April 2024


Emily Ogden
West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Law Commons

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol126/iss2/10

This Student Note is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact researchrepository@mail.wvu.edu.
EXPANDING DRUG COURTS AND ALTERNATIVE JUSTICE COURTS IN WEST VIRGINIA: IMPLEMENTING INNOVATIVE AND RESTORATIVE JUSTICE PRACTICES

ABSTRACT

The United States has the highest incarceration rate of any country in the world. Alarmingly, West Virginia’s incarceration rate is even higher. West Virginia’s staggering incarceration rate can largely be attributed to the increased criminalization and prosecution of individuals experiencing addiction. This Note considers what actions can be taken to limit incarceration and recidivism in West Virginia. The solutions proposed by this Note also aim to limit the collateral consequences of incarceration in West Virginia because many of West Virginia’s current issues are only exacerbated by incarceration.

This Note reviews alternative justice methods and notable alternative justice courts across the United States as a potential path to a solution. From this review, this Note identifies one limitation of many alternative justice courts across the United States, including the drug courts in West Virginia—individuals with the highest risk of recidivism are largely excluded from participation in alternative justice courts. This Note advocates for the expansion of drug courts, alternative justice courts, and restorative justice practices in West Virginia. This Note also advocates for adopting a community court model similar to courts in other jurisdictions that will address the needs of individuals who commit property offenses and quality-of-life crimes. The solutions this Note advocates for are critical to address the problems West Virginia currently faces regarding incarceration, substance use, and the well-being of the state.

I. INTRODUCTION .................................................................674
II. MASS INCARCERATION, SOCIAL IMPLICATIONS, AND CRIMINALIZING ADDICTION ........................................677
   A. The State of Mass Incarceration in the United States and Appalachia.........................................................680
   B. The Social Implications of Mass Incarceration ..............682
   C. Increasing Retributivism and Criminalizing Addiction......685
III. ALTERNATIVE METHODS OF INCARCERATION..................687
    A. Drug Courts.................................................................689
       1. Traditional Drug Court Model.................................690
       2. Non-Traditional Drug Court Models.........................690
I. INTRODUCTION

The United States’ current approach to incarceration is not working. Presently, the United States incarcerates 1.9 million people across state prisons, local jails, federal prisons and jails, and other institutions.¹ Excluded from this figure is an additional 3.67 million individuals either on parole or probation.² This means that, in total, over 5.5 million people across the country are either incarcerated or still being monitored after release from jail or prison.³ If the United States’ current approach to incarceration functioned effectively, a majority of these individuals would not be returning to prison after release because incarceration would have “worked” and formerly incarcerated individuals would not re-offend. However, that is not what is happening in the United States. Within three years of release, formerly incarcerated individuals

² Id.
³ Id.
have a 62% likelihood of recidivism. This number jumps to 71% within five years of release. With this high of a recidivism rate in the United States, it is clear that the traditional methods of handling crime and incarceration are neither sustainable nor effective.

In an effort to reimagine the punitive ideology behind incarceration and to offer more rehabilitative options in response to crime, some jurisdictions have implemented alternative justice options, such as diversion programs. Diversion programs encompass various alternatives to incarceration, such as community-based services, police-led interventions, mandated community service, substance use and mental health treatment, problem-solving courts (such as drug courts, mental health courts, and family treatment courts), deferred adjudication, probation, e-supervision, and community courts. This Note will focus on alternative justice courts, specifically drug courts and community courts, that incorporate a variety of diversion program tactics.

Both problem-solving courts and diversion programs have been successful in practice. Problem-solving courts, such as drug courts, experience success in terms of reducing both recidivism and the monetary costs of incarceration in the long run. Similarly, other diversion programs have also experienced success for both juveniles and adults. For example, juveniles participating in diversion programs experience less recidivism than juveniles in traditional correctional programs. Adults participating in diversion programs also experience significantly lower recidivism rates and improved employment outcomes. While there is a lack of nationwide evaluation of these programs, diversion program representatives generally report that they are achieving the goals the programs were designed to achieve, such as reducing costs and recidivism. Considering the daunting recidivism rate in the United States, it is

---


5 Id.


10 No Entry: A National Survey of Criminal Justice Diversion Programs and Initiatives, CTR. FOR HEALTH & JUST. AT TASC 1, 28–29 (2013),
critical that jurisdictions consider adopting alternative options to traditional incarceration, such as diversion programs, drug courts, and community courts, as a way to combat recidivism.

In addition to advocating for and implementing alternative options to incarceration, the principles of restorative justice should also be incorporated into these programs whenever possible. Restorative justice originates from practices by indigenous peoples across the world and now takes on many forms, such as family conferences, victim panels, dialogues between the parties to the harm, and circles that involve varying combinations of the individual who caused the harm, the victim, community members, and justice system authority figures. Most importantly, restorative justice asks who should be involved in repairing harm and how to go about repairing this harm, rather than how we should punish someone for causing harm. Research conducted around the world on restorative justice has shown that it can reduce both violence and recidivism. Even if alternative methods of justice are not closely adhering to a traditional model of restorative justice, it is still key to implement restorative justice practices when possible to best serve the interests of individuals in contact with the justice system, victims, and communities.

In Part II, the topic of incarceration in the United States, both past and present, is explored more in depth. Specifically, Part II focuses on how the increasingly retributive penal system and mass incarceration in the United States has led to dire implications for incarcerated individuals, their families, their communities, and society as a whole. Part III sheds light on alternative methods to incarceration that are currently implemented across the country by discussing real examples of drug courts and community courts and their successes. In Part IV, this Note turns to West Virginia. This Note chooses to focus on West Virginia due to its high incarceration rate, its nation-leading drug overdose rate, and its unique combination of high poverty, health concerns, and a struggling labor market, issues that both cause incarceration and are exacerbated by incarceration. Part IV explores current drug courts in West Virginia, why and how the state should expand drug courts, and the potential to create an alternative community court for other offenses. Additionally, Part IV also advocates for incorporating restorative justice principles when possible in drug courts, alternative courts, and the criminal justice system in general. Finally, Part V concludes that West Virginia could promote restorative justice within the state by implementing


11 DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 133 (2019).


14 SERED, supra note 11, at 133.
alternative justice methods through the use of drug courts and community courts to reduce recidivism and the collateral consequences of incarceration.

II. MASS INCARCERATION, SOCIAL IMPLICATIONS, AND CRIMINALIZING ADDICTION

Before diving further into the current state of the prison system in the United States, it is imperative to turn back to the origins of prisons and punishment in the United States to understand how these origins have shaped modern society’s view on responding to crime. Largely, the origin of incarceration in the United States is rooted in forced labor, increased punishment, and racism. Before the United States was even its own country, English convicts were sent to the American Colonies to be bought or leased as laborers and servants, carrying punitive practices over from England to the fledgling American Colonies.15

Around the time of the American Revolution, it was believed that incarcerated people could be “reformed” through incarceration, hard labor, and limited communication.16 In response, penitentiaries started opening around the eastern United States with these views in mind.17 Conditions in these penitentiaries were harsh, and wardens often employed similar inhumane and abusive practices utilized in slavery to compel compliance from incarcerated people.18 Conveniently, attributing the performance of labor as a measure to “reform” incarcerated individuals served as an opportunistic excuse to use incarcerated populations for low-cost labor.19

The conclusion of the American Civil War ushered in a prison population boom, most of which was fueled by the incarceration of newly freed African Americans.20 While the North’s victory in the Civil War and the ratification of the Thirteenth Amendment was certainly a step towards progress for the equality of African Americans, the practice of slavery was not entirely

15 H. BRUCE FRANKLIN, PRISON WRITING IN 20TH-CENTURY AMERICA 2 (1998). Also at this time, England’s “Bloody Code,” which sentenced individuals to the death penalty for committing certain crimes, was in place. Id. Over 200 crimes fell within the Bloody Code sentencing scheme. Id.
16 Id. at 3.
17 Id. Some prisons placed individuals in permanent solitary confinement; others whipped individuals who stepped out of labor lines. Id.
18 Id.
19 Id.
ended. Instead, the Thirteenth Amendment explicitly permitted the use of slavery and involuntary servitude for people convicted of crimes.\textsuperscript{21}

In response, former slave-holding states passed laws known as Black Codes, which were intentionally vague and criminalized behavior such as mischief, vagrancy, and loitering.\textsuperscript{22} These crimes were often applied only against newly emancipated people.\textsuperscript{23} Individuals convicted of these crimes were jailed and fined by police, who were incentivized by fees to arrest and imprison more people.\textsuperscript{24} The effect of Black Codes were further compounded by other measures taken by states to eliminate access to a fair justice system. Though the Civil Rights Act of 1875 prohibited race discrimination in jury selection, the seating of all-White juries and the exclusion of African Americans persisted into the 1930s, resulting in African Americans being convicted by largely all-White juries.\textsuperscript{25}

These legislative and judicial measures served to increase the number of African Americans incarcerated and funneled into prison labor in the South, while people incarcerated in the North also faced compelled labor.\textsuperscript{27} Labor contractors leased convicted individuals in the South, who were forced to perform manual labor on railroads, on plantations, and in coal mines.\textsuperscript{28} When convict leasing ended just before the 1930s, the use of chain gangs increased to fill the forced labor gap.\textsuperscript{29} These practices lasted well into the 20th century and eventually ended around the mid-1900s.\textsuperscript{30}

\textsuperscript{21} Frankln, supra note 15, at 4; U.S. Const. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime . . . shall exist within the United States”).

\textsuperscript{22} Frankln, supra note 15, at 4; see also Clint Smith, How the Word is Passed 87 (2021) (Southern states, such as Mississippi, also passed “pig laws,” which considered theft of livestock worth at least a dollar and theft of any property worth at least ten dollars as grand larceny).

\textsuperscript{23} Frankln, supra note 15, at 4.

\textsuperscript{24} Id.


\textsuperscript{27} Smith, supra note 22, at 86–87.

\textsuperscript{28} Frankln, supra note 15, at 5.

\textsuperscript{29} Delaney, supra note 20.

