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The Tipping Point: Prison Overcrowding Nationally, in West Virginia, and Recommendations for Reform

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THE TIPPING POINT: PRISON OVERCROWDING
NATIONALLY, IN WEST VIRGINIA, AND
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I. INTRODUCTION ........................................................................................................ 586
II. HISTORY OF A NATIONAL PROBLEM ..................................................................... 587
III. THE CURRENT STATE OF DISARRAY ...................................................................... 588
A. The State of California as a Microcosm ................................................................. 588
   1. A State of Emergency: Governor Schwarzenegger's Proclamation .................. 590
   2. The Ninth Circuit's Reaction: Release of Surplus Prisoners ......................... 590
   3. Supreme Court Review ...................................................................................... 592
IV. PRISON OVERCROWDING IN WEST VIRGINIA .................................................. 593
   A. Initial Response: The Governor's Commission on Prison Overcrowding ........ 595
      1. Potential Remedial Actions ............................................................................ 596
      2. Specific Recommendations .......................................................................... 596
   B. Criminal Sentencing Reform ............................................................................. 602
      1. Role of the West Virginia Law Institute ....................................................... 602
      2. The Final Report ............................................................................................ 603
V. THE ABSOLUTE NEED FOR REFORM .................................................................. 605
   A. Statutory Inequities in the West Virginia Code ............................................... 605
      1. Arson .............................................................................................................. 605
      2. Robbery ....................................................................................................... 606
      3. Drug Crimes ................................................................................................. 607
      4. "Three-Strikes" Law ...................................................................................... 607
      5. Obsolete Code Sections in Need of Expulsion ............................................. 608
   B. Community Corrections as an Alternative to Incarceration ............................. 608
      1. Prospective Community Programs and Diversion Plans ............................... 609
         i. Initial Risk Assessments ............................................................................. 610
         ii. Progressive Drug and Alcohol Abuse Rehabilitation ............................ 612
         iii. Recommendations from the Governor's Commission on Prison Overcrowding ...................................................................................................................... 614
         iv. Mental Illness & Community Corrections .............................................. 617
VI. CONCLUSION ......................................................................................................... 619
I. INTRODUCTION

Due to the fact that the United States imprisons its citizens at a higher rate than any country in the world\(^1\) it should be of little surprise that there is a current state of disarray within America’s prison system. At present, the United States is plagued by severe prison overcrowding. A surplus of the total population of offenders is living in overly congested prison conditions that threaten their health and safety and the health and safety of penal staff, all the while implicating important constitutional issues. In light of burgeoning prison populations, commentators and experts feel the problem lies within state and federal criminal sentencing guidelines. For example, in response to the dilemma, Congress has ordered an advisory panel of judges to “conduct a review of mandatory and minimum-sentences,” one that “could lead to a dramatic rethinking of how the U.S. incarcerates its criminals.”\(^2\) While the federal government recognizes common inconsistencies and the need for reform, states are also becoming conscientious and ordering their own respective reviews. Most recently, due to an excess prison population that could threaten public safety, the State of West Virginia—through a legislative mandate—ordered its own comprehensive review of its criminal sentencing guidelines, in hopes of decreasing the current overpopulation in its prisons and further reducing future discrepancies.\(^3\)

The task, given to the West Virginia Law Institute—an official advisory law revision and law reform agency statutorily proscribed\(^4\)—grew out of a report written by Governor Joe Manchin’s Commission on Overcrowding\(^5\) and called for the “review of relevant statutes and related literature” in order to “offer specific recommendations in sentence restructuring and appropriate diversion to community based rehabilitation.”\(^6\)

This Note will address not only what has become a national crisis but a catastrophic issue that plagues the State of West Virginia in regards to public safety and the state’s fiscal resources. Part I will discuss the historical aspects regarding overcrowded prisons and assess the causes of how we got to where we are today. Part II will examine the scope of the problem by using California as a microcosm of the United States at large. Although the situation in California represents a somewhat exaggerated example, it is useful as an illustration of

\(^1\) THE NATIONAL COMMISSION ON CRIME & JUSTICE, A CALL TO ACTION 40 (Linda M. Thurs- ton ed., 1993) [hereinafter CALL TO ACTION].


\(^3\) Legis. Oversight Comm. on Regional Jail and Correctional Facility Authority Res., 78th Leg. (W. Va. 2009) [hereinafter Legis. Oversight Comm.].

\(^4\) W. VA. CODE § 4-12-1 (2000).


\(^6\) Legis. Oversight Comm., supra note 3.
what could result if immediate action in other states is not taken. Part III addresses the problem of prison overcrowding in West Virginia, including a brief history of the State’s initial response to the crisis—Governor Manchin’s creation of a Commission to research prison overcrowding and formulate recommendations. Thereafter, the reforms that are currently under way: (1) the charge from the West Virginia legislature, and (2) the work of the West Virginia Law Institute in formulating suggestions for criminal sentencing reform, are discussed in detail.

In conclusion, it is emphasized that the State of West Virginia has an urgent need for a reduced prison population. First and foremost, there are statutory inequities and deficiencies that need to be tackled by the West Virginia legislature. Further, community corrections—an under-used and under-appreciated alternative to incarceration in the State of West Virginia—need to be utilized with greater frequency. Whether expanding current programs or creating new programs and facilities, such alternatives to incarceration could have an overwhelmingly positive impact on the problems West Virginia currently faces in its correctional system, and on any problems that may arise in the future.

II. HISTORY OF A NATIONAL PROBLEM

With a “lock them up, bury the key” mentality, the United States prison system has been both troubled and highly criticized. Even as far back as 1990, the National Commission on Crime and Justice recognized that the United States criminal justice system was flawed. Rather than relying “first and foremost on imprisonment,” the Commission commented that the nation needed a “range of means to insure both public safety and individual and community responsibility for crime prevention and response.”

Crime rates, and as such incarceration rates, have always been a point of contention and have fluctuated throughout American history. However, “Reganomics,” the “war on drugs,” and the economic reductions for social programs caused a large increase in crime throughout the United States and thus an increase of offenders sentenced to jail and prison. The reduction in resources for education, housing, jobs, and health care, combined with the influx of crack-cocaine, not only amplified crime rates but also increased the call for “vengeance and punishment” from the public at large. Moreover, in 1984, U.S. federal courts adopted the Sentencing Reform Act that created a Federal Sen-
tencing Commission.\textsuperscript{12} This Commission produced a detailed table proscribing punishments for particular crimes that inherently limited judicial discretion.\textsuperscript{13} And, as had been the case throughout American history, the United States "remain[ed] committed to incarceration as its first line of defense against crime and violence."\textsuperscript{14}

As the United States has such a high imprisonment rate it is important to note initially that there are various types and divisions of prisons in the United States including county jails, state prisons and federal prisons, all of which are further delineated based on minimum, medium, and maximum security.\textsuperscript{15} Nonetheless, and despite this uniformity, prison populations have increased at all levels. Although prisons are overcrowded and in some instances prisoners are living in appalling and unsafe conditions, the overwhelming majority of society does not seem sympathetic because the "public perception [is] that persons in prison deserve inhumane treatment because they have committed violent acts against others" is constant.\textsuperscript{16}

III. THE CURRENT STATE OF DISARRAY

A. The State of California as a Microcosm

The State of California and its drastic issues with prison overcrowding should be considered a microcosm of American society and an illustration of the extreme measures that will result if immediate action to reduce burgeoning prison populations is not taken. As Governor Schwarzenegger stated in his State of Emergency Proclamation addressing prison overcrowding, California's prisons have become places of "extreme peril to the safety of persons."\textsuperscript{17} Since reaching a record of more than 160,000 prisoners in 2006, its adult prison institutions have "operated at almost double their intended capacity."\textsuperscript{18} In fact, some institutions are currently operating at 300\% of their intended capacity and have tripled bunk beds in gymnasiums and day rooms.\textsuperscript{19}

Since the mid-1970s, California's prison population has increased by at least a damning 750\%.\textsuperscript{20} Not only does the current condition threaten society at large because prisoners are not obtaining necessary rehabilitative and reintegra-

\textsuperscript{12} CAYLEY, supra note 10, at 45.
\textsuperscript{13} Id.
\textsuperscript{14} CALL TO ACTION, supra note 1, at 11.
\textsuperscript{15} Id. at 41.
\textsuperscript{16} Id. at 42.
\textsuperscript{19} Id.
\textsuperscript{20} Id. at *19.
tive resources before their release, the severe overcrowding in some prisons is a threat to the physical and mental health of its inhabitants and the people who work there—with the likelihood of transmission of infectious disease increased and the propensity for violence greater in such overpopulated common areas.\footnote{Schwarzenegger Proclamation, supra note 17.}

As is the case nationally, many of California's problems with prison overcrowding result from its adoption of determinate sentencing\footnote{Determinate sentencing is defined as "A sentence to confinement for a fixed or minimum period that is specified by statute." TheFreeDictionary.com, http://legal-dictionary.thefreedictionary.com/Determinate+Sentence (last visited Oct. 28, 2010).} and its "three strikes and you're out law."\footnote{Cayley, supra note 10, at 54.} The Uniform Determinate Sentencing Act in California came about as a result of racial and economic discrepancies—where white and affluent offenders were receiving more lenient sentences because of skin color and social status.\footnote{Sean Hayes, The End of Determinate Sentencing: How California's Prison Problem Can be Solved with Quick Fixes and a Long Term Commission 4 (2006), available at http://www.law.stanford.edu/program/centers/scjc/workingpapers/SHayes_06.pdf.} However, determinate sentencing clearly has its flaws, as serious offenders are mandatorily released early and those who commit petty offenses, albeit for the third time, are sentenced to life in prison.\footnote{Id.} Determinate sentencing also "makes the criminal justice system into one focused solely on punishment, and this fails to take into account that not every criminal is the same person."\footnote{Id. at 9} And, as a further cause, similar to the trends nationally, California does not have adequate "post-sentencing practices," such as rehabilitation and counseling services, thus increasing recidivism, with repeat offenders reentering the system, increasing overall prison populations as a result.\footnote{Id. at 4.}

