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Wesley A. Shumway

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2017 Drug Laws in West Virginia: The Wrong Prescription for the State's Opioid Crisis

Wesley A. Shumway*

ABSTRACT

The United States has been devastated by an opioid epidemic. The 1990s, with shifting views of pain management and aggressive marketing of OxyContin, saw the beginning of a crisis that has taken the country by storm. Pain medication prescription rates skyrocketed throughout the United States, and as a result, addiction, overdose, and death have tormented the country in astonishing numbers.

However, no state has suffered more than West Virginia. The Mountain State, with its struggling economy, labor-related injuries, and poor educational outcomes, is ground zero for such a crisis. West Virginia has struggled with high addiction and overdose rates. In 2017, the West Virginia Legislature passed a series of harsh drug laws increasing mandatory minimums and creating new drug felonies. These felonies are similar in nature to the nationwide 1980s drug laws, which created new felonies and, memorably, increased mandatory minimum sentences.

This Comment analyzes the results of the 1980s drug laws and argues that the similar 2017 West Virginia drug laws are a step in the wrong direction. The harsh drug penalties of the 1980s led to mass incarceration, racial discrepancies, and incarceration of small-time offenders. In addition, the 1980s drug laws did not curtail drug supply and demand.

This Comment recommends striking down the 2017 drug laws, and instead investing more in drug courts. Drug courts, with their rehabilitative focus, have experienced positive results nationwide and in West Virginia. Drug courts reduce recidivism and are more cost-effective, but nine of West Virginia's counties still have no access to a drug court. In addition,

*J.D. Candidate, The Pennsylvania State University, Penn State Law, 2019. I would like to thank my parents for the examples they set in their academic careers, and my friend, W. Va. Delegate John Williams, for his assistance with this Comment. I would also like to thank my friends at the *Penn State Law Review* for their edits, advice, and support throughout the Comment-writing process.

this Comment recommends that West Virginia diversify its economy to shift away from solely relying on extraction and mining in particular. The declining coal industry has hurt the economy, and West Virginians need to get back to work.

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I. INTRODUCTION

The United States has been held hostage by the opioid crisis, but no state has fared worse than West Virginia.¹ The medical industry's shifting views of pain management in the 1990s, and aggressive marketing of OxyContin, led to a nationwide opioid epidemic.² As a result, states around the country, especially West Virginia, are struggling to combat the crisis.³

West Virginia has become ground zero for the opioid crisis due to the state's struggling economy, labor-related injuries, and poor educational

1. See *infra* Section II.B.

2. See *infra* Section II.A.

3. See *infra* Section II.B.

outcomes.⁴ In December 2016, West Virginia Senator Joe Manchin announced a statewide “War on Drugs.”⁵ This announcement signaled what would be a busy 2017 for West Virginia lawmakers, as they passed a series of harsh drug laws aimed at combating the opioid crisis.⁶

The new West Virginia drug laws, which increase mandatory minimum sentences and create new drug felonies,⁷ are similar to the drug laws that arose during the War on Drugs and crack–cocaine hysteria of the 1980s.⁸ This Comment analyzes the harsh 1980s drug laws and their negative systemic effects.⁹ In particular, the 1980s drug laws led to mass incarceration, racial discrepancies, and the imprisonment of small-time offenders.¹⁰ In addition, the 1980s drug laws failed in their effort to fight the drug trade, as recidivism rates did not improve, and drug supply and demand have increased.¹¹

Part II of this Comment outlines the modern opioid crisis in the United States, and discusses why West Virginia in particular has fared worse than other states.¹² Then, Part II continues by exploring West Virginia’s harsh 2017 drug laws,¹³ and comparing these laws to those seen during the 1980s expansion of the War on Drugs, which resulted in increased mandatory minimums for drug offenders.¹⁴ Part III then analyzes the negative outcomes of the 1980s War on Drugs, and the harsh mandatory minimum sentences.¹⁵

After analyzing alternatives to mandatory minimums and harsh drug laws, this Comment ultimately recommends that West Virginia strike down the 2017 drug laws that resemble those of the 1980s.¹⁶ Instead, West Virginia should boost its drug court program and seek to diversify and

4. See *infra* Section II.B.

5. Theodore Schleifer, *Manchin on WV opioid abuse: ‘We need to declare a war on drugs’*, CNN (Dec. 20, 2016, 9:02 PM), <https://cnm.it/2zOuMUD>.

