

ALTERNATIVE COURTS AND INTENSIVE SUPERVISION WORK

By: *Stephen R. Bough*¹

“The incarceration level that we’re seeing – we can’t keep doing that. Locking them up is not the answer.” – Missouri Governor Mike Parson (R)²

INTRODUCTION

Re-entering society after incarceration is a tough process and, by most accounts, a horrible failure for too many people. While incarcerated, all aspects of these citizens’ lives are controlled. When we require inmates to walk in single-file lines, limit their mealtimes, and restrict their movements, they are forced to develop new cultural norms just to get through the day. When they are released, we give them little to no resources and often direct them to a halfway house or tell them to get a job. On top of that, society is nothing like the world they left five, ten, or twenty years ago. Facing a challenges like these, it is no wonder most fail to adjust to life on the outside.

America locks up more people per capita than any other nation and yet has one of the highest recidivism rates in the world at 76.6%.³ In the federal system, 49% of offenders are rearrested. This number did not change between 2005 and 2010, despite the Supreme Court’s landmark decision in *Booker*⁴ that gave judges greater latitude in sentencing decisions and “increased [the] use of

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² Celisa Calacal, *Missouri Governor Parson Signs Drug Treatment Court Bill Into Law*, KCUR 89.3, (Oct. 24, 2018), <https://www.kcur.org/government/2018-10-24/missouri-governor-parson-signs-drug-treatment-court-bill-into-law/> [https://perma.cc/KG8L-UXA6].

³ Liz Benecchi, *Recidivism Imprisons American Progress*, HARV. POL. REV. (Aug. 8, 2021), <https://harvardpolitics.com/recidivism-american-progress/>. [https://perma.cc/LZ7Q-CJEW].

⁴ *United States v. Booker*, 543 U.S. 220 (2005) (holding that the United States Sentencing Guidelines are advisory, not mandatory).

evidence-based practices in federal supervision.”⁵ There are currently almost two million people in prisons or jails.⁶ Incarcerating this many people comes with an extraordinary price tag – the average cost of federal incarceration in 2020 was \$39,158 per inmate per year.⁷ Incarceration is both expensive and inhumane for many non-violent offenders.

Incarceration is not the only option.⁸ We know that Reentry programs and intensive supervision programs like drug courts are effective alternatives that reduce recidivism. For example, the United States Western District of Missouri’s Reentry Court has an 85.7% success rate for graduates, meaning they complete their term of supervised release without any new charges.⁹ A reduction of recidivism means hefty savings of tax-payer dollars. More importantly, successful Reentry means people engage in their communities, raise families, work productive jobs, and pay taxes.

Ideally, the criminal justice system would start thinking about successful re-entry starting with an individual’s very first interaction with the police. However, too many employees in the criminal justice system don’t have either the time or desire to think about how we, as a society, can effectively use our resources to prevent individuals from having any contact with the criminal justice system at all. In a system that has a high recidivism rate, everyone from police officers to judges to probation officers to the Bureau of Prisons¹⁰ (hereinafter “BOP”) needs to be thinking about how we can reduce recidivism.

This article will explore what is currently being done to aid re-entry and reduce recidivism in both state and federal courts, as well as what can be done to improve these programs. Section I addresses the First Step Act and current Reentry functions undertaken by the BOP. Section II analyzes alternative court programs, both in state and federal courts. Section III highlights judges who got off the bench and into the game, resulting in fantastic results for society.

⁵ Ryan Cotter, Courtney Semisch, & David Rutter, *Recidivism of Federal Offenders Released in 2010*, U.S. SENTENCING COMM’N (Sept. 2021),

https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210930_Recidivism.pdf. [<https://perma.cc/W4UD-KNSV>].

⁶ Ashley Nellis, *Mass Incarceration Trends*, THE SENTENCING PROJECT (Jan. 25, 2023), <https://www.sentencingproject.org/reports/mass-incarceration-trends/?emci=f77c2d5b-0a9c-ed11-994c-00224832eb73&emdi=4c3d69bf-bc9c-ed11-994c-00224832eb73&ceid=10192031/>. [<https://perma.cc/N6PX-FWLY>].

⁷ Annual Determination of Average Cost of Incarceration Fee (COIF), 86 Fed. Reg. 49060 (Aug. 31, 2021).

⁸ Incarceration is the only option when dealing with a mandatory minimum sentence as defined by Congress.

⁹ *Re-entry Court*, U.S. CTS. FOR THE W. DIST. OF MO., <https://www.mow.uscourts.gov/reentry-court> (last visited Jan. 31, 2023). [<https://perma.cc/X64X-2SDL>]. Our comparators are individuals who were invited to participate in Reentry court but turned us down. We are enormously proud of our graduates.

¹⁰ U.S. Dep’t of Just., *First Step Act Annual Report* (Apr. 2022), <https://www.bop.gov/inmates/fsa/docs/First-Step-Act-Annual-Report-April-2022.pdf> [<https://perma.cc/7G7B-3SKV>] (“The BOP’s philosophy and strategy for inmate Reentry into the community is based on the premise that Reentry preparation begins on the first day of an inmate’s incarceration.”).