Although prisons are only required to provide the "minimal civilized measure of life's necessities," the situation in California has undoubtedly failed.\footnote{Rhodes v. Chapman, 452 U.S. 337, 347 (1981).} In fact, many of California's prisons are operating at extreme levels of capacity. For example, as of 2006 there were twenty-nine prisons in the state with "severe overcrowding."\footnote{Schwarzenegger Proclamation, supra note 17.} A dramatic example, among many, included Avenal State Prison that had a capacity of 5786 inmates but was housing 7422 inmates; 1654 of which were being housed in "areas designed for other purposes."\footnote{Id. at 4.} Looking at all of the prisons listed in the Governor's proclamation, the facts are striking: drastic numbers of inmates are being housed in areas that were intended for other purposes and within such facilities a greater number of safety

\footnote{Id.}
breaches including riots, weapon confiscations and assault and battery committed by inmates against each other and prison staff.  

Recently, based on two Ninth Circuit federal court decisions in *Plata v. Schwarzenegger* and *Coleman v. Schwarzenegger*, California has been mandated to release prisoners in order to reduce prison overcrowding and rectify the inhumane conditions within its prison system. This extreme measure—but one that is permissible per 18 U.S.C. § 3626—should be a lesson to other jurisdictions that have rapidly increasing prison populations to take the problem seriously, rectify the damage done, and prevent further prison population growth.

### 1. A State of Emergency: Governor Schwarzenegger’s Proclamation

On October 4, 2006, as a result of a report from the Corrections Independent Review Panel as well as other undertakings, Governor Schwarzenegger issued a Prison Overcrowding State of Emergency Proclamation. After outlining the risks that the current state of California’s prisons present, including security risks and “increased, substantial risk for transmission of infectious illness,” Governor Schwarzenegger articulated that “immediate action is necessary to prevent death and harm caused by California’s severe prison overcrowding.” Because the legislature rejected the Governor’s initial proposals he “invoked his powers under the California Emergency Services Act to call for immediate efforts to transfer inmates to out-of-state correctional facilities,” in addition to other measures. Following his proclamation, two other reports were issued that confirmed and echoed his assertions and called for a course of action to reduce the prison population as well as decrease recidivism.

### 2. The Ninth Circuit’s Reaction: Release of Surplus Prisoners

In both the *Plata* and *Coleman* cases, the plaintiffs brought suit asserting that a reduction in prison population was necessary to “bring the California

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31 *Id.*
32 560 F.3d. 976 (Cal. 2009).
33 2009 WL 2430820 (9th Cir. 2009).
35 SCHWARZENEGGER PROCLAMATION, supra note 17.
36 Other risks included the safety of the “men and women who work inside these prisons and the inmates housed in them” because there is a greater difficulty in controlling large inmate populations, and areas with triple bunks that block view create an “increased, substantial security risk.” *Id.* Further, electrical and waste water systems are operating at a maximum capacity that results in an increased risk to the health and safety of staff and inmates in the facilities. *Id.*
37 *Id.*
39 *Id.*
prison system’s medical and mental health care into constitutional compliance.\textsuperscript{40} Although under federal law, a release of prisoners is a “remedy of last resort,”\textsuperscript{41} the Ninth Circuit nonetheless found the conditions in California so egregious that when “court intervention becomes the only means by which to enforce rights guaranteed by the Constitution, federal courts are obligated to act.”\textsuperscript{42} Thus, in a striking decision and due to the fact the State of California’s prisons have become “criminogenic,”\textsuperscript{43} the Ninth Circuit Court held that the prison population needed to be reduced in order to “achieve constitutional compliance.”\textsuperscript{44}

Historically, “federal courts have long recognized that population reduction orders may sometimes be necessary to ensure constitutional prison conditions,” and courts initially relied solely on “general principles of equitable relief and federalism in deciding whether to enter a population reduction order to remedy constitutional violations.”\textsuperscript{45} Today, the Prison Litigation Reform Act (PLRA)\textsuperscript{46} codifies the permissibility of a “prisoner relief order” when necessary.\textsuperscript{47} Under the PLRA, a “prisoner release order” may be granted where the court order “meets both the PLRA’s specific standard for prisoner release orders and its general standard for prospective relief in prison conditions cases.”\textsuperscript{48} Further, Congress, within its drafting of the PLRA, allowed courts to retain the power to order a population reduction order when such order “is truly necessary to prevent an actual violation of a prisoner’s federal rights.”\textsuperscript{49}

In order for a prisoner release order to be issued, two conditions must be met. First, a court must find that “a court has previously entered an order for less intrusive relief that has failed to remedy the deprivation of the Federal right sought to be remedied through the prisoner release order,’ and that ‘the defendant has had a reasonable amount of time to comply with the previous court orders.”\textsuperscript{50} Once this threshold has been met, a federal panel of three judges must then “find by clear and convincing evidence (1) that ‘crowding is the pri-

\textsuperscript{40} Id. at *2.
\textsuperscript{42} Coleman, 2009 WL 2430820, at *3.
\textsuperscript{43} Criminogenic is the term coined by criminologists to describe the phenomenon of a rising tide of criminalism. Gwendolyn Cuizon, \textit{What is a Criminogenic Society? Factors That Could Lead to Crimes, LAW, CRIME & JUSTICE} (Feb. 25, 2009), available at http://peacesecurity.suite101.com/article.cfm/what_is_a_criminogenic_society. It is a “term which means rising number of criminalism due to social disorganization, anomie/strain, culture conflict, "criminal" subcultures and demographics.” \textit{Id.}
\textsuperscript{44} Coleman, 2009 WL 2430820, at *3.
\textsuperscript{45} Id.
\textsuperscript{47} Coleman, 2009 WL 2430820, at *28.
\textsuperscript{48} Id.
\textsuperscript{49} Id. at *29 (quoting H.R. Rep. No. 104-21, at 25 (1995)).
\textsuperscript{50} Coleman, 2009 WL 2430820, at *29.
mary cause of the violation of the Federal right,' and (2) that 'no other relief will remedy the violation of the Federal right.' In regard to the prison conditions in California, the convened three-judge panel found that all the articulated criteria were met, as "clear and convincing evidence establishes that crowding is the primary cause of the constitutional violations" and that such "constitutional deficiencies in the California prison system's medical and mental health system cannot be resolved in the absence of the prisoner release order."

3. Supreme Court Review

In response to an appeal from state officials, Republican state lawmakers in California, and Governor Schwarzenegger, the United States Supreme Court has granted certiorari in order to reconsider the Ninth Circuit's prison release order. The argument proffered on appeal by state lawmakers suggests that the three judge panel overstepped its authority and infringed upon California's rights as an individual state to control its Department of Corrections. Specifically, those opposed to the order contend that the three-judge panel, "entered an unprecedented order that intrudes on the state's authority over its prison system and constrains the state's ability to respond to problem within its prison system and more broadly throughout California." As Governor Schwarzenegger stated, "[w]e continue to believe federal judges do not have the authority to order the early release of prisoners ... California should be able to take action on its own to keep its citizens safe without interference from the federal courts." In response, lawyers for the inmates assert that the order was rightfully entered and the state's appeal is meritless, "cast 'in the broadest terms possible, invoking grand principles of federalism and judicial activism.'" The Supreme Court heard oral arguments during the October term of 2010, no doubt embracing substantial legal disputes from both sides. "The case will be a crucial test for state prison systems across the country, pitting the ability of states such as California to fix their own problems against the powers of federal judges who step in and order sweeping reforms when a prison system fails to address chronic deficiencies." The Court's ultimate decision will have

51 Id. (quoting 18 U.S.C. § 3626(a)(3) (2006)).
52 Coleman, 2009 WL 2430820, at *63–64.
54 Id.
56 Conery, supra note 53.
57 Mintz, supra note 55.
an effect not only on the Ninth Circuit’s prisoner release order but will serve as a guidepost to other states facing potentially similar ramifications in regards to burgeoning prison populations. While it is not yet known what effect this might have for West Virginia, and other states throughout the country, the Plata and Coleman decisions still represent, until overruled or distinguished, an example of drastic federal intervention that could result if constitutional standards are not met in state correctional institutions.

IV. PRISON OVERCROWDING IN WEST VIRGINIA

As stated by the Governor’s Commission on Prison Overcrowding in its report, “West Virginia borders on the ‘tipping point’ of serious repercussions stemming from insufficient institutional correctional resources and the resulting stressful impact upon . . . Regional Jails.” And, although West Virginia has one of the lowest crime rates in the country, it “falls in the bottom fifth of states per-capita in the use of correctional supervision, either imprisonment, alternative sanctions or probation and parole services.” Further, although West Virginia has one of the lowest incarceration rates in the nation—ranked thirty-eighth out of fifty states—it has one of the fastest increasing rates of prison growth, nearing seven percent each year. In fact, it is growing at a faster pace than all the other states in the nation. According to the Bureau of Justice Statistics, West Virginia, from 1995-2003, was third in the average percent change, with its state prison population increasing by 8.3% over this time period. Additionally, while national prison incarceration rates for 1996-2003 increased 12.9%, West Virginia had a disconcerting incarceration increase of 73.3%. Not surprisingly, West Virginia has a serious dilemma regarding prison overcrowding, threatening both public safety and the fiscal stability of the state.