6. S.B. 219, 2017 Reg. Legis. Sess. (W. Va. 2017); S.B. 220, 2017 Reg. Legis. Sess. (W. Va. 2017); H.B. 2083, 2017 Reg. Legis. Sess. (W. Va. 2017); H.B. 2329, 2017 Reg. Legis. Sess. (W. Va. 2017); H.B. 2579, 2017 Reg. Legis. Sess. (W. Va. 2017); see *infra* Section II.C.2 for a discussion of the new drug laws passed by the West Virginia Legislature in 2017.

7. See legislation cited *supra* note 6.

8. See DEBORAH J. VAGINS & JESSELYN MCCURDY, AM. CIVIL LIBERTIES UNION, *CRACKS IN THE SYSTEM: TWENTY YEARS OF THE UNJUST FEDERAL CRACK COCAINE LAW 1–2* (2006), <http://bit.ly/2B0QANg> (outlining the effects of the 1980s crackdown on drugs, mandatory minimum sentences, and the crack-cocaine hysteria).

9. See *infra* Section III.A for a discussion of the negative systemic effects of the harsh drug laws of the 1980s.

10. See *infra* Section III.A.

11. See *infra* Section III.A.

12. See *infra* Section II.A–B.

13. See *infra* Section II.B.

14. See *infra* Section II.C.

15. See *infra* Section III.A.

16. See *infra* Section III.D.

stimulate its coal-reliant economy.¹⁷ These measures would provide a more lasting solution while avoiding the negative outcomes of harsh mandatory minimum sentences and drug crimes.

II. BACKGROUND

The modern opioid crisis took the United States by storm.¹⁸ States around the country have been dealing with high rates of overdose and addiction ever since the mass prescribing of OxyContin began.¹⁹ However, no state has been hit harder by the modern opioid crisis than West Virginia, where workplace injuries, a lack of economic diversity, and liberally prescribed pain medications have been the norm.²⁰

A. *The Genesis of the American Opioid Crisis*

The modern opioid crisis in the United States can be traced back to the 1990s, beginning with the aggressive promotion of OxyContin—extended release oxycodone used for moderate to severe pain, approved by the Food and Drug Administration in 1995—as well as the medical community’s shifting views on pain management.²¹ In a 1996 speech, James Campbell, President of the American Pain Society, dubbed pain the “fifth vital sign,” which kicked off a campaign to promote pain management.²² Other organizations followed suit, including the Joint Commission on Accreditation of Healthcare Organizations, which produced pain management standards in 1999 that hospitals were required to follow.²³ The Department of Veterans Affairs likewise created the “Pain as the 5th Vital Sign Toolkit” in 2000.²⁴

17. See *infra* Section III.D.

18. Harrison Jacobs, *Here’s why the opioid epidemic is so bad in West Virginia — the state with the highest overdose rate in the US*, BUSINESS INSIDER (May 1, 2016, 11:00 AM), <https://read.bi/28U96H4>.

19. Ameet Sarpatwari et al., *The Opioid Epidemic: Fixing A Broken Pharmaceutical Market*, 11 HARV. L. & POL’Y REV. 463, 464 (2017).

20. Jacobs, *supra* note 18 (“The current opioid epidemic has plagued the entire US. But it has hit one state harder than the rest — West Virginia.”).

21. *Id.*; see also Sarpatwari et al., *supra* note 19, at 467.

