data within the Commission file. Once merged, the analytic dataset was cleaned and refined. This resulted in the removal of two survey respondents with an outlying number of charges listed along with their incarceration sentence (1,072 charges and 803 charges, respectively), and the removal of seven additional survey respondents without valid identification numbers listed in the

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<sup>153</sup> Charles E. Loeffler et al., *Measuring Self-Reported Wrongful Convictions Among Prisoners*, 35 J. QUANTITATIVE CRIMINOLOGY 259 (2019).

<sup>154</sup> Lana D. Harrison, *The Validity of Self-Reported Data on Drug Use*, 25 J. OF DRUG ISSUES 91 (1995); see also George Yacoubian et al., *Comparing the Validity of Self-Reported Recent Drug Use Between Adult and Juvenile Arrestees*, 35 J. PSYCHOACTIVE DRUGS 279, 282 (2003) (suggesting that drug use may be underreported in self-report studies).

<sup>155</sup> David S. Kirk, *Examining the Divergence Across Self-Report and Official Data Sources on Inferences About the Adolescent Life-Course of Crime*, 22 J. OF QUANTITATIVE CRIMINOLOGY 107 (2006).

datasets. This process produced a final analytic sample of PADOc survey respondents, their contemporaneous intoxication, and Commission records on the sentences they received and the recommended sentence range in keeping with the advisory sentencing guidelines promulgated by the Commission at that time (n=2,135). Within the sample, 88.8% (n=1,897) of respondents identified as male and 11.1% identified as female (n=238). Respondents were primarily identified as White (63.8%, n=1,363) and Black (33.4%, n= 713), with a small number of Hispanic (1.45%, n=33) and Asian/ Pacific Islander (.09%, n=2) persons included in the sample. Finally, the average age of respondents in the sample was 34.1 years old on the day of their sentencing (sd= 11.3 years).

Survey data were coded to create several variables that were of unique importance to this analysis. Intoxication at Time of Offense is a dummy variable that indicates that a respondent self-reported being under the influence of any substance at the time of the crime that resulted in their incarceration offense. Several binary measures further specify the substance being used at the time of the criminal incident: Alcohol, Cocaine (or Crack), Opiates/Prescription Drugs, Heroin, Hallucinogens, K2/Synthetic Drugs/Bath Salts, Marijuana, and Other. The variable Multiple Drugs indicates respondents reporting more than one substance used at the time of the crime. Created variables collapsed substance types into four dummy variables using these broad groupings: Alcohol, Opioids, Marijuana, and Other.

The variable for Crime Type is a categorical variable indicating the offense type under classifications determined by the Association of State Corrections Administrators that includes these categories: Sex Crime, Violent Crime, Property Crime, Drug Crime, and Public Order Crime.

Finally, the analysis considers how administered sentences in practice are related to the recommended punishments under the Pennsylvania sentencing guidelines. For each charge, Pennsylvania law mandates that sentences fall into a standard, aggravated, or mitigated range depending on both the severity of the current offense and the individual's prior criminal record for each charge. This analysis considers the sentence conferred for the most serious offense recorded and sentenced in a judicial sentencing event. Created by the Commission, the variable Conformity captures how administered sentences fall into guideline ranges using these six categories: Above, Aggravated, Below, Mitigated, Procedural, and Standard. We note that our merged dataset has complete information on all variables used in this analysis.

### *C. Results*

We begin by examining the overall percentages of respondents who indicated that they were intoxicated at the time of their commitment offense. Table 1 displays proportions within the analytic sample (N=2,135) of self-reported substance use contemporaneous to the time of the offense that resulted in their current prison sentence. Any form of intoxication at the time of the crime is common: just under half of all survey respondents (47.35%; N=1,011) reported being intoxicated by a

substance—drugs and/or alcohol—at the time of their crime. Overall, the most common substance was opioids (18.92%), reflective of the number of people who indicated they had been using heroin (12.74%) and other opiates including prescription pain medication (6.18%). The second most used substance was alcohol: about 20% (18.8%; N=401) of the sample had been drinking at the time of their crime. In third, about 10% (N=210) reported being under the influence of multiple substances during the crime incident that can include either drugs and/or alcohol. Less frequently used substances include marijuana and “other” drugs (~9% each), opiates like prescription drugs (~6%), and cocaine or crack (~5%). Just under ten percent of respondents reported using marijuana alone at the time of their offense. Very few respondents used synthetic drugs or hallucinogens at the time of their offense. It is important to note that these responses reflect the intoxicants consumed at the time of their criminal offense, a measure that may be similar, but is almost certainly not identical to, data on usage patterns in the month prior to, or even at the time of, arrest.