Recognizing the need for immediate action on January 9, 2009, Governor Joe Manchin III, by Executive Order Number 1-09, established the Governor’s Commission on Prison Overcrowding. Grown out of a three-day symposium concerning the issue of jail and prison overcrowding, the Commission was given the task of studying and reviewing the state’s prison overcrowding problem and providing recommendations that might help curb the current deficiencies. Through its “research, meetings, problem solving sessions and consensus

58 MANCHIN REPORT, supra note 5, at vii.
59 Id. at 1.
60 Id.
62 Id.
63 Id.
64 MANCHIN REPORT, supra note 5, at 1.
65 Id.
recommendations" the Commission formulated an official report presented to the Governor on June 30, 2009. This report is discussed further in the later sections of this article.66

In the course of its research, the Commission exposed the severity of prison overcrowding in West Virginia. First, although the Division of Corrections currently has an inventory of 5015 beds, at the time of the report, approximately 6300 offenders were sentenced to time in the Division of Corrections, a number that was projected to further increase.67 Thus, 1300 excess prisoners were and are being held in regional jails before adequate space becomes available.68 Also alarming, as discovered by the Commission, is that the number of felony offenders within the state that are sentenced to be incarcerated in the Division of Corrections grows by approximately three individuals each day.69

Not only has this overflow population caused security and maintenance issues within prisons, it has, as the Commission articulated, "created a panoply of jail management problems."70 Because the jails must house the excess overflow of those sentenced to prison, it "hinders the jails in the performance of their mission of housing pre-trial detention and short term misdemeanor offenders."71 Additionally, those who serve a large percentage of their sentence in jails rather than prisons are oftentimes denied "treatment and services required to prepare them for re-entry into the community."72 As previously noted, this creates a trend of recidivism that causes re-incarceration and circularly further escalates prison populations and overcrowding. As stated in the report, because ninety percent of all prison inmates will eventually return to the community, "there is a duty for the state to provide the offender with programs that will aid in their rehabilitation and return to society."73 Such programs cannot be offered to felony prisoners incarcerated in regional jails due to surplus populations but can only be accomplished through physical custody in the Division of Corrections.74

Also adding to the overall problem of prison overcrowding is West Virginia's lack of, or failure to make use of, community corrections. Currently, West Virginia has a comparable amount of offenders serving sentences as those being supervised on probation, parole, or home confinement.75 Although this may seem to be a high statistic to the lay citizen, it falls far below the practices of other states, in which there is usually a ratio of two to three community su-

66 Id.
67 Id. at 5.
68 Id.
69 Id.
70 MANCHIN REPORT, supra note 5, at 5.
71 Id.
72 Id.
73 Id. at 6.
74 Id.
75 Id.
pervision offenders to one prison or jail offender.\textsuperscript{76} Astoundingly, and no doubt one of the root causes of the excess prison population, West Virginia ranks fiftieth in the United States in the “use of community corrections as an alternative to prison,” despite its implementation of the West Virginia Community Corrections Act, providing community correction based correctional programs as a sentencing alternative, in 2001.\textsuperscript{77}

Forecasts about the future of prison populations are also bleak. The Division of Criminal Justice Services Statistical Analysis Center predicts that by 2012, West Virginia will need increasing bed space, approximating around 8350.\textsuperscript{78} By 2017, the number is expected to rise alarmingly to 10,304.\textsuperscript{79}

A. Initial Response: The Governor’s Commission on Prison Overcrowding

As previously mentioned, as a result of the alarming statistics and mounting national problem with excess prison populations, the West Virginia Department of Military Affairs and Public Safety hosted a symposium in September 2008 to tackle the current issue of jail and prison overcrowding within the state.\textsuperscript{80} And, as a result of the symposium’s ultimate recommendation, a Commission was formed by Governor Manchin—a Commission that issued a report with recommendations for change. Like California, it was recognized that if the prison populations are not reduced or remedial measures taken, the state faces a situation that could involve intervention from the West Virginia Supreme Court of Appeals or federal receivership.\textsuperscript{81}

While the Commission’s ultimate goal was to reduce a surplus prison population, it also recognized the importance of safety and security for the public, Division of Corrections employees, and offenders.\textsuperscript{82} The ultimate question sought to be answered was: “Are there actions that may be taken to protect and improve the level of public safety in West Virginia which are more beneficial and more effective than the incarceration of offenders and the acquisition and operation of significant new institutions?” \textsuperscript{83} In order to answer this question the Commission reviewed practices in other states as well as academic literature and studies.\textsuperscript{84} Summarily, the Commission concluded that “there are too many offenders being sentenced to institutional correctional services, too few beds or

\textsuperscript{76} \textit{MANCHIN REPORT}, supra note 5, at 6.
\textsuperscript{77} \textit{ld.}
\textsuperscript{78} \textit{ld.}
\textsuperscript{79} \textit{ld.} at 7.
\textsuperscript{80} \textit{ld.} at 1.
\textsuperscript{81} \textit{ld.} at 11.
\textsuperscript{82} \textit{MANCHIN REPORT}, supra note 5, at 11.
\textsuperscript{83} \textit{ld.}
\textsuperscript{84} \textit{ld.}
cells in the Division of Corrections' facilities" and thus immediate action needs to be taken.\(^85\)

1. Potential Remedial Actions

The Governor's Commission on Prison Overcrowding concluded that three remedial actions are necessary to positively reduce the impact of prison overcrowding currently and in the future. First, the Commission proposed that alternative sanctions be utilized more consistently by "[i]dentify[ing] those offenders whose crimes may not have been too serious and sentence them to an appropriate level of community supervision and correction."\(^86\) Second, the Commission felt that there should be an appropriate reduction in the length of stay, including the use of rehabilitative services that increase the likelihood for parole and successful re-integration into the community.\(^87\) Third, and probably the most obvious, the State of West Virginia needs to acquire additional prison capacity, but do so in a "smart" fashion by building facilities and beds according to security and rehabilitation needs of the anticipated offender population.\(^88\)

2. Specific Recommendations

Along with the three remedial actions, the Commission also promulgated a "Comprehensive Agenda for the West Virginia Criminal Justice System."\(^89\) Based on policy issues, it specifically proposed fourteen recommendations that it projected would reduce the need for at least half of the prison beds needed in the future.\(^90\)

The Commission's first recommendation proposed the implementation of a "Risk-Need-Responsivity" Model of correctional intervention.\(^91\) This model would emphasize the "criminogenic" tendencies of individual offenders, including substance abuse and mental illness in hopes of "addressing [offender] needs or propensities with a result of reduced risk."\(^92\) Through a standardized risk and needs assessment, each offender would have a management plan, prior to sentencing, that would assist in his or her ultimate return into the community. As substance abuse and mental illness play a large, if not the most significant role in most crimes,

\(^{85}\) Id. at 12.
\(^{86}\) Id. at 13.
\(^{87}\) Id.
\(^{88}\) MANCHIN REPORT, supra note 5, at 13.
\(^{89}\) Id. at 15.
\(^{90}\) Id. at 16–38.
\(^{91}\) Id. at 16.
\(^{92}\) Id.
[b]y adopting a standardized and validated risk and needs assessment instrument for every convicted felon and administering the instrument before sentencing, or before other significant decisions relating to the offender, decision-makers can best provide a management plan that will address offenders needs and prepare him/her for a successful return to productive citizenship.93

The hope is that a model such as this will reduce criminal recidivism and free up Division of Corrections bed space by sending offenders with a low-risk assessment into community correctional programs as ""[a] continuity of services should reduce recidivism and future criminal behavior on the part of the offender.""94 Although the assessment would most likely cost around twenty dollars per offender, the ultimate savings would be roughly fourteen million dollars as approximately five hundred offenders would be diverted from jails and prisons to community correctional facilities.95

In 2008, it cost approximately $28,000 per year to house an offender in the Division of Corrections, and this is a cost that has risen approximately four percent annually for the past five years.96 By initial diversion, and spending the money at the forefront through individual assessments, the long-term savings would be considerable, as more offenders could be diverted from stays in the Division of Corrections.

By having an initial, individual assessment, there will also be more bed space in the Division of Corrections for violent, high-risk offenders.97 Extra space will not only allow the offenders who need the most rehabilitative and retributive treatment to be within the confines of prison but also will increase safety and maintenance for jails. Lower-risk offenders, initially identified, can then remain contributing members of society by serving their sentences on home confinement, through electronic supervision, in day report centers, or other community correction facilities.98

In the Commission’s second recommendation, it called for the expansion of alternative sanctions.99 In particular, emphasis was placed on expanding probation and parole as well as the concept of maintaining and increasing funding for community correctional facilities.100 In terms of probation, the Commission recommended the active use of Senate Bill 760, passed in 2009, which au-

93 Id.
94 MANCHIN REPORT, supra note 5, at 16.
95 Id. at 17.
96 Id. at 16.
97 Id. at 17.
98 Id.
99 Id. at 18.
100 MANCHIN REPORT, supra note 5, at 18.
Authorizes the West Virginia Supreme Court to develop a pretrial release program targeted at nonviolent misdemeanants. This however, as the Commission indicated, would require an increase in the number of probation officers in the State as current probation officers would become overwhelmed with extremely large case loads that they could not manage. In regard to parole, the Commission also called for an increase in the number of parole officers in hopes of returning offenders to the community earlier, and with more success so that they might become contributing members of society. Overall, the culminating suggestion was that ten probation officers and fifteen parole officers be hired to reduce case loads for current officers and in response to the proposed diversion and shortened length of stay for offenders in prison.