I. WHAT DOES THE BOP DO TO PREPARE CITIZENS TO COME HOME?

The BOP has a tough job – running a prison is difficult and dangerous work. The BOP is responsible for not just maintaining prisons, but also preparing inmates for release.¹¹ Kori Thiessen, Reentry Affairs Coordinator for the BOP, says:

People come to success in the BOP and reentry in a variety of ways. Some just get tired of it and they miss their spouse, kids, and freedom. Some people really have the “AH HA” moment. Other people come to recognize that it was their choices that got them put behind the wall. The saddest ones are those that never had a chance, those that were raised in an environment of crime, and this last group just needs a safe environment to explore alternatives. There’s clearly a mindset change for people who are successful, but they all come from very different places.¹²

This section will cover (A) the First Step Act; (B) Reentry programs provided by the BOP; and (C) residential Reentry centers.

A. *The First Step Act*

The BOP is normally the first institution in the criminal justice system to address Reentry. The BOP is statutorily required to establish prerelease planning procedures (i.e., getting an ID, social security card, etc.) and Reentry planning procedures (i.e., providing inmates with information to ease the Reentry process).¹³

In 2018, President Donald Trump signed the First Step Act, which directed the BOP to expand “any evidence-based recidivism reduction programs” and allowed the BOP to offer “incentives and rewards” for completing the programs.¹⁴ The First Step Act required the Attorney General to develop policies allowing for partnerships with private entities to provide cultural, religious, and vocational support and training.¹⁵ Most importantly, the First Step Act mandated the BOP to “provide *all* prisoners with the opportunity to actively participate in evidence-based recidivism reduction programs and productive

¹¹ 18 U.S.C. § 4042(a)(6)–(7).

¹² E-mail from Kori Thiessen, Reentry Affairs Coordinator, to the Honorable Judge Stephen Bough, U.S. Dist. Ct. for the W. Dist. of Mo. (Feb. 1, 2023) (on file with author).

¹³ 18 U.S.C. § 4042(a)(6)–(7).

¹⁴ 18 U.S.C. § 3621(h)(1)(B), (h)(4).

¹⁵ 18 U.S.C. § 3621(h)(5).

activities[.]”¹⁶ Due to the First Step Act, the BOP has developed or strengthened a series of programs that can only help formerly incarcerated people succeed.¹⁷

B. Reentry Programs Provided by the BOP

The BOP provides a breadth of Reentry programs, including 500-hour apprenticeship training, literacy programs, certification course training, a host of cognitive behavioral training programs, and post-secondary educational opportunities.¹⁸ Vocational work programs include Occupational Education Programs (hereinafter “OEP”) and Federal Prison Industries, also known as UNICOR.¹⁹ OEP are offered to all eligible inmates “for the purpose of obtaining marketable skills designed to enhance post-release employment opportunities.”²⁰ OEPs consist of teaching specific job skills, and certification from a state or association.²¹ Examples of vocations include air conditioning, automotive mechanic, cook, cosmetology (barber), insurance billing, culinary arts, and carpentry.²² The United States Sentencing Commission found that inmates who volunteered and completed an OEP were about 6% less likely to recidivate.²³

OEPs may also link with UNICOR, which is “a vital correctional program that assists offenders in learning the skills necessary to successfully transition from convicted criminals to law-abiding, contributing members of society.”²⁴ The mission of UNICOR is to “protect society and reduce crime by preparing inmates to successful reentry through job training.”²⁵ The BOP reports that inmates who participated in UNICOR are 24% less likely to recidivate, and 14% more likely to maintain employment after release.²⁶ Approximately 25,000 inmates are on a waiting list to participate, and priority is given to individuals

¹⁶ 18 U.S.C. § 3621(h)(6) (emphasis added).

¹⁷ U.S. Dep’t of Just., *First Step Act Approved Programs Guide* (Aug. 2022), https://www.bop.gov/inmates/fsa/docs/fsa_guide_0822.pdf. [<https://perma.cc/TY5T-QV63>].

¹⁸ *Id.* at 17.

¹⁹ Kristin M. Tennyson, Ross Thomas, Alyssa Purdy, Tessa Guiton, *Recidivism and Federal Bureau of Prisons Programs, Vocational Program Participants Released in 2010*, U.S. SENTENCING COMM’N (June 2022), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220614_Recidivism-BOP-Work.pdf. [<https://perma.cc/EL5R-6X4K>].

²⁰ Fed. Bureau of Prisons, *Program Statement*, U.S. DEP’T OF JUST. (Dec. 17, 2003), https://www.bop.gov/policy/progstat/5353_001.pdf. [<https://perma.cc/JM2P-XC4Y>]

²¹ *Id.*

²² Fed. Bureau of Prisons, *Inmate Occupational Training Directory* (Mar. 31, 2017), https://www.bop.gov/inmates/custody_and_care/docs/inmate_occupational_training_directory.pdf. [<https://perma.cc/NH9Q-NUUL>].

²³ Tennyson, *et al.*, *supra* note 19, at 5.

²⁴ UNICOR, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/custody_and_care/unicor.jsp. [<https://perma.cc/HNB9-8VQH>].

²⁵ UNICOR *Program Details*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/custody_and_care/unicor_about.jsp [<https://perma.cc/W7RX-D9X5>].