**Table 1: Substance Types of Contemporaneous Intoxication**

<b>Type of Substance</b>	<b>N</b>	<b>Percent</b>	<b>Standard Deviation</b>
Any Substance (Drugs or Alcohol)	1,011	47.35%	.50
Alcohol	401	18.78%	.39
Cocaine/Crack	111	5.20%	.22
Opiates/Prescription Drugs	132	6.18%	.24
Heroin	272	12.74%	.33
Hallucinogens	10	.47%	.07
K2/Synthetic Drugs	44	2.10%	.14
Marijuana	191	8.95%	.29
Other	183	8.57%	.28
Multiple Substances	210	9.84%	.30
<i>N</i>	2,135		

*Note: The final analytic sample excludes 341 survey respondents who did not have available sentencing data (i.e., could not be matched across data sets).*

*K2/Synthetic drugs includes bath salts.*

As a precursor to the discussion of the sentencing data, Table 2 tabulates the crime types for which survey respondents were convicted and sentenced. There is a nearly even distribution of convictions for violent, property, drugs, and public order crimes, each of which includes a range of criminal acts of a similar type. Sex crimes are less frequently featured in these data.

**Table 2: Conviction Offense Type**

<b>Crime Type Category</b>	<b>N</b>	<b>Percent</b>
Violent	453	21.22%
Property	467	21.87%
Drugs	452	21.17%
Public Order	437	20.47%
Sex	326	15.27%
<i>Total</i>	2,135	100.00%

*Note: The recorded crime type reflects that of the most serious offense included in a given judicial sentencing hearing.*

Table 3 shifts attention to the sentences handed down for the offenses for which respondents were convicted. Data presented in Table 3 indicate received sentences' conformity with Pennsylvania's Sentencing Guidelines, presented in descending order of severity. These broad categorizations represent the degree of alignment between each judicially administered sentence for the most serious offense (i.e., Table 2). The majority of the sample—two-thirds (N=1,416)—received a sentence that fell within the standard recommended range under Pennsylvania's guidelines.

**Table 3: Conformity with Sentencing Guidelines**

<b><u>Conformity with Sentencing Guidelines</u></b>	<b><u>N</u></b>	<b><u>Percent</u></b>
Above	95	4.46%
Aggravated	114	5.35%
Standard	1,416	66.51%
Mitigated	266	12.49%
Below	238	11.18%
<i>Total</i>	2,129	100.00%

*Note: This table excludes six (N=6) survey respondents that received a sentence marked as a “Procedural Departure” based on clinical recommendations. We omit this small number of cases on the premise that their inclusion does not fit with the focus on understanding how intoxication at the time of the crime might impact judicial discretion in sentencing.*

The remaining third of the analytic sample received a sentence classified as outside of the standard guideline range. Most of these respondents—about one-quarter of the entire sample (23.7%) and over 70% of the non-standard sentence recipients—received a sentence beneath the standard range. This group includes approximately 11% of the sample (N=238) who received a sentence that was below the standard sentencing range, while slightly more (12.5%; N=266) received a mitigated sentence. Comparatively fewer respondents received sentences higher than the recommended range, with only 4.5% receiving a sentence above the recommended range and just over 5% receiving an aggravated sentence. Considered together, the majority of the sample received a sentence within or beneath the recommended guideline range. This pattern suggests that discretion in sentencing, when applied, is oriented towards downward guideline departures or selections at the lower bounds of permissible ranges.

### *C. Relationships between Contemporaneous Substance Use, Crime, and Sentencing*

Given this balance in the sample towards standard and/or lesser sentences relative to guideline ranges, the analysis now specifically considers associations between contemporaneous intoxication and sentencing. To narrow the analytic focus, Table 4 presents collapsed categories of substance use in the analytic sample from data presented in Table 1.