In expanding community corrections, the Commission placed emphasis on the idea of offender rehabilitation and restitutionary programs. As the Commission stated, "[c]urrent community correction programs managed by local jurisdictions offer another significant resource of treatment and sanctions in the community," such as counseling services and job vocational training. Specifically, the Commission recommended that such programs be expanded so as to provide space for felony offender diversion and to assist in the re-entry process for offenders who have been awarded parole and will re-integrate into society.

Along the same lines, the Commission, in its third recommendation, called for an increase in West Virginia's substance abuse and mental health treatment facilities due to the trend that offenses often coincide with both the abuse of drugs and alcohol and mental illness. In corroboration with the Department of Health and Human Resources, Bureau for Behavioral Health and Health Facilities, the Commission indentified seven initiatives that will help divert offenders and prevent anti-social behavior before it becomes criminal. The initiatives recommend the implementation of additional residential treatment centers, medication assisted treatment, detoxification units, long-term substance abuse programs, transitional living programs, and recovery centers to help prevent criminal behavior and help with the diversion and reintegration of offenders.

The fourth recommendation furthered the Commission's emphasis on reintegration of criminal offenders into society as it called for the creation of

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101 Id. at 18.
102 Id. at 18–19.
103 Id. at 19.
104 Id.
105 Id.
106 Id. at 20.
107 Id. at 20–27.
108 Id. at 20–27.
transitional housing programs for offenders who are granted parole. Often when offenders are granted parole they have insufficient social support in the community to prevent recidivism. Further, while several hundred offenders are eligible for parole, there is no suitable living arrangement for them and parole is denied, thus increasing their length of stay in the state’s prisons. Transitional housing programs will “allow the offender to leave the Division of Corrections’ custody under parole supervision and return to the community.” One suggestion, emulated on a program developed by the Georgia Department of Corrections, includes implementation of a “Re-Entry Housing Program” where volunteers may provide paroled offenders with room and board, while compensated monthly for a short term and inspected and evaluated regularly.

The concept of “presumptive parole” epitomized the Commission’s fifth suggestion. Specifically, the Commission suggested that the statutory language be amended to provide for an early release for offenders who commit nonviolent offenses and are deemed low-risk in their initial assessments. Bed-space will ultimately be increased as there will be a presumption, based on a treatment plan and unless proven otherwise, that the offender will be released upon a specific date. However, presumptive parole can only be implemented with legislative reform and can only be successful when rehabilitative and therapeutic programs are offered to offenders within the Division of Corrections.

Undoubtedly one of the most significant and sweeping recommendations called for by the Commission, was a comprehensive review of the West Virginia Criminal Code in order to bring it to contemporary societal standards. In doing so two questions need to be addressed: first, “[d]oes West Virginia’s Criminal Code and entire sentencing structure enhance public safety? [and i]f the answer is yes, [then] can public safety be enhanced in a more effective manner that meets the need of the victim, the offender and the community at large?” Explicitly, the Commission stated that longer prison sentences, although emphasized through the legislative history of the state, may not be the correct way to reduce recidivism. In order to address this issue the Commission recommended that a concerted and collaborative effort be undertaken by the three branches of government and the West Virginia University College of Law in order to “provide input on the behavioral effects of various sentencing schemes” and to compare and contrast the laws in other states “where criminal

109 Id. at 27.
110 Id.
111 Id. at 28.
112 id.
113 Id. at 28.
114 Id. at 29.
115 Id.
116 Id.
117 Id.
code reform has brought about reductions in prison costs while promoting public safety.”\(^{118}\)

The Commission’s seventh recommendation was for an improvement and sharing of criminal justice data in electronic format.\(^{119}\) It called for the creation of a comprehensive information system that includes information such as risk and needs assessments, sentencing outcomes, probation and community corrections data, Division of Corrections institutional data, and parole data.\(^{120}\) The Commission also suggested that research be conducted to identify and monitor the factors that lead to recidivism and prison overcrowding.\(^{121}\)

Research, as the Commission suggested in its eighth recommendation, should also be conducted in regard to the effectiveness of community correctional programs.\(^{122}\) The Commission recommended that the Division of Criminal Justice Statistical Analysis Center, with input from the universities of West Virginia, and other experts in the field of corrections, conduct an evaluation of programs based on success and failure rates of various offenders sentenced to community correctional programs. While the Commission emphasized that it is of the opinion that such programs have the propensity to be successful, it believes that review and assessment of community correctional programs might help make adjustments where necessary to help achieve public safety goals “in the most cost-effective manner possible.”\(^{123}\)

Increasing the public’s education on the urgency of taking action and the need for community support was the Commission’s ninth recommendation.\(^{124}\) In communicating effectively with community leaders and the community at large, the Commission suggested the implementation of such progressive ideas, compared to West Virginia’s trend toward crime and punishment, might be welcomed more successfully. If there is an effective dialogue throughout the state that educates the public about the benefits of community correction programs and offender diversion, a positive response might be had, “especially if it can be shown that use of the community to a greater degree in treating offenders and returning them to a productive lifestyle increases public safety.”\(^{125}\)

The Commission, in its tenth recommendation, emphasized that not only do the previously recommended remedial actions need to be implemented but they also need to be maintained and monitored by an oversight group.\(^{126}\) This group should have the continual task of “monitoring . . . the needs and capabili-

\(^{118}\) MANCHIN REPORT, supra note 5, at 30.

\(^{119}\) Id.

\(^{120}\) Id. at 30–32.

\(^{121}\) Id. at 32.

\(^{122}\) Id. at 33.

\(^{123}\) Id.

\(^{124}\) MANCHIN REPORT, supra note 5, at 34.

\(^{125}\) Id.

\(^{126}\) Id.
ties of the correctional system as a whole, with requirements to inform the executive, legislative and judicial branches on a regular basis."\textsuperscript{127} As the Commission stated, this is important to assure the safety of West Virginia.\textsuperscript{128} Further, the group cannot be effective unless it is "comprised of representatives from all three branches of government and communities."\textsuperscript{129}

The final four recommendations of the Commission were in regard to the inevitable creation of greater correctional capacity. In the Commission's eleventh suggestion, it called for the construction of three hundred additional beds at the St. Mary's Correctional Complex,\textsuperscript{130} and in its twelfth suggestion it recommended that at least four Work Release Centers be created that will help prepare lower-security inmates for a return to community life.\textsuperscript{131} The Commission's thirteenth proposal, albeit more radical, suggested that the State explore the alternative of work release centers or facilities for the population of special offenders, such as older offenders and offenders with substance abuse problems and mental health issues.\textsuperscript{132} Not only is it necessary, as the Commission stated, to "deal with the physical maladies that effect an aging population" in prisons, but "[a]pproximately 85 percent of the offenders in the Division of Corrections' custody have an alcohol or drug problem," and "[m]any have mental illness in addition to the addiction."\textsuperscript{133} In creating separate facilities, the Division of Corrections will have a better opportunity to address these sensitive and serious needs.

Finally, the Commission recommended that a twelve-hundred cell, medium security prison be constructed in an area of the state that would be accessible to the staff for the institution.\textsuperscript{134} Although this idea is aggressive, the Commission believed that without the creation of such a facility "disastrous consequences"\textsuperscript{135} will result in the regional jails that currently hold the overflow prison inmates. Such a facility is also necessary to ensure public safety by retaining incarceration of offenders who have proven violent and need special and increased supervision.

The recommendations proffered by the Commission are undoubtedly persuasive and are a complete and thorough response to the problems of overcrowding that West Virginia currently faces. Relying on an array of expertise, the Commission successfully formulated what seems to be a broad array of suggestions for reform. While it is abundantly clear that the development of new

\begin{thebibliography}{99}
\bibitem{127} Id. at 34.
\bibitem{128} Id.
\bibitem{129} Id.
\bibitem{130} Id.
\bibitem{131} \textit{MANCHIN REPORT}, \textit{supra} note 5, at 35.
\bibitem{132} Id.
\bibitem{133} Id. at 35–36.
\bibitem{134} Id. at 36.
\bibitem{135} Id.
\end{thebibliography}
correctional facilities is inevitable, the Commission’s first ten recommendations present concrete options that the state could adopt in order to delay the construction and reduce the need for later expansion, if the evils that spurred overcrowding are not cured.

B. Criminal Sentencing Reform

As recognized nationally, the problem of prison overcrowding is most likely a result of defective criminal sentencing statutes because “state’s rigid mandatory sentencing laws fill prison cells and cost millions while doing little to enhance public safety.” For example, Arizona Prison Crisis: A Call for Smart on Crime Solutions, found that “rigid mandatory sentencing laws are largely to blame for the growth in incarceration of non-violent offenders, who make up over half of all prisoners.” Although this is one example of the problem in Arizona’s prison system and concerns its particularized ineffective sentencing guidelines, West Virginia has a similar “broken prison system” and a statutory code in need of reform.