²⁶ Fed. Bureau of Prisons, *FPI and Vocational Training Works: Post-Release Employment Project (PREP)*, https://www.bop.gov/resources/pdfs/rep_summary_05012012.pdf. [<https://perma.cc/95V5-SSDG>].

within three years of release.²⁷ The US Sentencing Commission reports a less glowing number of 3% less likely to recidivate than offenders who did not participate in UNICOR “after controlling for criminal history category, age at release, gender, and crime type.”²⁸

Given that 40% of federal inmates have diagnosable substance abuse problems, the BOP also offers substance abuse treatment.²⁹ The BOP reports that drug treatment programs result in reducing recidivism, reducing relapse, and improving health and relationships.³⁰ Two major programs are Non-Residential Drug Abuse Treatment Program (hereinafter “NRDAP”) and Residential Drug Abuse Treatment Program (hereinafter “RDAP”).³¹ NRDAP is a Cognitive-Behavioral Treatment program that lasts twelve weeks.³² Offenders participating in NRDAP may have shorter sentences that make them ineligible for RDAP or have had a positive urinalysis test.³³ RDAP is a much more intensive live-in program that consists of 500 hours of treatment over the course of 9 to 12 months, along with a host of follow-up programs.³⁴ RDAP is an attractive program because completion can result in a reduction of an inmate’s sentence³⁵ and because inmates and BOP employees report that the RDAP wing is the cleanest and safest wing in a prison. The US Sentencing Commission reports that RDAP completers were 27% less likely to recidivate and NRDAP completers were 17% less likely.³⁶

C. Residential Reentry Centers

Another way BOP eases Reentry is through a halfway house or residential reentry center (hereinafter “RRC”). Often individuals have little to no resources when released. Without any additional support, it is highly likely that people will fail to adjust to life on the outside. This is where RRCs come into play.

An RRC is essentially a mid-point between prison and free society. Traditionally, most offenders receive some amount of time in an RRC, whether

²⁷ *First Step Act Approved Programs Guide*, *supra* note 17, at 14.

²⁸ Tennyson, et al., *supra* note 19, at 5.

²⁹ ALAN ELLIS, FEDERAL PRISON GUIDEBOOK § 3:10 (4th ed. 2017).

³⁰ *Substance Abuse Treatment*, FED. BUREAU OF PRISONS, https://www.bop.gov/inmates/custody_and_care/substance_abuse_treatment.jsp [<https://perma.cc/N5D9-89AF>].

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*; Kristin M. Tennyson, Ross Thomas, Tessa Guiton, & Alyssa Purdy, *Recidivism and Federal Bureau of Prisons Programs: Drug Program Participants Released in 2010*, U.S. SENT’G COMM’N, 10 (May 2022), www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2022/20220517_Recidivism-BOP-Drugs.pdf [<https://perma.cc/P4KS-MNJJ>].

³⁵ 18 U.S.C. § 3621(e)(2)(B).

³⁶ Tennyson, et al., *supra* note 34, at 5.

30 days, six-months, or more.³⁷ According to the BOP, RRCs provide individuals who are nearing release “a safe, structured, supervised environment, as well as employment counseling, job placement, financial management assistance, and other programs and services.”³⁸ However, critics are quick to point out that RRCs “are an extension of the carceral experience, complete with surveillance, onerous restrictions, and intense scrutiny.”³⁹ Because the BOP no longer contracts with existing RRCs in the Kansas City region, the closest halfway house is in Leavenworth, Kansas, almost one hour and numerous bus rides away from most offenders’ homes, families, and jobs. More recently, the BOP has begun to favor home confinement where possible.⁴⁰ In fact, “the BOP has dramatically increased home confinement utilization by more than ten-fold,” growing that population from 3,000 inmates to over 30,000.⁴¹

While there are a host of suggested improvements to RRCs, including performance standards and a rating metric of performance, they remain an important tool for the difficult transition of reentering society.⁴²

II. ALTERNATIVE COURTS AND INTENSIVE SUPERVISION

State Court criminal justice systems have led the charge in developing alternative court and intensive supervision programs that focus on successful reentry and reducing recidivism. The first drug court was created in Miami, Florida in 1989, and the second was established in 1993 in Jackson County, Missouri, by former Senator Claire McCaskill.⁴³ Alternative programs have since expanded to address a host of societal ills, including drug courts, problem-solving courts, veterans’ courts, and youthful offender courts. Reentry courts generally fall into two categories: (1) “back-end” programs which offenders participate in after serving a term of imprisonment; or (2) “front-end” or “no-entry” programs where an individual typically doesn’t go to prison.⁴⁴ This article focuses primarily on “back-end” programs.

³⁷ ELLIS, *supra* note 29, at § 4:10.8.

³⁸ *Completing the Transition*, FED. BUREAU OF PRISONS, https://www.bop.gov/about/facilities/residential_reentry_management_centers.jsp [<https://perma.cc/TB4Z-FTC6>].

³⁹ Roxanne Daniel & Wendy Sawyer, *What you should know about halfway houses*, PRISON POL’Y INITIATIVE (Sept. 3, 2020) <https://www.prisonpolicy.org/blog/2020/09/03/halfway/> [<https://perma.cc/XWG8-9L2X>].

⁴⁰ ELLIS, *supra* note 29, at § 5:30.