\textsuperscript{30} Id.
States, incarceration primarily affected White individuals and was used to combat unionized labor movements by using prison factory labor.\textsuperscript{31}

Eventually, prisons began offering more opportunities for recreation, visitation, rehabilitative programming, and vocational training in the 1940s.\textsuperscript{32} However, these rehabilitative efforts were primarily reserved for White individuals; people of other races were infrequently considered capable of reform by corrections policymakers.\textsuperscript{33} These reforms were short-lived and were replaced by supermax prisons, lengthy mandatory sentences, Three Strikes Laws, and an overall increase in punitiveness in the 1980s, which caused the prison population in the United States to increase threefold in just 15 years.\textsuperscript{34}

This timeline returns us back to the current state of incarceration in the United States. Incarceration has changed drastically since its inception in the United States, however, its primary focus of punishment and punishing more people has remained the same. This section explores the drastic increase in the United States’ prison population from the past few decades and the dire consequences of this increase. Specifically, incarceration in both Appalachia and West Virginia and the issues incarceration creates in these regions is viewed in the context of a region already struggling with the ramifications of the opioid crisis,\textsuperscript{35} a declining labor market,\textsuperscript{36} and communities living in poverty.\textsuperscript{37} Lastly, this section introduces the circumstances that led to mass incarceration and how the Appalachian region, and specifically West Virginia, can begin to undo the overincarceration of its population.

\textsuperscript{31} FRANKLIN, \textit{supra} note 15, at 8.
\textsuperscript{32} Delaney, \textit{supra} note 20.
\textsuperscript{33} Id.
\textsuperscript{34} FRANKLIN, \textit{supra} note 15, at 15.
\textsuperscript{37} \textit{See West Virginia; United States}, U.S. CENSUS BUREAU (2017–2021), https://www.census.gov/quickfacts/fact/table/WV,US/IPE120221 (comparing the poverty rate in West Virginia with the poverty rate in the United States). According to current data, West Virginia’s poverty rate is 5% higher than the United States’ poverty rate. Id.
A. The State of Mass Incarceration in the United States and Appalachia

The United States incarcerates nearly two million people between state and federal prisons, meaning that 565 out of every 100,000 people living in the United States are incarcerated at any given time. Based on the most recent estimates, incarcerating such a significant portion of the United States population costs nearly $182 billion each year. Fortunately, the United States’ incarceration rate has slightly dropped in the past few years, hitting a new low for the first time since 1995, when 810 out of every 100,000 United States residents were incarcerated. A variety of factors may explain why the incarceration rate has dropped after reaching its peak from 2006–2008; rates of violent and property crimes have dropped, arrests have declined, changes in criminal laws and sentencing practices have led to shorter sentences, and the COVID-19 pandemic ushered in compassionate releases or e-supervision options for individuals with low-level offenses, the elderly, and the immunocompromised. Despite the incarceration rate decreasing in the past few years, the United States still has the highest incarceration rate of any country in the world.

---

39 Sawyer & Wagner, supra note 1. This number is based on data from 2023.
40 United States Profile, supra note 38. For more information on the economic drivers and consequences of mass incarceration, see Economics of Incarceration, PRISON POL’Y INITIATIVE, https://www.prisonpolicy.org/research/economics_of_incarceration/ (last visited Jan. 4, 2024).
42 Id.
Additionally, the incarceration rate is on the rise again due to the criminal justice system largely returning to pre-pandemic operations.\textsuperscript{48}

Looking specifically at geographical regions, Appalachia also outpaces the world, and even the United States, in terms of its incarceration rates. By averaging the 2021 incarceration rates of each Appalachian state,\textsuperscript{49} Appalachia incarcerates about 754 people per every 100,000 living in the United States, a number topping both the 2021 United States incarceration rate of 664 out of every 100,000 United States residents and the incarceration rate of every other country in the world.\textsuperscript{50} West Virginia in particular, a state with all its counties falling within the Appalachian region,\textsuperscript{51} saw a dramatic increase in its prison population between 2005 and 2015.\textsuperscript{52} During this time period, the prison population in the state roughly doubled.\textsuperscript{53} This increase can largely be attributed to the rise in the number of individuals arrested and placed in the custody of the West Virginia Division of Corrections and Rehabilitation (WVDCR) because of drug offenses and the opioid crisis. To put the increase in perspective, the number of individuals convicted of drug offenses admitted each year to West Virginia prisons has more than tripled from 1998 to 2015, resulting in individuals convicted of drug offenses comprising 15% of new admissions in 1995 to 25%...
in just 17 years. This massive increase in West Virginia’s prison population has led to overcrowding and higher expenses.

B. The Social Implications of Mass Incarceration

This dramatic increase in prison population due to drug offenses and the opioid crisis is not unique to West Virginia or Appalachia—it impacts the entire nation, and it comes at both an economic and social cost. As of 2011, the total cost associated with opioid use in relation to the criminal justice system is $5.1 billion. Additionally, across the United States, individuals convicted of crimes face collateral consequences that stem from contact with the justice system, including disenfranchisement, unemployment, and a lack of housing or

54 Id. at 2; see also Opioid Data Analysis and Resources, CTRS. FOR DISEASE CONTROL & PREVENTION (CDC) (Aug. 8, 2023), https://www.cdc.gov/opioids/data/analysis-resources.html (describing the waves of opioid overdose deaths, which have been increasing since at least 1999).
55 Since 2001, the number of incarcerated people waiting for space in prisons and the total prison population has increased by 937 people and 1,915 people respectively. W. VA. DIV. CORR. & REHAB., FY 2022 ANN. REP. 1, 30 (2022), https://dcr.wv.gov/resources/Documents/annual_reports/FY22%20ANNUAL%20REPORT%20WVDCR.pdf; see also Quentin King, West Virginia’s Total Incarcerated Population Fell in the Last Year, but on the Rise Again, W. VA. CTR. ON BUDGET & POL’Y (Mar. 29, 2021), https://wvpolicy.org/west-virginias-total-incarcerated-population-fell-in-the-last-year-but-on-the-rise-again/ (discussing overcrowding in West Virginia jails).
56 Since 2012, the West Virginia Division of Corrections and Rehabilitation (WVDCR) expenses have increased more than 190% in the adult corrections system. West Virginia Regional Jail and Correctional Facility Authority and West Virginia Division of Corrections (now combined to form the WVDCR) expenses in 2012 were about $177 million, while expenses in 2022 add up to over $337 million. See W. VA. REG’L JAIL & CORR. FACILITY AUTH., ANN. REP. FY 2012 1, 24 (2012), https://dcr.wv.gov/resources/Documents/annual_reports/RJA%20Annual%20Report%20FY%202012.pdf; W. VA. DIV. CORR., ANN. REP. 2012 1, 57 (2012), https://dcr.wv.gov/resources/Documents/annual_reports/AR2012.pdf.
60 Leah Wang & Wanda Bertram, New Data on Formerly Incarcerated People’s Employment Injustices, PRISON POL’Y INITIATIVE (Feb. 8, 2022), https://www.prisonpolicy.org/blog/2022/02/08/employment/; see also Expanding Economic Opportunities for Formerly Incarcerated Persons, WHITEHOUSE.GOV (May 9, 2022), https://www.whitehouse.gov/cea/written-materials/2022/05/09/expanding-economic-opportunity-for-formerly-incarcerated-persons/ (blog post by the White House focusing on employment barriers faced by formerly incarcerated persons).
housing discrimination upon release, all of which contribute to an increased likelihood of recidivism. The increase in prison population has led to these collateral consequences being imposed on a much larger portion of the population than just a few decades ago. Thus, the social cost of incarceration poses an even greater and immeasurable long-term threat than the economic cost of incarceration.

The effects of mass incarceration do not solely impact the person being incarcerated either; incarceration also affects their children, families, and communities. Adolescents and children of incarcerated parents are at a higher risk for adverse mental health concerns, experience increased behavior problems and cognitive delays, and have higher rates of incarceration and arrests than children without incarcerated parents. Families of individuals who will eventually become incarcerated are “worse off” than families who will never have an incarcerated family member; this fact remains true even before incarceration occurs. Families also experience financial difficulties, strained relationships, social disruption, judgment from the community, and grief for the loss of a person from their family role during incarceration. The impact of mass incarceration on families and children is especially concerning considering that 113 million adults in the United States have an immediate family member who has been incarcerated.

Communities, poverty rates, and public health concerns in the United States are also impacted by incarceration. Incarceration affects communities by diminishing the labor market that formerly incarcerated people can participate in, depleting economic strength in the neighborhood, weakening political power

---

63 See Laurel Davis & Rebecca J. Shlafer, Mental Health of Adolescents with Currently and Formerly Incarcerated Parents, 54 J. ADOLESCENCE 120 (2017).
68 Sawyer & Wagner, supra note 1.
due to disenfranchisement, and reducing community solidarity. In addition to its impact on families and communities, incarceration contributes to poverty in the United States and prevents its reduction, results in more overdoses and drug use, and worsens health problems that prevent reintegration.

Furthermore, the effects of incarceration are not distributed equally across race, class, or health status. The burden of mass incarceration disproportionately affects Black, Indigenous, and people of color (BIPOC) and people experiencing poverty. In addition to racial and class overrepresentation in the carceral system, people who experience struggles with mental health and substance use are also disproportionately more likely to become incarcerated than people without mental health or substance use concerns. The effects of mass incarceration thus put an even greater strain on already disadvantaged and struggling communities across the United States.

---


74 See Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, 139 DEDALUS 8, 9 (2010).


76 For more information on the link between social problems and incarceration, see Alexi Jones & Wendy Sawyer, *Arrest, Release, Repeat: How Police and Jails Are Misused to Respond to Social*
C. Increasing Retributivism and Criminalizing Addiction

Critics attribute the problem of mass incarceration to the United States’ focus on retributive justice, which was worsened by the War on Drugs and the tough-on-crime rhetoric that first gained traction in the 1970s, the rise of the superpredator theory and the Three Strikes Laws of the 1990s, and the use of the justice system as a response to substance use disorder and the opioid crisis.

77 The War on Drugs references the aim of the United States to reduce drug trafficking and drug use, which first started during President Nixon’s tenure in the 1970s. ALEXANDER, supra note 73, at 2. One highly criticized issue associated with the War on Drugs is its link to mass incarceration, and particularly the mass incarceration of poor people and minorities. Id. In fact, former political aide to President Nixon, John Ehrlichman, admitted in a 1994 interview that criminalizing heroin and, in turn, African Americans, was an explicit goal of the War on Drugs. Dan Baum, Legalize It All: How To Win the War on Drugs, HARPER’S MAGAZINE, Apr. 2016, at 22. To compliment the War on Drugs, media outlets and politicians vocalized their support by using rhetoric that encouraged tough-on-crime policies and policing. See Marc Mauer, Why Are Tough on Crime Policies So Popular, STAN. L. & POL’Y REV. 9, 11–12 (1999); Marc Mauer, RACE TO INCARCERATE 56–68 (1999). For more information on the timeline of the War on Drugs and tough-on-crime rhetoric, see Arit John, A Timeline of the Rise and Fall of ‘Tough on Crime’ Drug sentencing, THE ATLANTIC (Apr. 22, 2014), https://www.theatlantic.com/politics/archive/2014/04/a-timeline-of-the-rise-and-fall-of-tough-on-crime-drug-sentencing/360983/.