1. Role of the West Virginia Law Institute

In response to the Governor’s Commission on Overcrowding Report, the West Virginia Law Institute was given a charge from the West Virginia

137 Id.
138 Id.
139 The West Virginia Law Institute is an official advisory law revision and law reform agency of the State of West Virginia, located at the West Virginia University College of Law. W. VA. CODE § 4-12-1 (2010). The purpose of the Institute is “to promote and encourage the clarification and simplification of the law of West Virginia, to improve the better administration of justice and to conduct scholarly legal research and scientific legal work.” Id. To accomplish such an objective the duties of the Institute include various statutorily mandated undertakings. First, the Institute must consider improvements in substantive and procedural law to make recommendations concerning such to the state Legislature. W. VA. CODE § 4-12-2(a) (2010). The Institute is also directed to examine and study the law of West Virginia and discern defects and inequities and recommend needed reforms. W. VA. CODE § 4-12-2(b) (2010). Further, it provided that the Institute should receive and consider suggestions from state officials such as judges, justices, public officials, lawyers, and the public generally as to defects and anachronisms in the law. W. VA. CODE § 4-12-2(c) (2010). As it becomes apparent that such inconsistencies exist, the Institute is given the authority to recommend such changes in the law as it deems necessary to modify or eliminate antiquated and inequitable rules of law or recommend the repeal of obsolete statutes and suggest needed amendments, additions, and deletions. W. VA. CODE § 4-12-2(d), (f) (2010). In doing so, the Institute should render annual reports to the Legislature, and if necessary, accompany the reports with proposed bills to carry out any of its recommendations. W. VA. CODE § 4-12-2(e) (2010). At minimum, it is statutorily proscribed that the Institute organize and conduct an annual meeting within the state for scholarly discussions of current problems in the law, bringing together representatives of the Legislature, practicing attorneys, members of the judiciary, and
legislature to conduct research and make recommendations regarding reform of the criminal sentencing guidelines in the West Virginia Code.

The charge was sent from the Judiciary Chairs, Senator Jeffrey Kessler and Delegate Carrie Webster, and was officially addressed to David C. Hardesty, Jr. and Dean Joyce McConnell at the West Virginia University College of Law. In sum, the legislature requested that the report from the Institute be based on an effort that will lead to reductions in the demand for prison beds and meet current and immediate future needs for prison bed space. Further, the charge articulated that there is a great sense of urgency in tackling this problem because it is such a pressing issue within the state. Specifically, the legislature requested that the Institute review relevant statutes and related literature and offer specific recommendations in sentence restructuring and appropriate diversions to community-based rehabilitation. As an overriding principle, the proposed reforms were requested to minimize the risk to public safety and decrease incarceration costs.

While the report itself calls for a comprehensive review of all aspects of the criminal sentencing guidelines including probation, parole, and community corrections etc., the legislature recognized that "...the study must be limited in scope due to the short time-frame for the project completion." Accordingly, the legislature mandated specific guidelines for the Institute to follow including proscribing the specific statutes to be reviewed, including non-violent property and drug crimes and offenses with disproportionate penalty provisions. Further, the legislature requested that the report be conducted in a bi-partisan manner and that appropriate resource persons throughout the state be contacted.

2. The Final Report

Prepared by the official reporter, Professor Robert Bastress of the West Virginia University College of Law, the final report from the West Virgin-
ia Law Institute was presented to the West Virginia legislature on February 2, 2010. After a culmination of four general body meetings, where various community experts including judges and members of the West Virginia bar were given the opportunity to speak, the Institute made a resolution and adopted a final set of recommendations.\textsuperscript{148}

Substantively, the report called for a set of principal recommendations, including a list of specific crimes in need of reform, general sentencing and corrections laws requiring change, and programmatic measures that need to be implemented.\textsuperscript{149} After a background was given concerning West Virginia’s criminal sentencing practices, there was a discussion of “West Virginia criminal statutes that pose undue risks for the imposition of harsh or inequitable sentences,” and “various sentencing related proposals that the State could pursue to reduce prison overcrowding and improve the criminal system.”\textsuperscript{150} For example, the report acknowledged West Virginia’s felony murder statute as having “illogical and excessive consequences” and identified other states that have either abolished the rule or confined its scope to prevent unjust or harsh results.\textsuperscript{151} Similar criticisms were made regarding the state’s second degree murder,\textsuperscript{152} robbery,\textsuperscript{153} and kidnapping statutes to name a few.\textsuperscript{154} In conclusion, the report addressed “evidence-based practices found to be effective in reducing recidivism and the alternatives available through community corrections efforts.”\textsuperscript{155} However, because of the constraint on time, the Institute ultimately called for the “comprehensive overhaul of the West Virginia Criminal Code,” as “[a]ccording to one set of experts’ application of criteria to grade criminal codes, West Virginia’s Code is the second worst in the country, ranking fifty-first out of fifty-two codes.”\textsuperscript{156}

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\textsuperscript{148} Minutes from the meetings of the West Virginia Law Institute are available online at http://www.law.wvu.edu/academics/wv_law_institute_welcome/minutes.

\textsuperscript{149} \textit{WEST VIRGINIA LAW INSTITUTE, RECOMMENDATIONS FOR CRIMINAL SENTENCING LAW REFORM FOR THE STATE OF WEST VIRGINIA, REPORT TO WEST VIRGINIA LEGISLATURE 23–24} (2010) [hereinafter \textit{WEST VIRGINIA LAW INSTITUTE}].

\textsuperscript{150} \textit{Id.} at 26.

\textsuperscript{151} \textit{Id.} at 36.

\textsuperscript{152} \textit{Id.} at 37.

\textsuperscript{153} \textit{Id.}

\textsuperscript{154} \textit{Id.} at 39.

\textsuperscript{155} \textit{WEST VIRGINIA LAW INSTITUTE, supra} note 149, at 26.

\textsuperscript{156} \textit{Id.} at 26–27 (citing Paul H. Robinson, Michael T. Cahill, & Usman Mohammed, \textit{The Five Worst (And the Five Best) American Criminal Codes}, 95 NW. U. L. REV. 1, 60–61 (2000)).
THE TIPPING POINT

V. THE ABSOLUTE NEED FOR REFORM

In light of the national problem and the drastic response in California, as well as recent awareness and ever growing jail and prison populations, there is no doubt that the State of West Virginia needs to take action. However, the question becomes what is the most effective response, both in terms of cost-efficacy and public safety? While the Governor’s Commission successfully made fourteen strong recommendations, and the West Virginia Law Institute briefly touched on criminal sentencing reform, a broader-based and more comprehensive review of the West Virginia Code and the West Virginia Department of Corrections needs to be undertaken in order to eliminate particular deficiencies that have led to a burgeoning rate of imprisonment. And while the Institute’s recommendations to the legislature concerning statutory reform are commendable, further emphasis and attention needs to be given to the concept of community corrections, as it is one that appears to have been either ignored or overlooked as an alternative means of punishment.

A. Statutory Inequities in the West Virginia Code

As an analysis of the entire West Virginia Code is impractical for the considerations of this article, and discussion of only particular provisions is warranted, nonetheless, it should be recognized that certain statutory discrepancies exist and are at fault for the problem of current prison overcrowding. Further, regardless of their enforcement, the current West Virginia Code has some extremely outdated provisions that need to be brought to modern standards. West Virginia’s criminal laws are a “hodgepodge”\footnote{Western Virginia Law Institute, supra note 149, at 33.} of national developments in sentencing and theories regarding incarceration.\footnote{Id. “Traditionally, four basic rationales have driven criminal sentencing: (1) deterrence; (2) incapacitation; (3) rehabilitation; and (4) retribution.” Id. at 28 (citing Arthur Campbell, Law of Sentencing §§ 2.1-2.5 (3d ed. 2004)).} Criminal statutes combine both determinate and indeterminate sentences, “sometimes even in the same statute,” are inconsistent in some cases, and have an increased risk for “unequal treatment and inappropriate sentencing.”\footnote{Id. at 7 (citing William E. Tunnell, Principles of Sentencing 227 (2d ed. 2007)).}

1. Arson

Within Chapter 61 of the West Virginia Code, Crimes against Property, there are a number of inequitable, harsh sentences despite the minimalism of the offense.\footnote{See W. Va. Code §§ 61-1-1 to -13-6 (2010).} Specifically, the arson crimes\footnote{W. Va. Code §§ 61-3-1 to -7 (2010).} have strong punishments that do not seem to account for individual circumstances. A sentencing judge’s hands are...
presumably tied where the elements of the offense are met, and in most cases
the offender, regardless of conditions, will be serving time in prison. The
statute also fails to distinguish between setting fire to a building that is occupied
or unoccupied, or one that is simply abandoned. Thus, where an offender sets
fire to an “outbuilding,” defined statutorily as “any building or structure which
adjoins, is part of, belongs to, or is used in connection with a dwelling” includ-
ing, but not limited to a “garage, shop, shed, barn, or stable,” regardless of its
occupancy or the threat to public safety, such offender must serve at a minimum
two years in prison without the opportunity for parole. Further, second de-
gree arson, in which an offender willfully and maliciously sets fire to any other
structure, carries a statutorily mandated sentence of one to ten years in prison
regardless of any attenuating circumstances. Under this statute even simply
soliciting, inciting, or enticing another to set a fire also carries the same penalty,
which is clearly excessive.

2. Robbery

Under West Virginia Code section 61-2-12(a) the sentence for at-
tempts first-degree robbery or first degree (aggravated) robbery is a mandato-
ry ten year prison term with no statutory maximum. Without a proscribed
maximum sentence, this leads to inequitable results where judges have the dis-
cretion to impose staggeringly long sentences. Further, in comparison to other
states West Virginia’s statute calls for a much harsher sentence. Kentucky’s
statute proscribes a sentence of two to ten years, Maryland and Pennsylva-
nia’s statutes provide that sentences should not exceed twenty years, and in
Ohio the maximum sentence allowed for is ten years.