⁴¹ *First Step Act Annual Report*, *supra* note 10, at 41.

⁴² Rutgers Center for Behavioral Health Services Criminal Justice Research, *Halfway from Prison to the Community: From Current Practice to Best Practice* (April 2013), <https://cafwd.app.box.com/s/oit9lo07b72124qjjcik> [<https://perma.cc/52RP-CZQK>].

⁴³ *Drug Court*, JACKSON CNTY. COMBAT, <https://www.jacksoncountycombat.com/168/Drug-Court> [<https://perma.cc/QHT9-XN2R>].

⁴⁴ U.S. SENT’G COMM’N, FEDERAL ALTERNATIVE-TO-INCARCERATION COURT PROGRAMS 6–7 (September 2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20170928_alternatives.pdf [<https://perma.cc/3HWX-ND27>].

Since their creation, there has been an explosion of alternative courts across the state court system. For example, Minnesota has developed a variety of treatment courts, including an Adult Drug Court, DWI Court, Family Dependency Treatment Court, Juvenile Drug Court, Mental Health Court, and Veterans Court.⁴⁵ Missouri Governor Mike Parson passed bills expanding drug treatment courts to every county in Missouri and creating veteran’s treatment courts, allowing for diversion programs for military members or veterans dealing with substance abuse or mental health conditions.⁴⁶ The BRIDGE program in the United States District of South Carolina was one of the first alternative-to-incarceration drug court programs. Over six years, the program saved taxpayers \$3.5 million.⁴⁷ Of the 43 graduates during that time, only five had additional encounters with the law – an 89% success rate! Judge Bruce Hendricks runs the South Carolina program and noted “you need to get to the root of the problem – the substance abuse disorder – or you will have recidivism.”⁴⁸ In Kansas City, Missouri, municipal court Chief Judge Courtney Wachal developed a Domestic Violence Court that “seeks to improve victim safety and hold offenders accountable through increased supervision and a holistic approach towards offender needs.”⁴⁹ Judge Wachal’s success in reducing recidivism on domestic violence cases will be more thoroughly explored in Section III.

While there are important distinctions between Reentry courts, the reality is that each program’s intensive supervision and lack of adversarial approach results in successful avoidance of recidivism.⁵⁰ These alternative courts are not without critics, “who contend that they are not effective in treating addiction and reducing recidivism, wrongly reduce the punishment of culpable offenders for their volitional conduct, or wrongly criminalize drug addicts rather than genuinely treat them.”⁵¹ However, the Department of Justice, National Institute of Justice, reports that “in an unprecedented longitudinal study that accumulated

⁴⁵ *Treatment Courts*, MINN. JUD. BRANCH, <https://www.mncourts.gov/Help-Topics/DrugCourts.aspx> [<https://perma.cc/4RRH-ASDF>].

⁴⁶ Alisa Nelson, *Parson Signs Bill to Create Veterans’ Treatment Courts in Missouri*, MISSOURINET (July 10, 2019), <https://www.missourinet.com/2019/07/10/parson-signs-bill-to-create-veterans-treatment-courts-in-missouri/> [<https://www.missourinet.com/2019/07/10/parson-signs-bill-to-create-veterans-treatment-courts-in-missouri/>].

⁴⁷ Bruce Howe Hendricks, *Written Statement to U.S. Sentencing Commission – Drug Courts 4* (Mar. 2, 2017), <https://www.uscc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20170418/Hendricks.pdf> [<https://perma.cc/N9G7-Q7KQ>].

⁴⁸ E-mail from the Honorable Judge Bruce Howe Hendricks, U.S. Dist. Ct. for the Dist. of SC, to the Honorable Judge Stephen Bough, U.S. Dist. Ct. for the W. Dist. of Mo. (Feb. 3, 2023) (on file with author).

⁴⁹ *Domestic Violence Brochure*, KANSAS CITY MUN. DOMESTIC VIOLENCE CT., <https://www.kcmo.gov/home/showpublisheddocument/2472/637454368119570000> [<https://perma.cc/C4LE-2WVB>].

⁵⁰ U.S. SENT’G COMM’N, *supra* note 44, at 5–7.

⁵¹ *Id.* at 8.

recidivism and cost analyses of drug court cohorts over 10 years, NIJ researchers found that drug courts may lower recidivism rates (re-arrests) and significantly lower costs.⁵²

Despite the success of these alternative programs, the federal system was slow to embrace them.⁵³ This hesitation continued until 2013 when then-Attorney General Eric Holder endorsed alternative-to-incarceration programs.⁵⁴ In 2014, General Holder, speaking at a federal drug court graduation in Charleston, South Carolina, noted that “[s]ince its inception, the BRIDGE pilot program has shown tremendous promise in helping to reduce recidivism by empowering determined people . . . to overcome addiction, to fight through adversity, and to contribute to their communities.”⁵⁵ In 2022, current Attorney General Merrick Garland announced a Reentry Coordination Council, stating:

Removing barriers to successful reentry for previously incarcerated individuals is an important part of the Justice Department’s mission to keep our country safe, uphold the rule of law, and pursue equal justice under [the] law. . . . Whether it is safe, secure housing, employment, or food on the table, supporting formerly incarcerated people in accessing tools to reach their potential makes our communities safer and stronger.⁵⁶

In the federal system, the last three administrations have fully embraced alternative courts.