78 See Beth Caldwell & Ellen C. Caldwell, “Superpredators” and “Animals” – Images and California’s “Get Tough on Crime” Initiatives, 11 J. INST. JUST. & INT’L STUDIES 61 (2011) (discussing how juvenile crime rates were exaggerated and that certain youth populations, particularly youth of color, were depicted as “superpredators” that were predisposed to commit violent crimes without remorse or fear of incarceration); Jon Marc Taylor, Where Have All the Superpredators Gone, 11 J. PRISONERS ON PRISONS 19, 20–21 (2001) (demonstrating that the violent wave of superpredators scholars warned of in the 1990s never materialized; instead, juvenile crime rates dramatically decreased). Three Strikes Laws refer to laws that impose increasingly lengthy sentences on individuals that commit repeat offenses based on the number or type of offense that has been committed. See Three Strikes, CORNELL L. SCH. (Sept. 2021), https://www.law.cornell.edu/wex/three_strikes. Perhaps the most well-known example is California’s Three Strikes LAW. CAL. PENAL CODE § 667 (West 2023).

For the past several decades, politicians,\(^80\) prosecutors,\(^81\) private companies,\(^82\) and other proponents of the criminal justice system\(^83\) alike have benefitted from either promoting tough-on-crime policies or funding mass incarceration. Despite proponents of the criminal justice system peddling incarceration as a solution to crime, critics have emphatically stated for decades now that mass incarceration is not a solution to crime or social problems and that the current prison system simply does not work, as indicated by high recidivism rates and individuals’ struggles to improve in traditional prison environments.\(^84\)

Rather, reducing incarceration may lead to safer communities and lower crime rates.\(^85\) Two studies sponsored by the Safety and Justice Challenge (SJC) indicate that after incarcerated people were released, both as a result of COVID-19 and before the COVID-19 pandemic, crime did not increase in the

---


\(^83\) Id.


communities the studies reviewed.\textsuperscript{86} Instead, crime decreased following the release of incarcerated people during the initial months of the implementation of COVID-19 restrictions, which indicates that reducing incarceration of the studied individuals (primarily high health risk, early release, or individuals incarcerated before their trial) or reducing the prosecution or arrest of certain offenses (misdemeanors and traffic offenses) does not necessarily pose an increased risk to communities.\textsuperscript{87} The same was found true for cities that implemented decarceration strategies in the years before COVID-19 was a factor.\textsuperscript{88} Therefore, both the United States and West Virginia should consider viable options for reducing mass incarceration, recidivism, and in turn, the collateral consequences of incarceration.

III. ALTERNATIVE METHODS OF INCARCERATION

The following scenarios describe how a traditional method of incarceration provides limited options to individuals in contact with the justice system to avoid incarceration and the collateral consequences that stem from a criminal record.\textsuperscript{89} After these scenarios are discussed, alternative methods of incarceration are introduced.

Aaron was convicted of first-degree robbery and sentenced to ten years in prison. Before Aaron went to prison, he struggled with substance use. Aaron was disqualified from participating in existing drug courts because robbery is considered a violent offense. With good time credit, Aaron was released after six years. After Aaron’s release, he struggled to find housing and a job because of his criminal record. He also was ineligible for welfare and food stamps because of his criminal record. Aaron continued to struggle with substance use and was arrested and charged with a nonviolent drug offense eight months after he was released from prison. His criminal history of a robbery offense precluded him from participating in a drug court and he returned to prison for the drug offense.

Kathy is twenty-three years old and has a history of committing misdemeanor quality-of-life crimes, such as shoplifting and minor drug possession. She was convicted of misdemeanor petit larceny one year ago and sentenced to six months of probation. Kathy was arrested two months ago for grand larceny for stealing $2,000 worth of items from a local outdoor goods store.

\textsuperscript{86} Straughan, supra note 85.
\textsuperscript{87} JFA INST., supra note 85.
\textsuperscript{88} CUNY INST. FOR STATE & LOC. GOVERNANCE, supra note 85, at 7.
\textsuperscript{89} These scenarios are fictional and are not representative of actual persons or events. Any resemblance to actual persons, living or dead, or actual events is purely coincidental.
She was sentenced to two years in prison and no alternative options to incarceration were presented to her.

In response to the substantial social implications and ineffectiveness of mass incarceration, some communities and practitioners in the criminal justice system have turned to alternative justice methods, also called diversion programs, instead of conventional incarceration. Alternative justice employs a variety of methods to divert qualifying individuals from incarceration. These alternative justice methods can include, but are not limited to, e-supervision, community service, halfway houses, community courts, drug courts, mental health courts, treatment programs, and restorative justice programs. While several of these alternative methods to incarceration have been met with criticisms, each alternative method has empirical support as a promising alternative option to incarceration.

Additionally, restorative justice can be paired with other diversion tactics for greater impact on communities. Restorative justice focuses on repairing harm and encompasses several principles to achieve that goal: (1) Crime is a violation of people and relationships; (2) Victims and the community are central to the justice process; (3) A primary focus of a justice process is to assist victims and...
address needs; (4) The secondary focus is restoring the community to the degree possible; and (5) All human beings have dignity and worth.\textsuperscript{93} Restorative justice can function as an alternative justice method alone. Often though, knowingly or unknowingly, facilitators of other alternative justice programs incorporate restorative justice principles into their programs. Keeping the principles of restorative justice in mind when developing any sort of alternative justice program is key to creating a program that focuses on repairing harm rather than only assigning blame and punishment for harm.

This section outlines two types of alternative justice programs: drug courts and community courts. Specifically, this section provides an overview of how the programs function and looks to various models to understand how to successfully implement each as a diversion tactic.

A. Drug Courts

Several jurisdictions across the country have implemented and operate drug courts as a way to divert individuals from traditional incarceration. The Department of Justice defines drug courts as programs that provide long-term drug treatment rather than a prison sentence to individuals that agree to court supervision.\textsuperscript{94} The first drug court was established in Miami, Florida, in 1989; now, over 4,000 drug courts exist across the nation for adults, juveniles, families, veterans, and other vulnerable groups.\textsuperscript{95} Instead of focusing on punishing someone for drug addiction, drug courts aim to treat addiction and any underlying issues that may contribute to addiction.\textsuperscript{96} Each drug court follows different policies, but most include a team of drug court professionals consisting of traditional justice system actors, treatment providers, ancillary service providers, and sometimes community members.\textsuperscript{97} Drug courts have a screening process that dictates who can participate in that drug court and considers factors such as past criminal convictions, risk for relapse without supervision, and the applicant’s willingness to participate and receive treatment.\textsuperscript{98} These courts have experienced varying success, and several notable drug courts are presented below.

\begin{itemize}
  \item \textsuperscript{93} About Restorative Justice, supra note 13.
  \item \textsuperscript{94} OFF. JUST. PROGRAMS, DRUG COURTS SPECIAL FEATURE (May 16, 2023), https://www.ojp.gov/feature/drug-courts/overview.
  \item \textsuperscript{95} Id.
  \item \textsuperscript{96} Id.
  \item \textsuperscript{98} U.S. GOV’T ACCOUNTABILITY OFF., GAO-23-105272, ADULT DRUG COURT PROGRAMS: FACTORS RELATED TO ELIGIBILITY AND ACCEPTANCE OF OFFERS TO PARTICIPATE IN DOJ FUNDED ADULT DRUG COURTS (Feb. 13, 2023).
\end{itemize}
1. Traditional Drug Court Model

In Richmond, Virginia, the Chesterfield Community Criminal Justice Board recognized that courts needed to approach criminal behavior stemming from drug addiction differently than just allowing the traditional model of incarceration to persist. In September 2000, the Chesterfield/Colonial Heights Drug Court (CCHDC) was formed with goals of reducing recidivism, enhancing community safety, reducing substance dependency among participants, increasing accountability of participants, and developing necessary skills for participants to succeed and be productive citizens. This drug court is presided over by traditional justice system officers, such as judges, prosecutors, a defense attorney, the drug court administrator, and other officers. Here, drug court participants are selected solely by the prosecutor assigned to drug court and upon the request of a potential participant. The participant must be an adult; be charged with a felony drug or property offense; they must have no prior felony convictions for violence, sex offense, or drug distribution; and they must meet criteria for substance use dependence.

The program consists of five phases, and participants must complete all phases, be drug-free for a period of time, and maintain employment. In evaluating its success, the CCHDC commissioned an evaluation report and found that a comparison group had six times the number of new convictions than CCHDC graduates and over two-and-one-half the number of new convictions of terminated CCHDC participants. The study concluded that CCHDC met its goals of serving the community and reducing recidivism. The CCHDC model is very typical of drug courts across the country in terms of who presides over the court and who is allowed to participate. As evidenced by CCHDC’s self-evaluation, this traditional model is effective and successful.

2. Non-Traditional Drug Court Models

In 1999, the Woodbury County Community Drug Court (WCCDC) was established in Iowa in response to an increase in substance use and related

100 Id.
101 Id. at 11.
102 Id. at 13.
103 Id.
104 Id. at 15.
105 This group consisted of individuals who were eligible to participate in CCHDC but chose not to participate in the program. Id.
106 Id. at 16.
crimes, to help people addicted to substances. This drug court operates using a non-traditional, community-panel model, which is composed of volunteer community members who are trained to serve similarly to a traditional judge. Protentional participants are screened and then assigned to a drug court panel based on the needs of the participant. Participants must be charged with nonviolent offenses. When participants have a hearing, they meet with a panel of community members, which creates more accountability between the participant and the community. WCCDC utilizes a four-phase approach that emphasizes stabilization, acceptance, maintenance and aftercare, and, finally, recovery. This drug court has experienced varying degrees of success; while juvenile clients graduated at a higher rate than the national average, recidivism rates amongst the juvenile participants were also higher than the national average. However, further research on WCCDC graduates shows that 77% of adult drug court graduates did not reoffend upon release, which is 25% higher than the national average. The study concludes by stating that while drug courts have a higher up-front cost than incarceration does, WCCDC graduates are more likely to successfully reenter the community and not reoffend as compared to individuals who do not participate in drug court programs. Therefore, this model saves community resources over time as a result of the decreased cost of recidivism. Thus, WCCDC’s community-panel model serves as an instructive and successful example for other alternative drug courts.