**Table 4: Substance Types of Contemporaneous Intoxication – Collapsed Categories**

	<u>N</u>	<u>Percent</u>	<u>Standard Deviation</u>
Alcohol	401	18.78%	.39
Opioids	391	18.31%	.39
Marijuana	191	8.95%	.29
Other	288	13.49%	.34

*Note: This table collapses data from Table 1.*

These categories will be used for the remainder of the analysis to simplify comparisons and to focus on behaviors of policy and public health interest. Considered in this reduced form, marijuana is the least commonly used substance among survey respondents. Alcohol and opioids are used at nearly the same frequency, the latter of which includes opiates, prescription drugs, and heroin.

**Table 5: Conviction Offense Type by Intoxication Type**

<u>Crime Type</u>	<u>(1) Alcohol</u>		<u>(2) Opioids</u>		<u>(3) Marijuana</u>		<u>(4) Other Drug</u>	
	<u>N</u>	<u>Percent</u>	<u>N</u>	<u>Percent</u>	<u>N</u>	<u>Percent</u>	<u>N</u>	<u>Percent</u>
Violent	89	22.19%	37	9.46%	33	17.28%	53	18.40%
Property	52	12.97%	148	37.85%	34	17.80%	93	32.29%
Drug	37	9.23%	118	30.18%	52	27.23%	73	25.35%
Public Order	178	44.39%	83	21.23%	55	28.80%	58	20.14%
Sex	45	11.22%	5	1.28%	17	8.90%	11	3.82%
<i>Total</i>	401	100.00%	391	100.00%	191	100.00%	288	100.00%

Using these condensed categories, Table 5 cross-tabulates conviction offense types by contemporaneous intoxication type. Within columns, percent values indicate the proportion of respondents using the specified substance who were convicted of the specified crime type—for example, data in Column 1 indicate the convictions recorded for persons who self-reported alcohol use at the time of the crime incident.

There is variation in the relative proportion of respondents convicted of crime types across intoxication categories. Starting with alcohol (Column 1), almost half of respondents drinking at the crime time were charged with public order offenses



(44.4%), slightly less than one-quarter (22.2%) were charged with a violent crime, and the remaining were split somewhat evenly amongst the other crime types. Persons reporting simultaneous opioid usage (Column 2) were most often charged with property (~38%) or drug (~30%) crimes. Over half of respondents reporting marijuana use at the crime time were charged with either public order (28.8%) or drug (27.2%) crimes; nearly the same amount of marijuana-using respondents were charged with violent or property crimes (~18% each). Finally, about one-third of those using other drugs (e.g., crack or cocaine) at the time of their crime were charged with property crimes. It is noteworthy that violent crime is never the most commonly charged offense type across all forms of substance use, and sex crimes are always the least commonly charged offense type.

**Table 6: Intoxication Type and Sentence Conformity**

<b><u>Conformity with Sentencing Guidelines</u></b>	<b><u>Alcohol</u></b>		<b><u>Opioids</u></b>		<b><u>Marijuana</u></b>		<b><u>Other Drug</u></b>	
	<u>N</u>	<u>Percent</u>	<u>N</u>	<u>Percent</u>	<u>N</u>	<u>Percent</u>	<u>N</u>	<u>Percent</u>
Above	16	3.99%	13	3.32%	9	4.71%	8	2.78%
Aggravated	27	6.73%	12	3.07%	6	3.14%	11	3.82%
Standard	279	69.58%	285	72.89%	136	71.20%	212	73.61%
Mitigated	35	8.73%	45	11.51%	26	13.61%	31	10.76%
Below	40	9.98%	35	8.95%	14	7.33%	26	9.03%
Chi-Square Test Statistic (p-value)	17.37 (.00) ***		3.28 (.66)		5.73 (.33)		2.82 (.73)	

*Note: Analytic sample limited to respondents reporting any contemporaneous intoxication (drug or alcohol use). + =  $p < .10$ ; \* =  $p < .05$ ; \*\* =  $p < .01$ ; \*\*\* =  $p < .001$ .*

In Table 6, we consider how contemporaneous intoxication is associated with sentencing guideline conformity to test hypotheses regarding judicial discretion and empathy. Limiting attention to respondents self-reporting any form of contemporaneous intoxication, presented data tabulate sentence guideline conformity across self-reported substance of abuse. The patterns observed at the sample level (i.e., Table 3) are largely replicated—and slightly exacerbated—within this subgroup analysis. It is again the case that the majority of sentences issued within the analytic sample across all substance use categories fall into the standard guideline range. This proportion of standard sentences is slightly higher across all

conviction types among the subgroup of respondents reporting contemporaneous intoxication (~70–73%) than within the entire analytic sample (67%).