The Western District of Missouri’s Reentry Court, a program that I have been involved with for seven years, is an example of an extremely intensive back-end supervision program. Graduation from the program results in a substantial reduction of the term of supervised release and, hopefully, a wealth of tools and skills to avoid re-offending. Like other courts, we have a four-phase program that usually takes between one year to 18 months to complete.⁵⁷ Each of the four phases has different requirements for completion:

⁵² *Do Drug Courts Work? Findings From Drug Court Research*, NAT’L INST. OF JUST. (May 11, 2008) <https://nij.ojp.gov/topics/articles/do-drug-courts-work-findings-drug-court-research> [https://perma.cc/RUU3-E4U4].

⁵³ U.S. SENT’G COMM’N, *supra* note 44, at 5.

⁵⁴ *Id.* at 16.

⁵⁵ Eric Holder, *Remark at BRIDGE Drug Court Ceremony*, U.S. DEP’T OF JUST. (Apr. 11, 2014), <https://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-bridge-drug-court-ceremony-charleston-south>. [https://perma.cc/R6P5-SNHV].

⁵⁶ Press Release, U.S. Dep’t of Just., Justice Department Releases Reentry Coordination Council Report Recommending Evidence-Based Approaches to Reduce Barriers to Successful Reentry (Apr. 29, 2022), <https://www.justice.gov/opa/pr/justice-department-releases-reentry-coordination-council-report-recommending-evidence-based>. [https://perma.cc/86T3-N3QP].

⁵⁷ U.S. Courts for the Western District of Missouri, *A Guide to Reentry Court Program*, 9–13, <https://www.mow.uscourts.gov/sites/mow/files/Re-EntryCourtGuide.pdf>. [https://perma.cc/UD2Q-QMQW]. For a more thorough discussion of the program, see *Reentry Court*, *supra* note 9.

Phase I: Attend five bi-weekly meetings, obtain employment, pass drug and alcohol testing for thirty-five days, and present a historical life inventory;

Phase II: Attend eight bi-weekly meetings, continue steady employment, pass drug and alcohol testing for forty-five days, and present a “comprehensive relapse prevention plan;”

Phase III: Attend monthly meetings, maintain steady employment, be successful in substance abuse treatment, pass drug tests for sixty days, and participate in pro-social activities;

Phase IV: Attend monthly meetings, maintain steady employment, complete twenty-five hours of community service, pass drug tests for 133 days, and present a graduation speech.⁵⁸

For each week of compliance, participants receive one week of credit towards their term of supervised release. If a participant violates any requirement (e.g., tests positive for a controlled substance) during a week, they may face additional sanctions, such as location monitoring or more counseling. Continued violations can result in removal from the program. Throughout the program, participants are treated by outside providers, subject to unannounced home and work visits from their probation officers, and rewarded with gift cards, praise, and fewer restrictions.⁵⁹

A common criticism of drug courts is that the prosecutor has broad discretion in referring individuals to the program, which can result in injustice.⁶⁰ The same is true for alternative courts, including in the Western District of Missouri’s Reentry Program, which allows the U.S. Attorney to veto any participant, including based on the seriousness of the crime. The U.S. Attorney’s Office has been reluctant to participate in alternative courts because it allegedly only brings serious cases.⁶¹ There is no doubt that “alternative-to-incarceration courts are not for every offender.”⁶² However, some cases are more suited to

⁵⁸ U.S. Courts for the Western District of Missouri, *supra* note 57, at 10–13.

⁵⁹ *Id.* at 5.

⁶⁰ Drug Policy Alliance, *Drug Courts Are Not the Answer: Toward a Health-Centered Approach to Drug Use*, at 5 (March 2011), https://drugpolicy.org/sites/default/files/Drug%20Courts%20Are%20Not%20the%20Answer_Final2.pdf. [<https://perma.cc/2MBU-F474>].

⁶¹ U.S. SENT’G COMM’N, *supra* note 44, at 30.

⁶² E-mail from the Honorable Judge Bruce Howe Hendricks, *supra* note 48.

alternative courts than others – I have had to sentence a cancer survivor with a low-level criminal history who was buying marijuana from his drug-dealing son-in-law.

Categorical exclusions for participation based on the nature of the crime can also produce inequities. For example, the Western District of Missouri's Reentry Program, which was created in 2010, excludes anyone with a Criminal History Category VI or higher, prior felonies involving violence, and sometimes a pattern (three or more) of misdemeanor assaults.⁶³ Violence is defined to include using a weapon, but this definition is broad and can encompass absurd situations, like possession of a gun in a locked safe in a locked storage unit when drugs were found in the kitchen.⁶⁴ Broadly speaking, most non-legislatively created alternative courts are a partnership between the courts, probation, prosecutor, and defender. One partner cannot just override the rules and allow a prohibited individual from participating. In the post-*Booker* world of advisory guidelines, more case-by-case analysis is needed. All parties to alternative courts, but especially judges, should reconsider who is automatically being excluded from participation.

The Western District of Missouri's Reentry Court is typical of intensive supervision programs – whether they are Reentry programs or alternative to prison programs.⁶⁵ Alternative programs are so successful because the hostility is taken out of the hearings and replaced with a collegial nature. These programs have been developed, honed, tweaked – but dare I say not yet perfected – over the last 30 years.