Further, the statutory definition of first-degree robbery has the potential
for unreasonable results. The language of the statute defines the offense as

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162 For example, under W. VA. CODE § 61-3-2 (2010), second degree arson, where a person
burns down a building or another structure not an outhouse per se, the judge is mandatorily, under
determinate sentencing required to sentence the defendant to at least one year in prison. If there
are other attenuating circumstances the judges’ only discretion is only to give the defendant the
minimum of one year in prison. In an instance where a group of drunks burn down an old shack,
that is never used and decrepit, if the prosecutor chooses to prosecute under this statute then the
judge must inequitably sentence the defendant to one year, time in prison that seems to hardly fit
the crime.

163 Id. § 61-3-1(a) & (b) (2).
164 Id. § 61-3-2.
165 Id.
166 Id. § 61-2-12 (a).
167 KY. REV. STAT. ANN. §§ 530.020; 532.060 (LexisNexis 2010).
168 MD. CODE ANN. 27 § 488 (LexisNexis 2010).
"[c]ommitting violence to the person," or "placing the victim in fear of bodily injury." Due to the lack of specificity in the statute's language, there is a likelihood of broad consequences, including the mandatory confinement of an offender for ten years despite individual considerations or facts of the crime. Where, for example, a person, regardless of age or other circumstances, forcibly acquires a victim's purse, he or she can receive a substantial sentence, sometimes as harsh as those dealt bank robbers. With this determinate sentence the way it currently stands, an offender, where particular circumstances may warrant a lesser sentence, is required to serve time in prison—prisons without the necessary space.

3. Drug Crimes

Additionally, and potentially the most influential statutory inequities, certain drug related crimes mandate prison sentences for somewhat diminutive offenses. Although it should be recognized that many of these statutes are in response to West Virginia's ongoing problem with the abuse and distribution of methamphetamines, there are some statutory offenses that are clearly inequitable and have undoubtedly increased prison populations. For example, under West Virginia Code section 60A-4-408, "[a]ny person convicted of a second or subsequent offense under this chapter may be imprisoned for a term up to twice the term otherwise authorized" if "the offender has at any time been [previously] convicted" of a drug related offense. While the use of the word "may" in the statute makes the imposition of such a sentence discretionary, it should be recognized that this should be a sentence based on a series of aggravating circumstances, rather than the mere possession of a controlled substance, and proper statutory consideration should be given to individual propensities as well as the time between offenses.

4. "Three-Strikes" Law

Similar to California, under West Virginia Code section 61-11-18(c), a person who has previously committed two felony offenses "shall be sentenced to be confined in the state correctional facility for life" after being convicted of a third felony. This "three strikes and you're out" law is one that clearly has

171 W. VA. CODE § 61-2-12(a) (2010).
172 Id. § 61-2-12(b).
173 See WEST VIRGINIA LAW INSTITUTE, supra note 149, at 39.
175 W. VA. CODE § 60A-4-408(a) & (b) (2010).
176 Id.
178 W. VA. CODE § 61-11-18(c) (2010).
affected and currently affects the increase in prison populations throughout the state. Because the sentence is determinate, offenders who commit their third felony offense, no matter what the individual circumstances may be, must serve life within a state penitentiary, undoubtedly increasing the overall number of prisoners throughout the state. As stated in the West Virginia Law Institute’s Recommendations to the legislature, “individual cases call for individual assessments, not the application of blanket rules,” when making such an arduous decision. This statute fails to take into consideration “the age of the offender when the felonies were committed, their seriousness, the time lapsed between the offenses, the danger that the individual presents to society, the circumstances of the crimes, mitigating factors, or the individual’s potential for rehabilitation and for contributing to society.” As is the case in California, one can logically infer that enforcement of sentences based on this statute leads to an ever increasing prison population.

5. Obsolete Code Sections in Need of Expulsion

There are also some significantly outdated sections in the West Virginia Code that need to be either removed entirely or updated to bring them up to date with contemporary standards, regardless of their enforcement. For example, under West Virginia Code section 62-2-18 “[i]f any person fight a duel in this State, and in so doing inflict a mortal wound, he shall be deemed guilty of murder”, and under West Virginia Code section 61-8-4 persons who are not married and “lewdly and lasciviously associate” with each other and cohabitate are “guilty of open or gross lewdness and lasciviousness” and can serve jail time.

In modern times, such statutes are clearly outdated and the punishments superfluous. This further proves that a complete and comprehensive review of the West Virginia Code in its entirety is necessary to bring it to a modern standard.

B. Community Corrections as an Alternative to Incarceration

Although there is no common definition of the term “community corrections,” a commonly used description is “[t]he use of a variety of officially ordered program-based sanctions that permit convicted offenders to remain in the community under conditional supervision as an alternative to an active prison sentence.” In basic terms, community corrections are an alternative to

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179 West Virginia Law Institute, supra note 149, at 45.
180 Id.
182 Id. § 61-8-4.
incarceration in either jails or prisons. However, this system is one that has been significantly underappreciated in the State of West Virginia, despite enactment of the West Virginia Community Corrections Act in 2001.\textsuperscript{184}

The fact that community corrections preclude an offender from incarceration is not their only purpose. Although "there is a need for alternatives to jail or prison simply due to the fact that both types of facilities tend to be overcrowded in various areas of the United States"\textsuperscript{185} and "[c]ommunity corrections provide[] alternatives at both the front and the back end of the correctional system,"\textsuperscript{186} community corrections also hold "value as a primary sanction, regardless of whether jail or prison space is abundant."\textsuperscript{187} In fact, "these programs are now being used because they have shown to be more effective than sentencing schemes that are overreliant on incarceration."\textsuperscript{188}

Currently, the use of community corrections has been shown to be successful on different levels and their inadequate utilization in West Virginia is an issue that needs to be rectified by a collective effort from all levels of the government and the community as a whole. As stated by commentators, "society can reap enormous benefits in the form of relationships that build community cohesion."\textsuperscript{189} Not only does the community at large stand to benefit from the greater implementation of such alternatives, so do individual offenders themselves as well as their friends and families. Not only will such offenders "not have their liberty as restricted as they would if incarcerated," but they will also be able to maintain "meaningful connections" with family and the community such as developing relationships with significant others and maintaining contact with children, all while pursuing vocational and educational goals.\textsuperscript{190}

1. Prospective Community Programs and Diversion Plans

An "effective community correctional program . . . [should] have a clear theoretical and philosophical grounding."\textsuperscript{191} Thus, for community corrections to be successful in West Virginia they must not only be implemented, but they must also have a theoretical basis for their use. In order for such programs to be

\textsuperscript{184} W. VA. CODE § 62-11C-1 (2010). The purpose of the West Virginia Community Corrections Act is to "provide the judicial system with sentencing alternatives for those offenders who may require less than institutional custody"; the statutory text highlights particular goals of the Act as well as permitting county establishment of the particular community correctional programs listed, but not limited to those in the statute. \textit{Id}.

\textsuperscript{185} ROBERT D. HANSER, COMMUNITY CORRECTIONS 2 (2010).

\textsuperscript{186} \textit{Id} at 3.

\textsuperscript{187} \textit{Id}.

\textsuperscript{188} \textit{Id}.

\textsuperscript{189} \textit{Id} at 4.

\textsuperscript{190} \textit{Id}.

\textsuperscript{191} HANSER, supra note 185, at 41.
a success, the state must have a strong foundation for their implementation: one based on public safety as well as rehabilitation and retribution.

First and foremost, and in line with one recommendation of the Governor’s Commission on Prison Overcrowding, there needs to be community education and communication because “community support . . . is perhaps most needed when implementing a re-integrative approach to community corrections . . . .”\textsuperscript{192} Especially because West Virginia is a society that focuses its criminal justice system on punitive principles, many community members “may not truly understand that offender recidivism as well as the future crime rate are directly impacted by the successful rehabilitation and reintegration of the offender.”\textsuperscript{193} Thus, an appropriate and effective “dialogue,” as called for in the Commission’s report, is necessary to ensure the success of such programs.\textsuperscript{194}

In fact, with community involvement there is a greater likelihood for offender success because of such things as family involvement, community members to check on the offender’s progress, employers willing to utilize an offender’s labor, and local police to monitor offender progress.\textsuperscript{195}

Further, it should also be noted that community corrections programs not only theoretically diminish a burgeoning prison population, but they also have deterrent effects by hypothetically rectifying issues (i.e., drug and alcohol abuse) that are the main causes of crime. For example, “[d]rug-abuse research has established that there is a strong statistical association between crime and drugs: Criminal activity increases when offenders are using drugs, and drug abusers are at least as violent as, if not more violent than, their counterparts who don’t use drugs.”\textsuperscript{196} With the implementation of programs and day report centers that attempt to rehabilitate addicted offenders, the likelihood of re-offending has a greater propensity to diminish. As the Governor’s Commission on Prison Overcrowding articulated, “[w]ith assistance from the Department of Health and Human Resources, Bureau for Behavioral Health and Health Facilities (BHHF), a number of initiatives . . . can be utilized to divert offenders or prevent their anti-social behavior before it becomes criminal.”\textsuperscript{197}

i. Initial Risk Assessments

Initial risk assessment evaluations of offenders, as individuals, not just as a number in the system should be the first program implemented. First, it