Outside of standard sentences, most sentences issued outside of the standard range fall somewhere beneath the standard recommendations. This pattern is consistent for all intoxication types. Roughly 20% of respondents self-reporting use of each substance received a sentence that was mitigated or below the guideline sentence recommendation. Mitigated sentences were slightly more common than below guideline sentences. Aggravated or above recommendation sentences were comparatively infrequent, only applied in about 6–10% of sentences applied to persons self-reporting each type of intoxication. The one exception is persons under the influence of alcohol at the time of their crime, who receive a slightly larger amount of aggravated sentences (7%) relative to other intoxication types.

The final row of Table 6 displays the results of chi-square tests assessing whether there is a statistically meaningful relationship between the two variables. In this analysis, these tests examine whether there is a significant (from a statistical perspective) association between sentencing guideline conformity and self-reported substance use type contemporaneous to the crime incident. Using a conventional threshold of  $p < .05$ , alcohol was the only intoxication type that emerged as statistically significant. The test result affirms an association between sentencing guideline conformity and alcohol use at the time of the criminal incident, a result reflected in other recent scholarship.<sup>156</sup> The other three types of intoxication do not meet this threshold for significance, indicating that these data cannot affirm a statistical association between opioid, marijuana, and other drug use and sentence guideline conformity. While useful, these results should be interpreted with caution given the small number of persons in some of the extreme guideline ranges and the cautions detailed, *infra*.

## V. THE FUTURE OF CONTEMPORANEOUS INTOXICATION AND SENTENCING

As a society, we have choices to make about the significance of intoxication above and beyond its impact, or lack thereof, on convictions and sentences. Is a person who commits a crime while intoxicated less culpable or more culpable? The entire sentencing guidelines concept is grounded in the idea that a broad normative framework that still provides for judicial discretion is valuable. The federal tactic to largely ignore intoxication is one approach. However, given the prevalence of contemporaneous intoxication described in this survey, that seems to ignore the reality that intoxication is a common status at the time of the crime's commission. The approach in England and Wales to urge an aggravated sentence without more explanation or further guidance seems to be both over- and under-inclusive. The frequent American approach of policy silence, reflected by the Pennsylvania guidelines, leaves too much to the unguided discretion of the judiciary given the

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<sup>156</sup> Galoni et. al., *supra* note 132.

scope of the issue at hand.<sup>157</sup> Because this is a common issue, judges, defendants, and society deserve some explicit recommendations. Although we recognize that there is a danger of hamstringing judges in an area that requires nuance (a scalpel and not a cleaver),<sup>158</sup> ceding the field entirely comes with its own, significant costs. As Professor Dingwall put it,

[S]entencing should not be allowed to happen without any form of guidance. Individuals need to be confident that there will be a similarity of approach. This is not the same thing as removing all discretion from sentencers. Rather it is a question of requiring sentencers to use that discretion in a particular manner.<sup>159</sup>

We agree in principle and note that the variation in the data detailed here—especially between the nature of the substances being used and sentencing outcomes—suggests that there is a need for this issue to be considered in a more evidence-based manner—that is, one that features additional data collection and analysis. This policy gap can then start to be filled through the generation of data-driven evidence that can inform decision making and the potential reform of the advisory recommendations put forth by the relevant Guidelines.

Reasonable minds can and will differ as to the shape that policy guidance should take. Charles Felker recommended a system where intoxication is available as a mitigating factor if it impaired the “defendant’s ability to appreciate the wrongfulness of his conduct at the time he committed the crime,” while being a potential aggravating factor “to the extent that defendant’s decision to become drunk is equivalent to a decision to commit crime.”<sup>160</sup> Professor Dingwall posits that, “generally speaking, intoxication should not be treated as a mitigating factor unless

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<sup>157</sup> See, e.g., Gavin Dingwall & Laurence Koffman, *Determining the Impact of Intoxication in a Desert-Based Sentencing Framework*, 8 CRIMINOLOGY & CRIM. JUST. 335, 345 (2008) (asserting “that a uniform approach is necessary in order to avoid the unfairness associated with disparity”); Roberts, *supra* note 78, at 264 (“The concepts of equality and fairness that underlie the criminal law require sentencers to apply mitigating and aggravating factors consistently.”).