3. Incorporating Individuals with High-Level Offenses

Looking finally at a drug court in Honolulu, Hawaii, Judge Steven S. Alm recognized a deficiency in drug courts around the country—most drug courts only target individuals with low-level offenses based on exclusionary

---

108 Id. at 296.
109 Id. at 297–98.
111 Vick & Keating, supra note 107, at 296.
112 Id. at 298.
113 Id. at 318. WCCDC juveniles graduated at a rate of 56.4% as compared to the national average of 47%. Id.
114 Id. at 319. The author indicates the heightened recidivism rate may be a result of the study tracking graduates’ records for five years after participating in the drug court, rather than just two years, which is the length of the national data.
115 Id. at 319–20.
116 Id. at 319.
eligibility criteria,\textsuperscript{117} which disqualifies individuals with high-level offenses.\textsuperscript{118} However, Judge Alm recognized that helping individuals with high-level offenses, including those with violent offense convictions, likely would be a better use of funding and have a greater impact on the community supervision and prison systems.\textsuperscript{119} Judge Alm’s drug court follows three basic principles: focus on high-risk participants, refrain from over-treating lower-risk participants, and separate high- and low-risk participants.\textsuperscript{120} Depending on the participant’s needs, the drug court program is sometimes combined with Hawaii’s Opportunity Probation with Enforcement (HOPE Probation). HOPE Probation is a form of procedural justice that results in an arrest of a probationer and a proportional jail sentence for each violation; HOPE Probation differs from typical Hawaii probation because a single probation violation usually does not result in any penal consequences.\textsuperscript{121}

In the drug court, the graduation rate of high-risk participants compared to low-risk participants has increased, and millions of dollars that would have been spent on incarceration have been saved.\textsuperscript{122} But most importantly, the participants were afforded the opportunity to be rehabilitated rather than serve a merely retributivist sentence and face the collateral consequences that stem from incarceration. Further, the even higher-risk drug court participants that originally participated in HOPE Probation did not have a higher recidivism rate than lower-risk pretrial drug court participants.\textsuperscript{123} The data from the Hawaii drug court indicates that allowing individuals with high-level offenses, including those who have committed violent offenses, to participate in a drug court model leads to similar success as individuals with low-level offenses.

The examples discussed above show how implementing a drug court model for drug-based offenses, both for high-risk and low-risk participants, is successful to varying degrees. The courts discussed can serve as instructive models for other jurisdictions that want to provide alternative justice options to better serve their communities. It is important to note that community needs will vary, and practitioners should consider the specific and unique needs of their communities and adjust the example models provided here accordingly to ensure that a successful program is created.

\textsuperscript{117} Exclusionary criteria varies based on jurisdiction, but often individuals with violent felony convictions, a history of severe mental illness, or multiple felony convictions are excluded from drug court participation. Adult Drug Court Programs: Factors Related to Eligibility and Acceptance of Offers to Participate in DOJ Funded Adult Drug Courts, U.S. Gov’t Accountability Off. 1, 13 (2023), https://www.gao.gov/assets/gao-23-105272.pdf.

\textsuperscript{118} Judge Steven S. Alm, HOPE Probation and the New Drug Court: A Powerful Combination, 99 Minn. L. Rev. 1665, 1685–86 (2015).

\textsuperscript{119} Id. at 1686.

\textsuperscript{120} Id. at 1690–91.

\textsuperscript{121} Id. at 1672.

\textsuperscript{122} Id.

\textsuperscript{123} Id.
B. Community Courts

Another alternative justice model that could serve as an alternative to incarceration and allow communities to design programs based on what the community needs to achieve justice are community courts. These courts aim to bring courts and the community together to solve community problems and achieve justice. While individual community courts approach community justice differently, most community courts also integrate restorative justice principles by considering the needs of the individual being diverted from traditional incarceration, the victim, and the community together. Several notable examples are presented below.

1. Community Courts in Central Business Districts

The first community court established in the United States is the Midtown Manhattan Community Court (Midtown), which was started in 1993 to address quality-of-life crimes near Times Square. Midtown deals only with arraignments and gives participants the option to plead guilty or not guilty. When participants plead not guilty, their case is transferred to a traditional court. Midtown sentences people who plead guilty to community service or to get treatment for substance use or similar issues. This sentence is legally binding. Midtown provides a wide array of social services, such as drug treatment, housing assistance, health-care services, and GED and job training, all of which aim to address the risk factors frequently associated with increased criminal behavior. At Midtown, cases move faster, the daily cost for custody is lower, community service compliance is higher, and some participants remain in treatment voluntarily. Most importantly, serious crimes and minor crimes alike decreased because Midtown adequately addressed the needs of participants rather than imposing a merely retributivist punishment. The Midtown Community Court model has since served as an inspiration and goal for other community courts across the nation.

125 Id. at 38.
126 These crimes include prostitution, shoplifting, drug possession, turnstile jumping, and disorderly conduct. Id. at 40.
127 Id.
128 Id. at 41.
129 Id.
130 Id.
131 Id.
132 Id. at 42.
133 Id.
A Philadelphia Community Court also experienced similar successes, such as reduced recidivism, by blending criminal justice with social services and aiding participants in receiving long-term care for substance use.\(^\text{134}\) This community court is based on Midtown’s model and serves a central business district like the Midtown Court does in Times Square.\(^\text{135}\) The Philadelphia court also primarily deals with quality-of-life crimes.\(^\text{136}\) The project coordinator of the Philadelphia Community Court emphasizes the need for flexibility and responding to the needs of the community as a key element of operating a successful alternative court.\(^\text{137}\) This appropriately stresses the fact that there is no one-size-fits-all alternative court that will adequately address the needs of various participants and different communities. Instead, the project coordinator suggests implementing creative approaches to justice, whether that reflects the practices of another community court or not.\(^\text{138}\) Though this community court has since closed, data from the Defender Association of Philadelphia indicates that conviction rates for clients on new arrests that had previously participated in the Philadelphia Community Court were nearly halved, or greater, over a period of three years.\(^\text{139}\)

2. Community Courts in Neighborhoods and Small Cities

Other community courts, such as the Hartford Community Court, which opened in 1998, also follow a similar standard set by the Midtown Community Court and primarily target low-level misdemeanors, quality-of-life crimes, and city ordinance violations.\(^\text{140}\) The Hartford Community Court serves 17 neighborhoods in Hartford, Connecticut, originally serving an area of 130,000 individuals when it first opened,\(^\text{141}\) and now serving an area of about 121,000

---


\(^{135}\) Id.

\(^{136}\) Id. at 39.

\(^{137}\) Id. at 41.

\(^{138}\) Id.

\(^{139}\) Id.

\(^{140}\) Quintin Johnstone, *The Hartford Community Court: An Experiment That Has Succeeded*, 34 CONN. L. REV. 123, 130 (2001). The court does not accept misdemeanors accompanied by aggressive violence or drug offenses, aside from a defendant’s first charge of marijuana possession. Id.

individuals according to the 2020 census. In the Hartford Community Court, participants enter a conditional guilty plea and have their charges dismissed and expunged if plea conditions are met. Community service is the typical sentence; however, some participants are jailed for a period of time, depending on the severity and frequency of the offense. Hartford offers similar social services to Midtown, and participation in those services may become a mandatory requirement of the plea. Special court programs are also available for people who engage in or solicit prostitution, people with substance use issues, and juveniles. Currently, about 95% of participants with a conditional guilty plea satisfy the conditions imposed by the court to have their charges completely dismissed. While the court has experienced success, the reach of the Hartford court is limited. The court does not provide long-term treatment for mental health or substance use, both of which often contribute to subsequent criminal activity. This is a limitation that some other models of community courts also have; however, a long-term treatment element would better ensure success of community court models and should be implemented if possible.

The Red Hook Community Justice Center is another long-standing, successful community court that has primarily focused on redirecting individuals who commit nonviolent, low-level offenses away from traditional incarceration since it was established in 2000. This community court focuses on the Red Hook neighborhood in Brooklyn, New York, which has a population of about 40,000 people. The Red Hook Community Justice Center recognizes that incarcerating individuals with low-level offenses tends to lead to a “criminogenic effect” and causes these individuals to commit more offenses upon release due to the various obstacles to re-entering society. In recognition of these adverse effects on individuals with low-level offenses, Red Hook implements an approach informed by restorative justice and procedural justice principles in criminal, civil, and family cases to ensure meaningful justice that ultimately

---

143 Johnstone, supra note 140, at 133.
144 Id.
145 Id. at 134.
146 Id. at 136–37.
147 Id. at 136.
148 Id. at 153.
151 Park, supra note 149, at 580. These obstacles can include effects on attaining housing, mental health, and familial relationships.
serves both participants and the community.\textsuperscript{152} In addition to job training and drug treatment, social services are also offered.\textsuperscript{153} In practice, the Red Hook Community Center has noted that implementing procedural and restorative justice principles both restores humanity in participants and heals them, and in turn, creates more equitable communities.\textsuperscript{154}

Drug courts and community courts function differently, but both are examples of alternative justice diversion tactics that could be implemented to aid communities in achieving justice while reducing mass incarceration, recidivism, and mitigating the collateral consequences associated with incarceration. Below, the scenarios presented at the outset of this section are considered in light of the alternative incarceration methods presented here.

By incorporating some of the alternative incarceration methods practiced by other jurisdictions, Aaron would have the opportunity to participate in a drug court program despite his prior robbery offense. Aaron would then have access to social services, job training, and recovery options. These services would address both Aaron’s struggles with substance use and the collateral consequences he continues to face from his robbery conviction. By participating in the drug court program, Aaron’s chance of recidivism would be significantly lower and he would have more opportunities for jobs, housing, and participation in society.

Kathy’s situation would also be changed for the better if she had access to the alternative incarceration methods presented here. If these alternative options were available at the time of Kathy’s initial quality-of-life misdemeanors, Kathy would have been able to receive social services, counseling, and job training as needed. This would have greatly reduced her likelihood of committing subsequent offenses. If Kathy is able to participate in a diversion program instead of going to prison, she would avoid experiencing the social and societal implications associated with incarceration. Additionally, Kathy could have the opportunity to participate in a restorative justice dialogue with the owner of the local outdoor goods store to help repair the community and the harm she caused. Offering these opportunities to Kathy would reduce her likelihood of committing further offenses in the future and avoid the collateral consequences associated with a felony criminal record.