III. HOW CAN WE DO BETTER?

If there can ever be an agreement among all Americans, surely it is the criminal justice system is not working. The United States has the most expensive system, the highest recidivism rate, and incarcerates the highest percentage of our population. This is not the American exceptionalism we expect. There is an obvious solution – problem-solving courts are cheaper and have improved recidivism rates. However, each level of the criminal justice system needs to rethink the reluctance to fully embrace these innovations. As I judge, I will focus on my lane.

Many judges stop their involvement in a case the second a defendant is sentenced. Other judges see the inadequacies in the criminal justice system and actively participate in improving it. Literally getting off the bench and engaging with defendants as humans is life-changing, for both the defendant and the judge. Employing a “collegial” model that seeks to maximize rehabilitations minimize recidivism” is beneficial to all.⁶⁶

⁶³ U.S. Courts for the Western District of Missouri, *supra* note 58, at 7.

⁶⁴ *United States v. Anderson*, 618 F.3d 873, 877 (8th Cir. 2010) (affirming a two-point enhancement under U.S.S.G. § 2D1.1(b)(1) for possessing a dangerous weapon).

⁶⁵ U.S. SENT'G COMM'N, *supra* note 44, at 10.

⁶⁶ U.S. SENT'G COMM'N, *supra* note 44, at 7.

United States Magistrate Judge Lajuana Counts, who worked for over 20 years in the U.S. Attorney's Office and serves on the Western District of Missouri's Reentry Court, is a passionate supporter of alternative courts:

Once someone has been held accountable for their criminal actions, that person deserves to have a chance to move forward in life in a positive direction. As a prosecutor, my focus was on holding persons accountable for any illegal activity. As a judge[,] I'm seeing this human being as someone who has served their time and now has decided to change the trajectory of their life by being a part of the Reentry Court program. This is a person who has taken a step forward to live a better, more productive[,] and positive life, and it takes caring people (a village) to help. Everyone deserves the chance to redeem themselves, and that is just what Reentry Court focuses on and why I made the conscious decision to volunteer to be a part of this program.⁶⁷

United States District Judge Richard Webber from the Eastern of District Missouri epitomizes the get-off-the-bench attitude:

The best part of my service as a judge was realizing I was sending too many people back to prison for violating supervised release, and I pondered what I could do to stop or retard seeing violators on supervised release. When individuals are released from prison and go into a half-way house, the assigned probation officer informs them on their first visit they will see me at the probation office in a reception room. The individual sits at the end of the table, I am seated at her or his right side at the corner of the table, so we are separated face-to-face [by] about 16 inches. I start the conversation by saying, "This is my opportunity to try to convince you I personally care about you and I do not want to send you back to prison for violating conditions of supervised release. The probation officer (the only other person in the room) will explain you can get enrolled in college, get a CDL, get special technical training in many fields, and I mention other issues pertaining to each individual. I tell them not to ask the probation officer for early discharge, but if she or he recommends it, I will grant

⁶⁷ E-mail from the Honorable Judge Lajuana Counts, U.S. Magistrate Court for the W. Dist. of Mo., to the Honorable Judge Stephen Bough, U.S. Dist. Ct. for the W. Dist. of Mo. (Jan. 20, 2023) (on file with author).

the request and the three of us will go to lunch on me to celebrate. The results have been dramatic in the reduction of violations in my cases. The first two Happy Thanksgiving and Merry Christmas texts come from two of these individuals. I have paid for many lunches, the best money I spend. One individual told me after our visit, “You are the only one who ever cared for me.”⁶⁸

Judge Webber is not alone. Retired United States District Judge Mark Bennett from the Northern District of Iowa would go visit people in prison. Judge Bennett, now the Director of the Institute for Justice Reform and Innovation at Drake Law School, noted:

I visited over 400 inmates I personally sentenced because I thought it was important that they knew I cared about them. I spoke with them about many things including expectations for supervised release. The visits helped me learn about BOP programs and the offender[']s view on them. These visits helped shape my sentencing approach. We had a residential Reentry facility in Sioux City that I visited for lunch with the residents every 60 days to see how they were doing and to talk about expectations and how they were getting along with their PO.⁶⁹

As discussed above, state courts started this movement and are seeing the greatest results. One example is Judge Courtney Wachal’s Domestic Violence (hereinafter “DV”) Court in Kansas City, Missouri. Judge Wachal’s DV Court has been nationally recognized by the U.S. Department of Justice and serves as a mentor court for other jurisdictions.⁷⁰ Judge Wachal described the formation of her innovative court:

Through continued work and training with the Center for Court Innovation, as well as the experience I garnered becoming the regular non-DV drug court judge in 2019, we ultimately chose

⁶⁸ E-mail from the Honorable Judge Richard Webber, U.S. Dist. Ct. for the E. Dist. of Mo., to the Honorable Judge Stephen Bough, U.S. Dist. Ct. for the W. Dist. of Mo. (Jan. 17, 2023) (on file with author).

⁶⁹ E-mail from the Honorable Judge Mark Bennett, Dir. for the Inst. for Just. Reform and Innovation, Drake L. Sch., to the Honorable Judge Stephen Bough, U.S. Dist. Ct. for the W. Dist. of Mo. (Jan. 17, 2023) (on file with author).