<sup>158</sup> Padfield, *supra* note 27, at 82 (urging “caution to those who argue that guidelines on aggravating and mitigating factors should be more prescriptive”); see also *id.* at 83–4 (“The complex impact that an offender’s intoxication rightly has on a sentencer reveals the realities of sentencing practice and the danger with formulaic sentencing.”).

<sup>159</sup> DINGWALL, *supra* note 58, at 170; see also Padfield, *supra* note 27, at 82 (“Further non-binding guidance on the precise role of intoxication on sentence decisions would be helpful.”).

<sup>160</sup> Charles J. Felker, *A Proposal for Considering Intoxication at Sentencing Hearings: Part I*, 53 FED. PROB. 3, 4 (1989); see also Felker, *supra* note 117, at 13–14 (setting forth draft policy language and commentary); Charles J. Felker, *Considering Offender Intoxication at Sentencing*, 2 FED. SENT’G REP. 192, 194 (1989).

the offender had never offended whilst intoxicated before.”<sup>161</sup> What if the defendant is acting “out of character”?<sup>162</sup> Again, opinions vary.

While the data we present in this paper advance our collective understanding of the relationship between contemporaneous intoxication and sentencing in Pennsylvania, there is much more we need to know.<sup>163</sup> We believe that an evidence-based foundation is essential to create any policy about the treatment of contemporaneous intoxication at sentencing. Adequate evidence is currently unavailable.

To help obtain the information needed for rational policy formation, we recommend more data collection by the Pennsylvania Commission on Sentencing and additional research by academics. The quality of the reasons provided by Pennsylvania judges, described above,<sup>164</sup> is insufficient to provide the Commission with the insight into the reality of sentencing in the courtroom it needs and deserves. Reporting simply that one or both of the parties recommended that the sentence aggravated or mitigated sheds virtually no light on what is happening at sentencing. The system can—and must—do better. Furthermore, we urge the Pennsylvania Commission to acknowledge the mixed and complicated nature of intoxication at sentencing and start to craft narrative guidance that helps trial judges understand circumstances that more readily support aggravation or mitigation or neutrality concerning offenses committed by intoxicated individuals. As an additional benefit, once the Commission starts asking about these situations, prosecutors and defense attorneys will be incentivized to discuss the nature of the contemporaneous intoxication during plea negotiations and sentencing hearings. This will encourage judges to document if and when this factor plays a role in their sentences.

#### CONCLUSION

As with all sentencing issues, difficult questions abound.<sup>165</sup> In this case, self-reports data suggest that about half of all individuals incarcerated consumed drugs or alcohol contemporaneously with their crime of conviction. These data also suggest that both alcohol and opioids often act as intoxicating agents during the commission of many of these crimes, about twenty percent for each substance. Despite these similarities, only intoxication with alcohol was associated with a downward departure in sentence length. These findings additionally highlight how little we understand, within both the empirical literature and sentencing

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<sup>161</sup> DINGWALL, *supra* note 58, at 170.

<sup>162</sup> Padfield, *supra* note 27, at 90.

<sup>163</sup> *Cf.* Padfield, *supra* note 27, at 93 (stating that, “we need a lot more empirical research into the realities of sentencing.”).

<sup>164</sup> *See supra* note 90–96 and accompanying text.

<sup>165</sup> Padfield, *supra* note 27, at 97 (“How is the court meant to distinguish remorseful drunks from dangerous drunks, one-off drunks from alcoholics, those who get drunk in order to commit their offences from those who did not know they were drunk?”).

jurisprudence, about the nexus between intoxication and punishment. Given the growing social harms of the opioid epidemic and the difficulty inherent in sustaining the relatively small decreases in the prison populations so recently realized, documenting, understanding, and critically studying these relationships should take on a new urgency.