\textsuperscript{152} Id. at 594.
\textsuperscript{153} Id. at 592–93.
\textsuperscript{154} Id. at 598.
IV. ADDRESSING JUSTICE SYSTEM INADEQUACIES WITH ALTERNATIVE COURT OPTIONS IN WEST VIRGINIA

Because of the state of incarceration in Appalachia and its social implications, Appalachians, and West Virginians specifically, would benefit from alternative justice tactics. The remainder of this Note will discuss West Virginia’s efforts to provide alternative justice options across the state to better serve individuals facing criminal charges and communities. West Virginia is a unique state in that it has a small population and faces several issues that incarceration both causes and exacerbates, such as high poverty, widespread health concerns, and a waning labor market.

The most well-known form of alternative justice that has been implemented in West Virginia is its drug courts. This section discusses current drug courts in West Virginia and proposes expanding eligibility requirements of drug courts to serve more individuals. Additionally, this section proposes establishing alternative justice courts for individuals who commit crimes that do not stem from habitual substance use. Finally, this section reviews the principles of restorative justice and highlights the fact that successful justice systems maintain their focus on repairing harm rather than merely punishing individuals for causing harm.

A. Existing Drug Courts in West Virginia

Since at least 2015, West Virginia has been the epicenter for opioid overdoses, with data indicating that 41.5 deaths per every 100,000 people in the state occurred due to an opioid overdose. This is the highest opioid overdose rate of any other state in the nation. Additionally, data from the CDC indicates that West Virginia still has the highest drug overdose mortality in the nation as of 2020 for all drugs, not just opioids.

155 See West Virginia; United States, supra note 37.
157 See West Virginia Economic Outlook 2022–2026, supra note 36; see also Lee, supra note 36 (discussing the low levels of labor market participation in West Virginia).
158 Merino, supra note 58, at 187.
159 Id.
As a state ravaged by the opioid epidemic and drug overdoses, West Virginia has turned to drug courts for some adults\(^{161}\) and juveniles\(^{162}\) as an alternative option to incarceration due to drug addiction.\(^{163}\) The first juvenile drug court was piloted in Cabell County in 1999,\(^{164}\) and the first adult drug court was established in 2005 in the Northern Panhandle.\(^{165}\) Adults in West Virginia who commit a nonviolent crime stemming from habitual substance use may be eligible to participate in drug court as an alternative option to incarceration.\(^{166}\) Allowing such participation is supported by the core belief that certain individuals convicted of drug offenses would not be impacted by the criminal justice system if not for their addictions.\(^{167}\) Since the first drug courts were established, West Virginia has seen reductions in recidivism and in the cost of diverting participants to drug courts instead of incarceration.\(^{168}\)

Organizers, participants, and support staff for drug courts have lauded the success of drug courts not only as a way to reduce recidivism and the cost of incarceration, but also to restore the community and drug court participants. United States Magistrate Judge Michael Aloi, who oversees a federal adult drug treatment court in Clarksburg, emphasizes the importance of restoring drug court participants by addressing underlying issues and needs so that participants can return to the community safely and successfully.\(^{169}\) Some of the participants’

---


\(^{164}\) Juvenile Drug Courts, supra note 162.


\(^{168}\) Yingling, supra note 166. Though specific data on how much drug courts have reduced recidivism is not available, the West Virginia Judiciary website states that drug courts “significantly” reduce recidivism. Adult Drug Courts, supra note 161.

underlying needs include socio-economic hardships, reliable transportation, stable housing, employment, and obtaining proper identification or a driver’s license. Judge Aloi recognizes that these underlying issues are often driven by a variety of contributing factors, such as poverty, addiction, mental health concerns, and instances of sexual abuse.

While Chief Circuit Judge Christopher J. McCarthy, who oversees Harrison County’s adult drug treatment court, acknowledges that the number of people graduating from drug court treatment programs is “minute” compared to the number of drug cases active in West Virginia courts, he believes that the impact the program makes on people’s lives is priceless and a “huge success.” Between the positive impact drug courts have on West Virginia communities, as well as the reduced social and monetary cost of participating in a drug court rather than perpetuating incarceration, even diverting a seemingly insignificant amount of cases from incarceration to treatment court is a promising alternative to undertake. Furthermore, in situations like this, where the impact of drug court is so specific to individuals, it is difficult to fully quantify the additional positive impacts drug courts have on the community outside of measuring recidivism and incarceration rates.

**B. The Need to Expand Drug Courts in West Virginia**

Drug courts in West Virginia are doing incredible work by making meaningful changes in the lives of participants, reducing recidivism, and lessening the monetary and social costs associated with incarceration. This success should be expanded upon by providing similar opportunities for other individuals who would benefit from a drug court program. This section addresses the populations currently excluded from participation in drug courts in West Virginia and how these individuals could be incorporated into drug court programs, should they meet other participatory guidelines; the need to continue drug court services; and, finally, the challenges to implementing proposed changes to West Virginia’s drug court system.

---

171 *Id.*
172 Harvey, *supra* note 169.
173 West Virginia Supreme Court of Appeals Justice John Hutchinson states that the drug court program costs about $5,300 annually per participant, while incarcerating a person for a year would cost $20,000 if the person was in jail and would cost $38,000 if the person was in prison. *Id.* The cost to incarcerate someone in federal prison in West Virginia is about $3,600 a month, or about $43,000 a year. *Id.*
174 Other participatory guidelines include a requirement that the individual be experiencing habitual substance use, being charged with a crime that stems from habitual substance use, and being willing to participate in a drug court program.
1. Eligibility Restrictions in West Virginia Drug Courts and Recidivism of Barred Individuals

Certain individuals are unable to participate in drug court programs for a variety of reasons, including prior convictions, funding issues, geographic challenges, and a lack of available programs for certain age demographics. Currently in West Virginia, the following individuals are unable to participate in drug court programs: those with a prior violent felony conviction in any state,

175 While West Virginians in all counties theoretically can access a drug court, ten West Virginia counties do not have established drug courts. Adult Drug Court Map, W. VA. CTS. (Sept. 25, 2023), http://www.courtswv.gov/lower-courts/adult-drug-courts/ADCMap09-25-2023.pdf. Residents in these counties must participate in a neighboring county’s drug court, which poses an issue to participants who do not have access to a reliable vehicle or public transportation. In a rural state like West Virginia, public transportation access is limited and not all counties are served, including some counties that already do not have drug court programs. Compare id., with 2022 Public Transportation Coverage in West Virginia, W. VA. PUB. TRANSIT ASS’N (2022), https://64c88e.p3cdn1.secureserver.net/wp-content/uploads/2023/02/WVPTA_annual_report_brochure_update.pdf (the shaded counties are not serviced).

176 Despite having one of the nation’s highest incarceration rates of juveniles, less than half of the counties in the state have established juvenile drug courts. Punishment Beyond Prisons 2023: Incarceration and Supervision by State, Appendix, PRISON POL’Y INITIATIVE (2023), https://www.prisonpolicy.org/reports/correctionalcontrol2023_data_appendix.html; Juvenile Drug Court Map, W. VA. CTS. (July 7, 2023), http://www.courtswv.gov/lower-courts/juvenile-drug/JDCMap7-7-2023.pdf. The lack of juvenile drug courts in the state is particularly concerning because adults who began using drugs as a juvenile are more likely to experience substance use disorder as an adult. See Bridget F. Grant & Deborah A. Dawson, Age of Onset of Drug Use and Its Association with DSM-IV Drug Abuse and Dependence: Results from the National Longitudinal Alcohol Epidemiologic Survey, 10 J. SUBSTANCE ABUSE 163 (1998); Kevin M. King & Laurie Chassin, A Prospective Study of the Effects of Age of Initiation of Alcohol and Drug Use on Young Adult Substance Dependence, 68 J. STUDS. ON ALCOHOL & DRUGS 256 (2007). Additionally, the lack of juvenile drug court programs is also concerning because individuals who have committed a juvenile offense are more likely to be incarcerated as adults, especially as young adults. See Anna Aizer & Joseph J. Doyle, Jr., Juvenile Incarceration, Human Capital and Future Crime: Evidence from Randomly-Assigned Judges, 130 Q. J. ECON. 759, 784–89 (2015) (finding that individuals incarcerated as juveniles experience a higher adult incarceration rate by the age of 25 than adults who did not experience juvenile incarceration). This is certainly an issue in the state that needs to be addressed because it is imperative to break the cycle of incarceration and the potential for criminality at a young age. However, this Note primarily focuses on drug courts and alternative courts for adults, and thus, strategies and implementation of more juvenile alternative courts are beyond the scope of this Note. For more information on access issues for teen drug courts in West Virginia, see Anya Slepian, Teen Drug Courts Work. But Too Many West Virginians Don’t Have Access to One, W. VA. PUB. BROAD. (Aug. 23, 2021), https://wvpublic.org/teen-drug-courts-work-but-too-many-west-virginians-dont-have-access-to-one/. For further resources on reducing recidivism for individuals with juvenile offenses, see Elizabeth Seigle, Nastassia Walsh & Josh Weber, Core Principles for Reducing Recidivism and Improving Other Outcomes for Youth in the Juvenile Justice System, COUNCIL STATE GOV'TS JUST. CTR. (2014), https://csgjusticenter.org/wp-content/uploads/2020/01/Juvenile-Justice-White-Paper-with-Appendices-1-1.pdf; Nancy Rodriguez, Restorative Justice at Work: Examining the Impact of Restorative Justice Resolutions on Juvenile Recidivism, 53 CRIME & DELINQ. 355 (2007).
those charged with a violent felony conviction, and those either charged with a sex offense or prior sex offense conviction that requires the individual to register on the sex offense database. Violent offenses include homicide, certain sex crimes, robbery, and assault. The West Virginia drug court statute notes that special treatment programs may be established to incorporate people charged with violent offenses or prior violent offenses; however, there are no known drug court programs in the state that have been established to include these individuals. These restrictions also apply in both the Northern and Southern Federal District Courts in West Virginia according to those courts’ eligibility criteria. Thus, in both state and federal courts in West Virginia, certain high-risk individuals, such as those previously charged with violent felonies, are excluded from accessing drug courts.