⁷⁰ *Domestic Violence Court*, KANSAS CITY MISSOURI, <https://www.kcmo.gov/city-hall/departments/municipal-court/probation-and-problem-solving-courts/domestic-violence-court> (last visited Jan. 31, 2023); Benita Jones, *Kansas City’s Domestic Violence Court only municipal court in nation to be named a mentor court by the U.S. Department of Justice*, KCMORE MAGAZINE 21 (2018), <https://www.kcmo.gov/home/showpublisheddocument/12/636943889997730000> [<https://perma.cc/E3FQ-56P4>].

to separate the compliance docket into two tracks – one for high-risk offenders without substance abuse issues (compliance docket) and one for those with substance abuse issues (DV Drug Court). This approach allowed for varying sanctions for violations regarding re-offending or no-contact orders (swift and certain sanctions, typically incarceration) versus substance abuse related violations (therapeutic in nature). It also allowed us to use funding from our regular drug court programming to send DV offenders with substance abuse issues to in-patient treatment.

While the courts were closed during COVID I applied for and received a Bureau of Justice Assistance/Department of Justice grant for two early intervention programs. The grant was awarded in October of 2021. The first program is a free 3-hour class that is ordered as a condition of bond for all first-time offenders. There are separate curriculums for males and females, as statistics show that often females charged on our docket may also be victims of DV. The idea behind this requirement was to increase DV awareness with first-time offenders whose cases may ultimately be dismissed for want of prosecution. The second is the RSVP (Relationship and Sexual Violence Prevention) docket, which targets young adult male offenders (ages 18-24) charged with intimate partner violence. It's a diversion program for those with limited DV criminal history. The recidivism rate for offenders on the compliance docket was significantly lower than those on regular court-supervised probation. In addition, those that were not compliant received swift sanctions, which is in the best interest of public safety.

My job is to pursue justice. While applying for grants and establishing multiple specialty courts for domestic violence cases may not fit neatly into the job description of being a municipal judge, in Kansas City we are seeing a decrease in recidivism. This is a result of targeting the highest-risk populations with specialized services. Serving the needs of the community by promoting public safety and holding offenders accountable is what justice is about.⁷¹

⁷¹ E-Mail from the Honorable Judge Courtney Wachal, Mun. Ct. of Kansas City, Mo., to the Honorable Judge Stephen Bough, U.S. Dist. Ct. for the W. Dist. of Mo. (Jan. 20, 2023) (on file with author).

Participating in alternative courts can open a judge's eyes to the reality of successful Reentry. Judges who do not participate only see defendants when they violate the terms of supervised release and come back to court. It can be easy to become jaded when that is all the judge sees – to believe that no one has a job, that everyone is using drugs, and that no one communicates with their Probation Officer.⁷² That is not the whole picture.

In the Western District of Missouri, the Reentry Court helps restore my faith in humanity and allows me to do my part in reducing recidivism. One of the biggest joys of the program is graduation – I see 86% of Reentry Court participants succeed, give them a graduation plaque with our picture on it, and share a celebration cake. Everyone benefits from these moments. The graduates get celebrated in a fashion that may have never otherwise occurred in their lives. Other participants benefit from seeing their peers succeed. It also reminds the Judges, Probation Officers, Federal Public Defenders, and U.S. Attorneys, who all can get a little hardened, of why they do what they do.

Carie Allen, the public defender in the Western District of Missouri's Reentry court, finds inspiration from her participation:

At graduation, participants have gone from prisoner #24601, to a person who is supported and championed by people working in the criminal justice system. Seeing them embrace a new life, and knowing they are on the road for a successful future, is the most rewarding part of being a criminal defense attorney.⁷³

Anthony Wheatley, a probation officer in the Western District of Missouri's Reentry and Drug Courts, commented "they say 'hard times make tough people and easy times make weak people.' Reentry Court challenges individuals to make tough decisions. At the graduation, you can hear and feel their sense of accomplishments and progress they have made in turning their life around."⁷⁴ Jeff McCarther, the assistant U.S. Attorney assigned to Reentry Court, noted "smiles abound from participants and their families, Reentry graduation is the culmination and celebration of the incredible hard work of the participants. That a person graduates from Reentry Court is a strong signal that

⁷² As a corollary, inmates can fall into the same trap. The only people who return to the BOP are those that have had their supervised release terminated. Those individuals occasionally report that probation officers are out to get them and that no one succeeds on supervised release.

⁷³ E-mail from Carie Allen, Pub. Def., to the Honorable Judge Stephen Bough, U.S. Dist. Ct. for the W. Dist. of Mo. (Jan. 23, 2023) (on file with author).

⁷⁴ E-mail from Anthony Wheatley, Prob. Officer, to the Honorable Judge Stephen Bough, U.S. Dist. Ct. for the W. Dist. of Mo. (Jan. 23, 2023) (on file with author).

they are choosing to turn away from their past life and embrace a new beginning.”⁷⁵

Our graduates give speeches, and sometimes we laugh, sometimes we cry:

My name is Derwayne Williams.⁷⁶ I’m 37 years old. In 2009 I was sentenced to 240 months in prison, and I think that was the lowest I ever felt in my life. I was sent over 500 miles away from the only people I had. I started off bitter and hard-headed because it was the only way I knew to cope. Over time I obtained my GED and upholstery certification. I started reading and learning more about myself and started facing the truth. The truth was that I was wrong and lost and I started working on myself. In 2016 I got a blessing from President Obama and was granted clemency and release in 2018.