\textsuperscript{192} Id. at 58.
\textsuperscript{193} Id.
\textsuperscript{194} MANCHIN REPORT, supra note 5, at 34.
\textsuperscript{195} See HANSER, supra note 185, at 58.
\textsuperscript{197} MANCHIN REPORT, supra note 5, at 20.
should be made clear "that assessment is also critical because those offenders who have a high risk of committing violent crimes should not be placed on community supervision." A popular and accepted example of such assessment is the Level of Service/Case Management Inventory (LS/CMI). The LS/CMI is "a fully functional case management tool...designed to assist professionals in management and treatment planning with adult and late adolescent male and female offenders in justice, forensic, correctional, prevention, and related agencies." This system is based on the concept of individualized assessment of offenders to evaluate their risk level. In doing so, the LS/CMI evaluates, through initial questioning and assessment, "general and specific risk/need components, ... other client issues (e.g., social and mental health), and responsivity concerns (e.g., cultural concerns or communication difficulties), and includes a case management component." The LS/CMI is a multi-component evaluation that "involves obtaining information from many sources about many aspects of the offender's life" through interviewing the offender himself and through other sources. A broad picture of the offender is developed and treatment goals are proscribed through assessment of the following: criminal history, education/employment, family/marital status, leisure/recreation, companionship, alcohol/drug problems, procriminal attitude/orientation, and antisocial patterns. As stated by the founders, "[t]hrough the use of intervention programs, the offender's needs can be addressed and the offender's risk of recidivism can be reduced." Furthermore, as proclaimed by the Governor's Commission on Prison Overcrowding,

[b]y adopting a standardized and validated risk and needs assessment instrument for every convicted felon and administering the instrument before sentencing, or before other significant decisions relating to the offender, decision-makers can best provide a management plan that will address offenders needs and prepare him/her for a successful return to productive citizenship.

198 HANSER, supra note 185, at 84.
200 ld.
201 ld.
202 ld.
203 ld.
204 ld.
205 MANCHIN REPORT, supra note 5, at 16.
Additionally, the LS/CMI, or a similar risk assessment tool, has the propensity to divert low to moderate risk offenders from the state’s prisons to other community correctional programs, leaving bed space within the division of corrections for violent or higher risk offenders. Also, as previously discussed, although such an assessment might cost approximately $20 per offender, in the long run there would be significant cost benefits as fewer offenders would need to be housed in state prisons at an annual cost of approximately $28,000 per prisoner.

Moreover, in regard to recidivism, by diverting low and moderate risk offenders from prison sentences, the likelihood that they will re-offend is reduced as research shows “incarceration can increase the risk levels of offenders.” Thus, by initially diverting offenders from sentences within the Division of Corrections and offering them both retributive and rehabilitative services, the probability of re-offending hypothetically diminishes, and in the long run, reduces prison populations.

ii. Progressive Drug and Alcohol Abuse Rehabilitation

Currently, there exists “solid empirical evidence that ordering offenders into treatment, and getting them to participate, reduces recidivism.” Although the public commonly believes that imprisoning addicted offenders will “eliminate their opportunity to commit crime” and although this may be true for the time during which they are incarcerated, “once offenders are released, their criminality continues.” As a result, a much more worthwhile strategy such as treatment and rehabilitative programs should be implemented to “eliminate or reduce[] the only motivation many addicts have to steal: their dependency on drugs.”

Under the current West Virginia Drug Offender Accountability and Treatment Act, the legislature “recognizes that a critical need exists in this state for the criminal justice system to reduce the incidence of substance abuse and the crimes resulting from it,” and further “that accountability and rehabilitative treatment, in addition to or in place of, conventional and expensive incarceration, will promote public safety, the welfare of the individuals involved, reduce the burden upon the public treasury, and benefit the common welfare of this state.” In response, the legislature statutorily mandated that counties

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206 Id.
207 Id. at 16-17.
208 Id. at 17.
209 Petersilia, supra note 196, at 112.
210 Id.
211 Id. at 113.
213 Id. § 62-15-3.
within the state “may establish a drug court or regional drug court program under which drug offenders will be processed to address appropriately, the identified substance abuse problem as a condition of pretrial release, probation, incarceration, parole, or other release from a correctional facility.”

Currently, drug courts in West Virginia “serve... adults who have either pled guilty or been found guilty of non-violent misdemeanors and felonies, and who were motivated to commit those crimes due to a substance abuse addiction. People can volunteer for the program to avoid jail and prison sentences, if a judge so orders.”

Although as of May 13, 2009 twenty-three counties in West Virginia made use of such courts, the number of programs and resources that support these courts should be increased, as well as the total number of courts throughout the state because, as stated by Supreme Court Administrative Director Steve Canterbury,

[r]ecidivism is lower in cases where individuals are forced to meet the demands of drug courts. It's also less expensive for taxpayers than sending someone to jail. And it has been proven throughout the nation and in West Virginia that treatment courts can help people become contributing members of society rather than leeches on the social fabric.

Nationally, the concept of drug courts and their effects on recidivism and crime rates have been championed. Based on this empirical data, drugs courts represent an effective method for reducing re-arrests and reconvictions, thus decreasing jail and prison populations.

Another alternative is the increased utilization of Treatment Alternatives to Street Crime (TASC) initiatives, which are “[systems] in which independent agencies track the treatment progress of individual drug abusing offenders, and act as liaisons between courts and independent drug treatment programs.”

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217 AMicus, supra note 215.
219 Id. As stated in the report, “review of 27 relatively rigorous evaluations provides evidence that drug court programs can reduce recidivism compared to criminal justice alternatives, such as probation,” and “[p]ositive results concerning recidivism are closely associated with program completion.” Id. at 7.
Traditional TASC programs, while independently run, serve as “‘bridges’ between the criminal justice system and treatment programs” and “can work alone or in conjunction with other alternatives to incarceration, such as boot camps, intensive supervision of probation, and home confinement.” In sum, TASC programs “work to establish treatment accountability by ensuring that offenders receive the appropriate type and level of treatment and that the offender is attending treatment regularly, treatment is progressing, and the agency to which TASC referred the offender is providing effective treatment services.” Such programs, so long as there is effective communication and implementation, have the propensity to be successful rehabilitation and treatment tools—tools that can further reduce recidivism and overcrowding in jails and prisons throughout the state.

In regards to pre and post release programs, Intensive Supervision Probation/Parole (ISP) Programs also represent effective alternatives to determinate sentencing of drug-related offenders. At this time there is no traditional ISP program, they “generally utilize smaller caseloads and more intensive contacts than traditional probation/parole programs.” Along with more consistent monitoring, ISPs incorporate other programs, including “job placement, electronic monitoring and house arrest, community service, and referrals for drug and alcohol treatment.” Such programs have the potential to add to overall offender rehabilitation and, in some cases, re-integration; these things that are even more important when an offender has a history of substance abuse and when “combining treatment and criminal justice sanctions in a coordinated fashion appears to be critical.”

iii. Recommendations from the Governor’s Commission on Prison Overcrowding

Expressly, the Governor’s Commission on Prison Overcrowding also recognized seven specific alternatives to incarceration for drug and alcohol abusing offenders that should be implemented in order to reduce growing prison populations. Based on conclusive data, these facts and research suggestions certainly represent a step in the right direction and should be implemented as soon as practical in order to begin to curb drug related offenders from being incarcerated.

221 Id. at 1903–04.
224 Id. at 126.
225 Id. at 133.
226 See Manchin Report, supra note 5, at 20–27.
First, because as the Commission recognized “drug users are more likely than nonusers to commit crimes and those arrestees . . . [are] often under the influence of a drug at the time they committed the offense,” as well as the overwhelming statistics that “participation in crime declines with age and young people make up the largest percentage of offenders entering the criminal justice system,” a ten bed substance abuse residential treatment unit should be created, with length of stay up to ninety days, specifically for males ages eighteen to twenty-seven.227 Because there are not any current programs that focus on this population of offenders specifically, it is important to reiterate that “[s]uccess with this population in treatment reduces the likelihood of their entry into the criminal justice system.”228 Further, there are budgetary benefits as well. According to research conducted in June 1998 by the Hazelden’s Butler Center for Research, “for each $1 invested in treatment in California, taxpayers saved $47 reduced in health and social costs.”229

Second, the Commission recognized the need in the state for medication assisted treatment of Opioid users.230 In doing so, the state should offer an Opioid Treatment Program (OTP) in behavioral health centers throughout the state that offer congressionally approved Buprenorphine for use in the treatment of opioid dependence.231 Currently, there are nine OTPs in the state and, at the time the report was issued, there were 4500 methadone clients.232 It is also estimated that there may be an additional 4000 people “who would likely benefit from access to buprenorphine, methadone, or another form of medication assisted treatment.”233 As is the case with other programs, “hundreds of peer-reviewed studies indicate people receiving methadone or buprenorphine along with other substance abuse treatment demonstrate highly successful outcomes in areas such as reduced crime, increased employment, decreased health care costs, etc.”234 Statistically, in 2008, people in West Virginia receiving at least twelve consecutive months of methadone treatment, ninety-eight percent were not “arrested/re-arrested . . . .”235 This clearly indicates that such programs have the capability of reducing prison populations because as the number of offenders in the Division of Corrections has risen, it “appears to be related to the increase in the availability of Oxycontin and similar drugs, as well as the burst of methamphetamine use throughout the state.”236 Accordingly, “[i]f substance abusers

227 Id. at 20.
228 Id. at 21.
229 Id.
230 Id. at 21.
231 Id.
232 MANCHIN REPORT, supra note 5, at 23.
233 Id.
234 Id.
235 Id.
236 Id. at 23.
can be identified and diverted before further criminal activity, additional prison beds can be saved for the dangerous and higher risk offenders."\textsuperscript{237}