As of the 2022 fiscal year, 44.2% of people in West Virginia prisons are convicted of violent offenses, and therefore ineligible for drug court programs in the state, absent a separate drug court being established for these individuals and available funding. No such separate court currently exists in the state. An additional 1.1% of incarcerated individuals are convicted of nonviolent offenses but must register with the state’s sex offense database, which also bars them from accessing drug courts. This means at least 45.3% of the current prison population is denied access to drug court programs even though they may not be high-risk or high-need individuals.

As of the 2022 fiscal year, 44.2% of people in West Virginia prisons are convicted of violent offenses, and therefore ineligible for drug court programs in the state, absent a separate drug court being established for these individuals and available funding. No such separate court currently exists in the state. An additional 1.1% of incarcerated individuals are convicted of nonviolent offenses but must register with the state’s sex offense database, which also bars them from accessing drug courts. This means at least 45.3% of the current prison population is denied access to drug court programs even though they may not be high-risk or high-need individuals.

---

181 Also, it is important to note the exclusion of individuals undergoing MAT as a recovery tool in certain courts. While it is unclear if these individuals are restricted from participating in all drug courts in West Virginia, other jurisdictions have excluded individuals undergoing MAT from participating in drug court programs. The reason for this restriction is because some drug courts consider receiving MAT as a violation of the sobriety condition required to participate in drug court. Shames & Subramanian, supra note 163, at 24–25. Fortunately, the negative perception about MAT seems to be changing and some federal grants even bar drug courts from denying applicants because they are undergoing MAT. SAMHSA Treatment Drug Courts Request for Applications (RFA) No. TI-15-002, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. 1, 33, https://www.samhsa.gov/sites/default/files/grants/pdf/ti-15-002-modified-due.pdf (last visited Jan. 4, 2024).
182 W. VA. DIV. CORR. & REHAB., supra note 55, at 36. This number is calculated by adding together the number of individuals convicted of violent crimes: homicide, forcible sex crimes, robbery, and assault.
183 Id. This number is calculated by adding together the sex offenses that are nonviolent, but still require registration with the sex offense registry. Other offenses can be found in W. VA. CODE ANN. § 15-12-2 (West 2023).
population in West Virginia is unable to participate in drug court programs, both at the time of their sentencing and in the future.184 While there is no available data on the percentage of incarcerated people in West Virginia prisons who are serving a subsequent felony sentence after having a prior violent felony conviction, these individuals are also ineligible for drug court services.

Both recidivism and the opportunity to reoffend is a concern in West Virginia for individuals that are barred from participating in drug courts because of violent felony convictions. People convicted of violent felonies in West Virginia have a recidivism rate of 87.18%,185 a figure that is significantly higher than the national recidivism rate for individuals convicted of violent offenses, which sits at 56.3%.186 While the West Virginia Department of Homeland Security touts West Virginia’s low overall recidivism rate of 26.8% from a 2011 report, as compared to the 2011 national recidivism rate of 43.3%, clearly the same cannot be said for the recidivism rate of individuals convicted of violent offenses in West Virginia.187 With individuals convicted of violent offenses largely spending less than three years in state prison188 and less than six years in federal prison,189 the opportunity for individuals restricted from drug court participation to reoffend is concerning. While the punitive solution to this issue would be to increase sentence length, longer sentences do not address the reasons that lead to crime and incarceration in the first place and is thus not a viable option to reduce recidivism.

184 W. VA. DIV. CORR. & REHAB., supra note 55, at 36. This number is calculated by adding together the number of incarcerated individuals with violent offenses and the number of incarcerated individuals with nonviolent sexual offenses that must still register with the sex offense database in West Virginia.

185 2016 West Virginia Recidivism Report, JUST. & CMTY. SERVS. 1, 2 (Sept. 2020), https://dcr.wv.gov/resources/Documents/publications/DOC_recidivism_2016.pdf. This number was calculated by adding together the recidivism rates of the following violent crimes: homicide, forcible sex crimes, robbery, and assault.

186 Durose & Antenangeli, supra note 4.


188 Fifty-seven percent of individuals convicted of violent offenses are released from state prisons in less than three years. Danielle Kaeble, Time Served in State Prison, 2018 1, BUREAU JUST. STAT. 1, 1 (Mar. 2021), https://bjs.ojp.gov/content/pub/pdf/tssp18.pdf. Further, around two-thirds of people incarcerated in state prisons for violent crimes serve less than two years. Id. Contrary to popular belief, only about 4% of individuals convicted of violent offenses served more than two decades in state prison. Id.

The reason for the exclusion of individuals with prior convictions is not necessarily based on the belief that they would not succeed in a drug court but is rather an issue of funding. State and federal drug courts that receive federal funding are barred by statute from including participants with a history of violent offenses. Unfortunately, due to the limited resources available for drug courts, both because of funding restrictions and just a general lack of funds available, a fraction of the people that could benefit from drug courts actually have access to them. Nationwide, drug court programs reach only about half of eligible participants, and only 5% of all individuals convicted of crimes with substance use concerns.

All this data points to a few simple conclusions: people who have committed violent offenses are excluded from West Virginia drug courts; these individuals are at a higher risk for recidivism; many likely struggle with substance use; and many are released within a few years of incarceration. West Virginia’s current drug court model that excludes these individuals is insufficient should West Virginia want to continue to reduce recidivism and assist people in reentry to the community. Drug courts in West Virginia make an incredible and meaningful difference in participants’ lives, as discussed in depth in Part IV.A. However, the positive impact that drug courts can have in the state must be extended to individuals who have committed violent offenses if there is to be a meaningful impact on recidivism rates, prison overcrowding and population, and overall societal wellness and function.

2. Potential Drug Court Solutions for Individuals with Prior Violent Offenses

To further extend the positive impact of alternative justice solutions, West Virginia must consider how to adapt the current drug court model to one that better serves high-risk individuals in the state, like people who have committed violent offenses, while continuing to serve people who may be at high risk for substance use relapse but may have a lower risk for reoffending or for

---


191 Yingling, supra note 166; Steven Belenko, Matthew Hiller & Leah Hamilton, Treating Substance Use Disorders in the Criminal Justice System, 15 CURRENT PSYCHIATRY REPS. 1, 3 (2014).

192 NAT’L INST. ON DRUG ABUSE, supra note 71. Nearly two-thirds of the prison population in the United States struggles with substance use. Id.

193 W. VA. DIV. CORR. & REHAB., supra note 55, at 30; King, supra note 55.
committing violent offenses. One way to accomplish this goal is to analyze and apply existing models of drug courts where this has worked before. The Honolulu Drug Court, presided over by Judge Alm, and its concept of HOPE Probation was presented as a way to incorporate individuals with high-level offenses and a high-risk of recidivism into a successful drug court program. In Judge Alm’s drug court, he focuses on individuals with high-level offenses, including individuals convicted of violent felonies and with a history of violent crime, and places individuals with lower-level offenses into a separate drug court. Additionally, he implements HOPE Probation for certain individuals with high-level offenses, which briefly incarcerates individuals for violating the terms of their drug court probation, usually only a few days. While this may seem harsh and counter-intuitive to one of the goals of drug courts—to reduce incarceration—this method has proved effective both at reducing recidivism and reducing long-term costs of incarceration.

Ideally, Judge Alm’s approach to drug court would be coupled with services offered by the Hartford Community Court, such as social services, job training opportunities, and even specialized programs for certain groups of participants. To truly address and remedy the causes of participants’ criminality, it is essential to provide opportunities to address trauma, mental health struggles, substance use disorder, and financial insecurity. Further, drug courts in West Virginia should remain open to the idea that long-term care for substance use may be necessary for certain participants. As demonstrated by the

---

194 As a preliminary note before considering potential solutions, it is important to reiterate that for individuals to be considered for participation in drug courts, the offense committed must be a result of habitual substance use. W. VA. CODE ANN. § 62-15-6 (West 2023). Participation in drug court stems from the belief that individuals convicted of qualifying offenses would not interact with the criminal justice system if not for their addictions. Baker, supra note 167. For this reason, the proposed solutions in this Note will not address individuals who are presently charged with committing a violent sexual offense because inclusion of these individuals is a complex and nuanced topic that is instead better and comprehensively addressed by other literature. See Alexa Sardina & Alissa R. Ackerman, Restorative Justice in Cases of Sexual Harm, 25 CUNY L. REV. 1 (2022); Donna Coker, Restorative Approaches to Intimate Partner Violence and Sexual Harm, 36 OHIO ST. J. ON DISP. RESOL. 591 (2021); Sarah Deer & Abigail Barefoot, The Limits of the State: Feminist Perspectives on Carceral Logic, Restorative Justice and Sexual Violence, 28 KAN. J. L. & PUB. POL’Y 505 (2019); Mary P. Koss, The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes, 29 J. INTERPERSONAL VIOLENCE 1623 (2014); Clare McGlynn, Nicole Westmarland & Nikki Godden, ‘I Just Wanted Him to Hear Me’: Sexual Violence and the Possibilities of Restorative Justice, 39 J. L. & SOC’Y 213 (2012); Annie Cossins, Restorative Justice and Child Sex Offences: The Theory and the Practice, 48 BRIT. J. CRIMINOLOGY 359 (2008); C. Quince Hopkins & Mary P. Koss, Incorporating Feminist Theory and Insights Into a Restorative Justice Response to Sex Offenses, 11 VIOLENCE AGAINST WOMEN 693 (2005).
195 See supra Part III.A.
196 Alm, supra note 118, at 1690–91.
197 Id. at 1694.
198 Id.
199 Johnstone, supra note 140, at 134, 136–37.
Philadelphia Community Court, remaining flexible regarding participants’ needs is key.\textsuperscript{200} Additionally, remaining flexible with the length of care provided may result in reduced recidivism.\textsuperscript{201} Currently in West Virginia, drug courts are offering some of these services now to current drug court participants.\textsuperscript{202}

Expanding the availability of drug courts to individuals who currently do not meet eligibility requirements in West Virginia because of violent crime convictions will have an even greater impact on recidivism and the well-being of West Virginia communities, as evidenced by the success of drug and community courts where these methods have been implemented previously. It is also important to emphasize that drug court programs can incorporate individuals with violent felony convictions at their own pace, both for the benefit of participants and communities. Starting with individuals who, for example, committed a violent offense ten years ago and have again made contact with the criminal justice system as a result of their habitual substance use would be an effective first step towards reducing eligibility restrictions. Should a drug court program choose to do this, the drug court can then incorporate other higher-risk individuals at its own pace, allowing the community, participants, and drug court professionals time to adjust to the change. Additionally, continued evaluation of the program will be key so that drug court professionals can respond accordingly to both participant and community needs.