I started this program not knowing what the outcome would be. I just knew it would be a good start for a new lifestyle. I came in[to] this program ready for change and I did. I still have roadblocks and temptation, but I focus on what’s more important. So now that I’m finishing this program doesn’t mean that it’s the end. It’s the beginning of my drug-free and positive lifestyle.

Since release[,] I have held a job the whole time. I put out an album that’s doing pretty well. I have a clothing line that’s getting started. I get to see my kids graduate high school and I’m doing all this with no complaints. It may sound crazy to some, but prison is one of the best things to happen to me. Sometimes your biggest blessing is a reality check.

Participating in alternative courts is not the only way a judge can make a difference in a defendant’s life. I often make trips to visit Leavenworth’s federal prison, attend the RDAP program, and meet with people I have sentenced. I wouldn’t talk about their case, but often led with “what do I need to know about prison?” Another variation in “normal” sentencing is having people write me letters. I don’t set this as a special condition in every case, just when I feel like there’s some special attribute about a person, some glimmer of hope. I ask them

⁷⁵ E-mail from Jeff McCarther, Assistant U.S. Att’y, to the Honorable Judge Stephen Bough, U.S. Dist. Ct. for the W. Dist. of Mo. (Jan. 23, 2023) (on file with author).

⁷⁶ Graduation speech from Derwayne Williams to the Honorable Judge Stephen Bough, U.S. Dist. Ct. for the W. Dist. of Mo. and Reentry Court (Feb. 21, 2020) (on file with author).

to write about stable home plans, stable employment, and stable relationships – my recipe for supervised release success. They are told the letters also go to the probation officer and I think of them as promises. Sometimes I write back, but every time I get a letter I learn. Here's an example of those letters:

Other than studying and working, I have been trying to figure to get done what needs to happen to get a hardship [driver's license] and to be able to afford having the ignition interlock for a very long time. Sometimes it feels like I will never catch up in life and it is frustrating to be in the position I am. I do have to remember where I came from and where I was seven years ago, and that alone is amazing. With all these things going on, I have been doing a step study with my sponsor and some other people and will be doing another fourth and fifth step.⁷⁷

Another individual wrote:

Well, work is great. I'm still at [my same employer]. I just love my job so much, and the relationships that are built, the difference I can make in someone's life, just as great as the difference they make in mine. My co-workers are terrific, we work so well together and have so much fun. It's helped me with my anxiety, and being socially awkward, and to always practice patience, which in turn helps me in my day-to-day life. I make decent money and I'm doing great there. I just love it.⁷⁸

Do all the letter-writers live up to their promises? Of course not. Do some letter-writers have their supervised release terminated only to be sent back to prison? Sadly yes. Do some of them succeed? You bet. Overall, it is another tool that gets me more actively engaged in hopefully successful outcomes.

There is no shortage of ways for judges to make a difference. Politicians of all stripes recognize that the 50-year experiment with mass incarceration is financially and humanely unsustainable.⁷⁹ To stop this cycle, all that is needed is for judges to get off the bench and get engaged to achieve what United States District Judge Richard Webber calls the “best part of [his] service as a judge.”⁸⁰

⁷⁷ Permission granted by the author but not to be identified.

⁷⁸ Permission granted by the author but not to be identified.

⁷⁹ Nellis, *supra* note 6. The number of incarcerated American citizens rose from 360,000 in the early 1970s to nearly two million today. *Id.*

⁸⁰ E-mail from the Honorable Judge Richard Webber, *supra* note 68.

CONCLUSION

Why get off the bench and get into the game? Why not let Congress create these courts? Why not let probation officers handle these people? All good questions. According to Professor Shon Hopwood of Georgetown Law School:

Long ago, America decided that the only way to hold someone accountable is to put them in prison. The great irony is the longer you put someone in the Department of Corrections the less likely they are to be corrected. There are different types of ways to hold people accountable in their communities that are more effective and cheaper.⁸¹

As judges, I believe we are an essential part of the criminal justice system, and we have a duty to lead. We know our recidivism rates are high, the system is too expensive for the results we are getting, and someone should do something about it. We also have an outsized influence over our system and can't afford to leave it to anyone else – Congress, presidents, probation, prosecutors, or defenders – to address problems that we encounter every day. Ultimately, “[t]here’s plenty of space in the criminal justice system for alternative-to-incarceration courts to succeed. Intensive supervision through cooperation with probation, the U.S. Attorney’s Office, and the Federal Public Defender is better for the community by saving tax-payer dollars and improving the lives of the participants and their families.”⁸² All we need is the courage to lead and change.

⁸¹ E-mail from Shon Hopwood, Assoc. Professor of L., Georgetown L., to the Honorable Judge Stephen Bough, U.S. Dist. Ct. for the W. Dist. of Mo. (Jan 25, 2023) (on file with author).

⁸² E-mail from the Honorable Judge Bruce Howe Hendricks, *supra* note 48.