Due to the fact that there are currently only two providers of medically monitored detoxification services with twenty-three beds in the State of West Virginia, four twenty-bed detoxification units with a ten-day length of stay should be created to "serve individuals who are experiencing signs and symptoms of severe withdrawal and there is a strong likelihood that the individual will require medication for withdrawal symptoms."\textsuperscript{238}

Because of the fact that "[t]he longer an individual must wait for treatment, the more likely they [sic] are to turn back to substance abuse and the destructive behavior patterns associated with it,"\textsuperscript{239} there should also be an implementation of eight, ten-bed long-term substance abuse treatment programs with up to ninety-day stays for males. This is indisputably in response to the importance of "immediacy of treatment" because "[w]hen a substance abuser makes the decision to seek treatment, the length of time he or she must wait to enter treatment is a critical factor in their prospects for recovery," and, hypothetically, their propensity of criminal activity.\textsuperscript{240}

Currently, there are six "community sponsored transitional living quarters for persons recovering from addiction who have been in more intensive inpatient or other institutional treatment," otherwise known as "Fellowship Homes" in the State of West Virginia.\textsuperscript{241} This is certainly a number that needs to be increased, and with the implementation of two, twelve-bed facilities, "[t]hese programs may be appropriate to assist local community correction programs with diverted offenders who have not yet been hardened by their exposure to prison."\textsuperscript{242} Regardless of whether the addict comes from the system, post-incarceration, or has yet to enter the system, such "therapeutic community[n]es can be a positive peer influence . . . ."\textsuperscript{243}

Oxford Houses are "democratically run, self-supporting and drug free homes," with six to fifteen residents each.\textsuperscript{244} At the time the report was issued, there were eight such houses around the state, where recovering individuals do not drink alcohol or use drugs, and pay an equal share of housing expenses.\textsuperscript{245} Because such homes are acceptable places for an offender to live post-incarceration, with a 250% increase and the creation of twenty new houses, wait

\textsuperscript{237} Id.
\textsuperscript{238} MANCHIN REPORT, supra note 5, at 24.
\textsuperscript{239} Id.
\textsuperscript{240} Id.
\textsuperscript{241} Id. at 24–25.
\textsuperscript{242} Id. at 25.
\textsuperscript{243} Id.
\textsuperscript{244} MANCHIN REPORT, supra note 5, at 25–26.
\textsuperscript{245} Id. at 26.
times for inmates reentering society from prison or jail could be significantly reduced.\textsuperscript{246}

All of the foregoing suggestions from the Commission represent progressive implementations that have the propensity to not only reduce the number of offenders initially sentenced to prison and aid in their transition back into West Virginia communities, but also to enhance public safety by addressing issues (i.e. drug and alcohol abuse), that lead to criminal behavior. Further, “[i]ncreased state support for these programs will result in net savings for the taxpayer because they are less expensive and more effective for nonviolent offenders than imprisonment.”\textsuperscript{247}

iv. Mental Illness & Community Corrections

Serious mental illness “can make it considerably more difficult for justice-involved offenders to become productive and law-abiding citizens.” As many studies indicate, the growth of the mentally ill populations in jails and prisons is staggering with “[a]s many as one in five of the 2.1 million Americans in jail and prison . . . [being] seriously mentally ill.” Strikingly the number of mentally ill individuals in correctional facilities even outnumbers the number of mentally ill patients in mental hospitals and institutions.\textsuperscript{249} To some, national prisons and jails have become a “default mental health system.”\textsuperscript{250} However, prison itself is not a solution to the issues of the mentally ill, and in most cases does not provide adequate treatment and services. In fact, prison often “compounds the problems of the mentally ill, who may have trouble following the everyday discipline of prison life, like standing in line for a meal.”\textsuperscript{251} Therefore, a more comprehensive system within the Department of Corrections should be implemented to address the issues of mentally ill offenders: one that’s sole focus is not on incarceration, but rather management and treatment through community programs and services.

As is the case with drug and alcohol abuse treatment for offenders, there are societal benefits from such programs because “[b]y treating mentally ill offenders, society may benefit through reduced recidivism and improvements in social outcomes, such as education and employment among justice-involved populations.”\textsuperscript{252} While there is undoubtedly a moral argument for the humane

\begin{thebibliography}{99}
\bibitem{246} Id.
\bibitem{247} West Virginia Law Institute, \textit{supra} note 149, at 57.
\bibitem{250} Id.
\bibitem{251} Id.
\bibitem{252} Mears, \textit{supra} note 248, at 258.
\end{thebibliography}
treatment of such offenders, and prisons are not the most benevolent option, there are also pragmatic considerations for the special treatment of mentally ill offenders. For example, as is the case with treatment of substance abuse offenders, there are some suggestions that in “treating mentally ill offenders, society benefits because the offenders are less likely to commit crime and more likely to become productive citizens.”

First and foremost, West Virginia should assess its own problem through research and investigations concerning both the number of mentally ill patients currently housed within the Division of Corrections and the treatment they are receiving. Nationally, “despite persistent calls for addressing mental illness among offenders in the criminal justice system...there is no national database that records information about mentally ill offenders in the justice system.” Due to the fact that “typically offenders are not systematically screened and assessed for mental illness, nor is information obtained from any assessments recorded,” the state should conduct such research in order to assess the need for and implement a successful community based system. Thus, “empirical research is absolutely essential for establishing the level of demand for services in the criminal justice system.”

Once conclusive information is gathered addressing the state’s need for such programs (which will most likely be overwhelming), not only should programs in the Department of Corrections be created, but additional and appropriate community correctional programs and services should then be implemented. As highlighted previously, initial assessments of individual offenders through such programs as the LS/CMI should be the first step in evaluating an offender’s needs and risk to the public at large. Next, there needs to be effective communication between the correctional system and community correction officers to determine the proper treatment, practices, and programs for the arrested individual or one that has been released into the community through either probation or parole.

Due to the fact that “mental health services can encompass a wide range of activities,” the state should look to its already established resources, such as mental health institutions, counseling services and case management in order to build upon current programs and create a more progressive system for mentally ill offenders. For example, while particular programs and facilities exist

253 See id. at 259–60.
254 Id. at 260.
255 Id. at 264–65.
256 Id. at 265.
257 Id. at 271.
258 See Mears, supra note 248, at 271. “There are two important populations omitted from the above analyses: individuals arrested but not placed in jail and individuals released from prison without supervision.” Id.
through the West Virginia Bureau for Behavioral Health & Health Facilities, special attention should be placed on treating offenders initially and upon their release (even if conditional through probation or parole) from the criminal justice system.

Currently, there are two acute care psychiatric hospitals, William R. Sharpe, Jr. Hospital, and Mildred Mitchell-Bateman Hospital, as well as one long term-care facility, Joe Manchin Sr. Health Care Center. In addition there are three geriatric and special need facilities for inpatient care within the state, as well as an acute care facility, the Welch Community Hospital, which "provides acute inpatient and outpatient services to the rural population of southern West Virginia with emphasis on prevention and community education." However, additional community resources need to be implemented and specifically directed at treatment for mentally ill offenders in order to curb the evergrowing population in the state’s prisons. Although there are a number of behavioral community health programs throughout the state, research should be conducted and a reevaluation of such programs undertaken to ensure that they are properly meeting the treatment needs of mentally ill offenders within the community, specifically with a focus on anti-social behavior and common precipitating factors that induce criminal behavior.

Adequate case management is another imperative aspect of any form of community correctional program for mentally ill offenders. Presently, West Virginia has a comprehensive case management program; however, as is the case with the community behavioral programs, a review of this program is warranted in light of the specific problems facing mentally ill offenders, with emphasis placed on the reduction of individual recidivism through counseling and other services.

VI. CONCLUSION

Reiterated by Governor Manchin, "West Virginia is facing a dramatically increasing prison population . . . [it] simply cannot sustain."

259 See Division for Adult Mental Health Services, W. VA. BUREAU FOR BEHAVIORAL HEALTH amp; HEALTH FACILITIES (Aug. 25, 2010), http://www.wvdhhr.org/bhhf/adultmh.asp.
261 Id.
there has been recent awareness of this issue in light of the national crisis it has become, it is important that attention remain until the problem of prison overcrowding is solved, or at least reduced. As highlighted by the Governor's Commission on Prison Overcrowding, one of the most important steps that must be taken is a thorough review and reform of West Virginia's criminal sentencing guidelines. Although the West Virginia Law Institute's recommendations to the legislature were a progressive first step, a more comprehensive reform is absolutely necessary. As West Virginia is "always going to be tough on crime, . . . [it] must adopt a different approach or . . . [it] will have an insurmountable problem,"\textsuperscript{265} The state does not necessarily have to become "soft on crime" in order to reduce prison populations, rather, it needs to be "smart on crime."\textsuperscript{266}

Further, West Virginia has "done a good job of locking criminals up, but a poor job of rehabilitating non-violent offenders and helping them become productive citizens."\textsuperscript{267} In order to curb an ever growing prison population and effectively reduce recidivism and crime rates, West Virginia needs to further develop the community corrections programs currently in place, as well as establish programs as an alternative to incarceration.

Overall, while correcting the problems that the state currently faces, it is important to remain focused on the foundation of public safety and community well-being. Regardless, whatever the solution may be one thing is clear: change is absolutely necessary, and that change must occur swiftly.

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\textsuperscript{265} Id.
\textsuperscript{266} Id.
\textsuperscript{267} Id.

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