3. Continuing Drug Court Services for Individuals with Nonviolent Offenses

Expanding the availability of drug courts to more people does not mean there should be a reduction in availability for those who currently benefit from drug courts. However, programs that currently benefit drug court participants cannot simply be combined with programs that will benefit individuals with high-level offenses. Two key elements of Judge Alm’s drug court are that individuals with high-level offenses and individuals with low-level offenses are not placed in the same drug court programs and that the individuals are not overtreated.\textsuperscript{203} A potential challenge that might emerge when adopting Judge Alm’s approach to drug courts in the state is the potential reduction in judges’ availability to oversee lower-risk drug court programs. However, implementing Judge Alm’s approach to drug courts does not mean the solution then is to reduce services for individuals with low-level offenses. This would be counterproductive and harmful to both drug court participants and communities, and thus, this Note is certainly not suggesting that drug court services for individuals convicted of low-level offenses should be reduced.

\textsuperscript{200} Babcock, supra note 134, at 41.
\textsuperscript{201} Id.
\textsuperscript{202} Baker, supra note 167.
\textsuperscript{203} Alm, supra note 118, at 1690–91.
Instead, to remedy the gap in judges’ availability that may be created if more resources and time were to be devoted to high-risk individuals, other models of drug courts could be adapted to fill this role. For example, the Woodbury County Community Drug Court (WCCDC) serves individuals convicted of a nonviolent offense that is related to their struggle with substance use. However, WCCDC takes a different approach than traditional drug courts. Instead of operating through judicial system actors, lay community members volunteer to be trained to oversee the drug court on a panel with other community members. The hands-on community involvement is reminiscent of restorative justice, which also involves the community, and is aimed at increasing accountability between participants and the community. The WCCDC model could be implemented in West Virginia for individuals with low-level offenses to continue to provide services that typical drug courts do, while still achieving success in terms of treatment, reducing recidivism, and reducing the social and monetary costs of incarceration. Additionally, if individuals with low-level offenses are not succeeding in a community-based drug court, those individuals could have the option to move to the drug courts presided over by legal judges, where they could be monitored closely as needed.

4. Implementing the Proposed Changes to West Virginia’s Drug Court System

Implementing these proposed solutions in West Virginia communities is certainly harder in practice than it is to advocate for the implementation of these solutions on paper. Changing the structure of drug courts in West Virginia will require more than just believing that this Note’s proposed solutions will improve the options available to prospective drug court participants and communities. Community members would need to be willing to serve as volunteers, judges would need to be willing to preside over drug courts that are designed for individuals convicted of high-level offenses, and West Virginia legislators would also need to be willing to revise the current statutes that govern drug courts in the state. Changing the structure of drug courts will require additional funding to do so, as certain federal funding avenues will become unavailable if eligibility requirements are expanded. These are not easy tasks to accomplish.

As mentioned above, one challenge of implementing this solution is the need for volunteers to get involved with community-based drug courts for individuals with low-level offenses. The formal volunteering rate in West Virginia is

---

204 Vick & Keating, supra note 107, 295–96.
205 Id. at 296.
206 Id.
207 Id. at 319.
Virginia hovers around the national average, and the rate of informal helping in the state places West Virginia in the top ten states in the country. This data indicates that community members are willing to help both in formal and informal volunteer settings, making West Virginia an ideal place to implement a community-based drug court. Moreover, West Virginia also presents an ideal opportunity for the establishment of a community-based drug court because its residents possess a strong regional identity that has been shaped by decades of extractive industries, activism, resilience, and their geographical ties to the state and its topography. Though community competence, defined as the shared ability of individuals in a community to learn about and identify problems in their community and cooperatively address these problems, has not been heavily studied in West Virginia (or Appalachia generally), the state has the potential for a high level of community competence and awareness due to the region’s strong sense of identity.

While this proposed solution will face obstacles if implemented, this is a necessary step in combatting the array of issues West Virginia currently faces regarding incarceration, substance use disorder, and the overall well-being of the state. Since 1998, the number of people convicted of drug offenses admitted each year to West Virginia prisons has tripled. This increase in drug offense admission has contributed to West Virginia’s swelling prison population, which has roughly doubled since 2005. Equally worrisome is the fact that West Virginia leads the nation in drug overdoses. Locking up people that are struggling with substance use and committing crimes as a result of this substance use is not going to help West Virginia in the long run. The state recognizes this too, as evidenced by its implementation of drug court programs for individuals with nonviolent offenses throughout the state. The next step is to expand the impact drug court programs can have to a larger group, which means allowing individuals who have committed high-level offenses to participate in these programs.

---


209 Id. Informal helping includes individuals who help their neighbors through a variety of activities; see also West Virginia, AMERICORPS, https://americorps.gov/about/our-impact/volunteering-civic-life/wv (last visited Jan. 4, 2024).


212 Orsini & Spence, supra note 52, at 2.

213 Id. at 3.

214 Drug Overdose Mortality by State, supra note 160.
More importantly, as a result of reducing the prison population and recidivism through implementing this proposed solution, the social implications of mass incarceration discussed earlier will also be limited. In a state like West Virginia that already has skyrocketing overdose rates, high rates of poverty, a population with substantial health problems, and an already-struggling labor market, it is imperative to take additional and necessary steps to prevent and reduce incarceration. Implementing the solutions proposed here is an initial and necessary step towards that purpose and policymakers and practitioners should consider doing so.

C. Diverting Certain Offenses to an Alternative, Non-Drug Related Court

Similar to many drug courts, most alternative justice courts have one thing in common—they bar those with non-drug connected offenses or certain felonies from participating in alternative justice courts. This limitation, amongst others, is a justified criticism of alternative justice courts. The remainder of this section addresses these limitations of alternative justice courts by identifying offenses that are not currently served by alternative justice courts in West Virginia but would better serve individuals in contact with the justice system, society, recidivism rates, and the criminal justice system if these individuals were instead diverted away from traditional incarceration. The proposed alternative courts will be specific to West Virginia and based on data from West Virginia. However, other states should consider how these solutions may serve their communities and consider taking similar measures to create alternative courts elsewhere. This section proposes the adoption of alternate community courts in

---

215 Id.
216 See West Virginia; United States, supra note 37. West Virginia outpaces the national poverty rate by 5%.
218 See West Virginia Economic Outlook 2022-2026, supra note 36; see also LEE, supra note 36.
219 Christine Mehta, How Drug Courts Are Falling Short, OPEN SOCI’Y FOUND., (June 7, 2017), https://www.opensocietyfoundations.org/voices/how-drug-courts-are-falling-short (criticizing drug courts for denying participants from receiving MAT in substance use recovery, such as taking methadone); Moving Away from Drug Courts: Toward a Health-Centered Approach to Drug Use, DRUG POL’Y ALL. (May 2014), https://idpc.net/publications/2014/07/moving-away-from-drug-courts-toward-a-health-centered-approach-to-drug-use (last visited Jan. 4, 2024) (providing multiple examples of how drug courts fall short, such as restricting access to certain treatments, serving as an adjunct to the criminal justice system instead of an alternative system, and performing similarly to probation in terms of recidivism); Sarah Martinson, Alternative Courts Not A Catch-All Fix For Mental Illness Crisis, LAW360 (Mar. 7, 2021, 8:02 PM), https://www.law360.com/articles/1356267/alternative-courts-not-a-catch-all-fix-for-mental-illness-crisis (arguing that certain individuals experiencing mental health crises should not be arrested and filtered through the criminal justice system, but should instead go to mental health treatment in the first place).
West Virginia to address property crimes as well as various misdemeanors and quality-of-life crimes.

1. Addressing Property Crimes in Alternative Community Courts in West Virginia

Notably, one-fifth of the prison population in West Virginia has committed a property offense, making property crimes one of the highest categories of crime represented in the prison population.\(^{220}\) According to the 2019 FBI Crime Report, 83% of crimes committed in West Virginia are property crimes.\(^{221}\) In West Virginia, property crimes have the highest recidivism rate\(^{222}\) at a 29.84% likelihood of re-offense in the three years following release.\(^{223}\) Excluding embezzlement, this recidivism rate jumps to a 32.67% likelihood of re-offense.\(^{224}\) Fortunately, this is less than half the national recidivism rate for property offenses, which is a 69.7% likelihood of re-offense in the three years following release.\(^{225}\) However, property crimes in West Virginia have slightly a higher recidivism rate than the average recidivism rate for all crimes in West Virginia, which is 29.25% for the same time frame.\(^{226}\)

While the property crime recidivism rate in West Virginia is lower than the national average for property offenses and close to the state average for all offenses, the prospect that one-fifth of the prison population in the state has about a 30% chance of returning to prison after release is concerning. What is particularly worrisome is the fact that property sentences tend to carry lower sentences than other crimes, leading to more opportunities for recidivism.

\(^{220}\) W. Va. Div. Corr. & Rehab., supra note 55, at 36. This number is calculated by adding together the number of individuals convicted of property crimes, which is a total of 1,163 individuals. The total number of incarcerated adults in West Virginia is 5,842. Id. See infra note 223 for what this Note defines as property crimes.


\(^{222}\) This figure excludes non-forcible sex offenses, which have a recidivism rate of 43.24%. As mentioned previously, diverting people convicted of sexual offenses to alternative courts is a complicated and nuanced discussion that exceeds the scope of this Note. See supra note 194 for sources that comprehensively address this issue.

\(^{223}\) 2016 West Virginia Recidivism Report, supra note 185. This number was calculated by averaging the recidivism rates of the following property crimes: destruction of property (44.44%), burglary (42.29%), larceny (34.44%), counterfeiting (28.87%), stolen property (27.78%), arson (26.92%), fraud (23.96%), and embezzlement (10%). Id. These crimes are classified as property crimes both due to their classification in the West Virginia Code, as well as for comparison reasons to the national rate. See Durose & Antenangeli, supra note 4. Though the recidivism rate for embezzlement is comparatively low to the other property offenses, it is included to have consistent data to compare to national statistics.

\(^{224}\) 2016 West Virginia Recidivism Report, supra note 185.

\(^{225}\) Durose & Antenangeli, supra note 4.

\(^{226}\) 2016 West Virginia Recidivism Report, supra note 185.
According to data from the Bureau of Justice Statistics, the average time served in state prisons for property offenses is 21 months.\textsuperscript{227} This is nearly three times shorter than sentences served in state prisons by people convicted of violent offenses.\textsuperscript{228} Further, this means that nearly three times as many individuals convicted of property offenses will be released before those convicted of violent offenses. The reality of this situation is that though individuals convicted of property crimes have a lower recidivism rate in West Virginia than individuals convicted of violent crimes,\textsuperscript{229} there is a much higher likelihood they will be released sooner and will have more frequent opportunities to recidivate.

The solution is not to increase property crime sentences, as that does not address the causes of incarceration nor the collateral consequences that stem from it. Instead, these individuals should ideally have access to an alternative justice court that can aid in diverting them from incarceration, with the goal of reducing recidivism, reducing the prison population, and preventing these individuals from experiencing the social and societal implications associated with incarceration.\textsuperscript{230}

The community courts discussed in Part III.B. primarily address quality-of-life crimes and low-level misdemeanors, rather than property crimes, however, these courts are still instructive examples in responding to other types of crime. Implementing a community court system that addresses why individuals commit these crimes, as the example courts do for quality-of-life crimes, is an ideal approach to dealing with property crime. Unfortunately, there is no singular clear answer as to why property crimes are committed. One prevailing and long-held theory is that the wealth generated from property crimes outweighs the benefit-to-cost ratio of committing that crime.\textsuperscript{231} Thus, individuals experiencing poverty are more likely to commit property crimes.\textsuperscript{232} Poverty is not the sole driver of crime, however. Adverse childhood experiences, high-crime environments, and substance use also contribute to increased criminality.\textsuperscript{233}

\begin{itemize}
  \item \textsuperscript{227} Kaeble, supra note 188, at 2.
  \item \textsuperscript{228} Id.
  \item \textsuperscript{229} See Part IV.B for more information on the recidivism rate of individuals convicted of violent offenses in West Virginia.
  \item \textsuperscript{230} See Part II.B for a more comprehensive discussion of the social and societal implications of mass incarceration.
  \item \textsuperscript{231} See Haiyun Zhao, Zhilan Feng & Carlos Castillo-Chavez, The Dynamics of Poverty and Crime, 43 J. SHANGHAI NORMAL UNIV. 486 (2014).
  \item \textsuperscript{232} Id.
\end{itemize}
In West Virginia, there is both a high poverty rate and a surging substance use and overdose rate, making the state ripe for high property crime rates. Adopting the practices of community courts similar to the ones discussed in Part III.B. that provide social services, job training, community service opportunities to substitute for incarceration, and long-term treatment for substance use and mental health needs will help address the issues that cause property crime. Additionally, these courts should implement similar practices currently used in West Virginia drug courts that address the socio-economic needs of participants, such as reliable transportation, stable housing, employment, and obtaining proper identification or a driver’s license.

2. Addressing Misdemeanors and Quality-of-Life Crimes in West Virginia

Though quality-of-life crimes and low-level misdemeanors were not identified at the outset of this section as a group of crimes that have a high rate of recidivism, that omission results from an absence of clear data on quality-of-life crimes in West Virginia. These crimes are popular targets for alternative and community courts because the prosecution of these crimes typically impacts minorities and individuals experiencing poverty. Additionally, these crimes would ideally be dealt with in alternative courts instead to avoid imposing a criminal record on an individual convicted of a minor, quality-of-life offense that then results in the collateral consequences that come with a criminal conviction.

The alternative and community courts discussed above in Part III.B. comprised two categories: courts in central business districts and courts in small cities or neighborhoods. West Virginia is a state with a unique population that does not fit neatly within either of these categories. The entire population of the state of West Virginia is slightly higher than Philadelphia, where the Philadelphia Community Court operated. However, the entire state of West Virginia is not a central business district. Additionally, only two cities in West Virginia have a higher population than the population the Red Hook Community Justice Center

234 See West Virginia; United States, supra note 37.
235 Drug Overdose Mortality by State, supra note 160.
236 Baker, supra note 167.
238 These collateral consequences are discussed in depth in Part II.B.
serves. However, the West Virginia population would not best be served by only adopting models meant for small cities like the Red Hook area because the state still has business districts—these districts just happen to be much smaller than those in other states.

Despite West Virginia’s small and unique population, the models adopted by the community courts in central business districts discussed above can still be applied in West Virginia’s larger cities, while reserving the small city court models for some of West Virginia’s smaller communities. The six most populous cities in West Virginia are Charleston, Huntington, Parkersburg, Morgantown, Wheeling, and Weirton. The true residency in these cities may even be higher. For example, the Morgantown population estimate largely does not include the student population of West Virginia University, nor the smaller communities near Morgantown such as Westover and Star City. Ideally, a similar approach taken by the Midtown Manhattan Court and the Philadelphia Community Court would be adopted in these cities and other large cities in West Virginia. Flexibility would be key in these community courts, and ideally, a wide array of social services would be available to participants, including long-term substance use or mental health treatment if necessary. The goal of these community courts in larger West Virginia cities should be to reduce crime in general by diverting low-level misdemeanor offenses in these large cities to improve community safety.

Approaches similar to the Red Hook Community Justice Center and the Hartford Community Court could be adopted in smaller West Virginia towns that also have a goal of reducing quality-of-life crimes and the impact of incarceration on their communities. Some ideal candidates could be towns with small populations but high crime rates, such as Nitro, St. Albans, Ranson, Moundsville, Charles Town, New Martinsville, and Oak Hill. Each of these towns ranks below the top ten most populated cities in West Virginia, but within the top ten cities with the highest crime rates in the state. Ideally, the response to these crimes in small towns would include providing participants with social services and job training, and sentences would include community service and restorative justice circles between participants and community members. After sentencing is complete, participants should be eligible for expungement of the offense or charges should be dropped as a condition of the sentence. This approach both repairs the community and avoids the collateral consequences that come with a criminal record.

240 These cities are Charleston and Huntington, which have populations of just under 50,000 people. See Charleston City, West Virginia; Huntington City, West Virginia, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/charlestoncitywestvirginia,huntingtoncitywestvirginia/PST045222 (last visited Jan. 4, 2024).


242 Compare id., with Peters, supra note 221.
D. Incorporating Restorative Justice Principles

At the outset of this Note and Part III, the principles and practices of restorative justice programs were presented as guidance for alternative justice methods. While traditional restorative justice programs follow a distinct set of guidelines, the principles these programs follow can still be instructive in other alternative justice programs, whether or not these alternative justice programs strictly follow the traditional practices of restorative justice programs. Fundamentally, restorative justice focuses on repairing harm rather than how to punish someone for the harm caused. To reiterate, restorative justice programs consider harm as a violation of relationships, include victims and the community as a central feature in the justice process, focus on assisting and addressing victims’ needs, work to restore the community, and believe that all humans have dignity and worth.

Even where existing alternative methods of justice fail to closely adhere to a traditional model of restorative justice, it is still critical to consider and implement restorative justice principles when possible to serve the interests of individuals in contact with the justice system, victims, and communities. This approach will assist communities in achieving justice while reducing mass incarceration, recidivism, and mitigating the collateral consequences associated with incarceration. Thus, if West Virginia communities and court systems plan to adopt any of the changes suggested by this Note—or even if not—the principles of restorative justice should always be considered when justice system authorities are purporting to do justice. After all, the criminal justice system should ideally serve the interests of everyone affected by crime, which includes victims, individuals in contact with the justice system, and communities alike.

Additionally, as a final note, while diversion programs and restorative justice programs do provide an important and successful alternative to incarceration, this Note would be remiss not to acknowledge the fact that diversion programs still result in racial disparities in practice. A report by the Prison Policy Initiative indicates that racial disparities persist in these programs due to cost of participation, eligibility limitations, and discretionary decisions that allow for bias. This is particularly concerning considering that racial

---

243 These practices include family group conferences, victim panels, mediation between the parties to the harm, and circles that involve varying combinations of the individual who caused the harm, the victim, community members, and justice system authority figures. Restorative Justice Literature Review, supra note 12.

244 See SERED, supra note 11, at 135; About Restorative Justice, supra note 13.

245 About Restorative Justice, supra note 13.


247 Id.
minorities are already disproportionately impacted by mass incarceration. To address these concerns, an ideal alternative court should eliminate financial inaccessibility by seeking outside funding or providing fee waivers to eligible participants, expanding eligibility criteria for participation, and eliminating opportunities for bias when possible. Taking these steps is crucial to creating an alternative court that will be available to everyone regardless of race, have a meaningful impact on mass incarceration, and effectively combat the issues that stem from incarceration.

V. CONCLUSION

The incarceration rate in the United States topples the incarceration rate of any other country in the world, and West Virginia has an even higher incarceration rate. West Virginia’s startling incarceration rate can largely be attributed to the increased criminalization and prosecution of individuals convicted of drug offenses. More importantly, incarceration drives recidivism. The collateral consequences that stem from incarceration, such as disenfranchisement, poverty, unemployment, housing insecurity, and the exacerbation of existing mental health concerns and addiction all increase the likelihood of recidivism. Mass incarceration also harms families, children, and communities in addition to the incarcerated person. In a state like West Virginia, where the rates of poverty, substantial health problems, and struggling communities are already higher than other states, it is critical to reduce the recidivism rate as well as the collateral effects of incarceration.

This Note reviewed alternative justice methods, also called diversion programs, as a potential option to reduce incarceration, recidivism, and the collateral costs of incarceration. Notable drug courts and community courts around the United States serve as instructive models that can be implemented in other jurisdictions, such as West Virginia. Currently, West Virginia operates drug courts in many of its counties. These drug courts are doing incredible and transformative work in communities and for individuals struggling with addiction. However, West Virginia drug courts largely exclude high-risk individuals, such as those with prior violent offenses. This Note proposes a solution by advocating for drug courts to consider the practices of courts in other jurisdictions to adequately incorporate these individuals into West Virginia’s drug court system. This Note also advocates for implementing a community court model similar to the example courts that would address the needs of individuals who commit property and quality-of-life crimes.

The solutions proposed by this Note are easier to advocate for on paper than they are to actually implement. However, it is imperative for the criminal justice system and overly punitive incarceration system in West Virginia to change. Implementing these proposed solutions is necessary to address the

248 Nellis, supra note 73.
249 Wang, supra note 246.
problems West Virginia faces regarding incarceration, substance use, and the well-being of communities and the state as a whole. To echo the wisdom of restorative justice principles—all human beings have dignity and worth. In West Virginia, it is time to follow this principle and invest in the well-being and success of the residents in this state.

Emily G. Ogden*