22. See Sarpatwari et al., *supra* note 19, at 465. See generally Mitchell B. Max et al., *Quality Improvement Guidelines for the Treatment of Acute Pain and Cancer Pain*, 274 J. AM. MED. ASS’N 1874 (1995) (discussing new proposed guidelines for the management of pain). The traditional four “vital signs” are body temperature, pulse rate, respiration rate, and blood pressure, which are used to monitor health problems. See *Vital Signs (Body Temperature, Pulse Rate, Respiration Rate, Blood Pressure)*, JOHNS HOPKINS MED. HEALTH LIBRARY, <https://bit.ly/2GlmEQQ> (last visited Dec. 9, 2018).

23. Sarpatwari et al., *supra* note 19, at 465.

24. *Id.*; see also JOINT COMM’N ON ACCREDITATION OF HEALTHCARE ORGS., PAIN MANAGEMENT STANDARDS: COMPREHENSIVE ACCREDITATION MANUAL FOR HOSPITALS, UPDATE 3 (1999); DEP’T OF VETERANS AFFAIRS, PAIN AS THE 5TH VITAL SIGN TOOLKIT 5 (2000).

The promotion of OxyContin and the christening of pain as the “fifth vital sign” caused sales of prescription pain medication to skyrocket from the late 1990s to 2010.²⁵ This drastic increase in sales of prescription pain medication forced states to begin cracking down on such sales in an attempt to control the epidemic.²⁶ State crackdowns on pain medication clinics and prescriptions have reduced overall pain medication prescriptions, but current prescription rates are still three times higher than they were in 1999.²⁷

Purdue Pharma²⁸ capitalized on the medical community’s new focus on pain management by developing OxyContin.²⁹ Purdue Pharma employed aggressive tactics to promote OxyContin, including hosting over forty lavish conferences, using advanced marketing data analysis, creating lucrative bonus packages for its sales representatives, and sending other promotional materials to healthcare providers.³⁰

Indeed, Purdue Pharma used its marketing data to target doctors who prescribed the most opioids, and were the least discriminate prescribers, in an attempt to encourage more OxyContin prescriptions.³¹ In addition to more than doubling the size of its sales team, Purdue Pharma increased its doctor call list from between 33,400 and 44,500 doctors to about 70,500 to 94,000 doctors.³² Further, to promote the product, Purdue Pharma’s sales representatives provided patients with free starter prescriptions lasting up to a month.³³

In addition, Purdue Pharma heavily promoted OxyContin as a viable option for the “non-malignant pain market,” repeatedly claiming that OxyContin’s risk of addiction was low.³⁴ In fact, Purdue Pharma sales representatives were instructed to report that the risk of addiction was “less than one percent.”³⁵ This aggressive campaign proved extremely

25. Jacobs, *supra* note 18.

26. Abby Goodnough, *Opioid Prescriptions Fall After 2010 Peak*, C.D.C. Report Finds, N.Y. TIMES (July 6, 2017), <https://nyti.ms/2uOK9bs>.

27. *Id.*

28. Purdue Pharma L.P., founded over sixty years ago, is a privately held pharmaceutical company headquartered in Stamford, Connecticut. *About Purdue Pharma*, PURDUE PHARMA, <http://www.purduepharma.com/about/#&panel1-46> (last visited Dec. 9, 2018).

29. Sarpatwari et al., *supra* note 19, at 467.

30. Art Van Zee, *The Promotion and Marketing of OxyContin: Commercial Triumph, Public Health Tragedy*, 99 AM. J. PUB. HEALTH 221, 222 (2009). The number of sales representatives employed by Purdue Pharma more than doubled between 1996 and 2000 to accommodate the company’s aggressive marketing tactics. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 222–23.

34. *Id.* at 223.

35. *Id.*

successful.³⁶ From 1996 to 2001, extended-release oxycodone accounted for \$2.8 billion in sales, and, from 2008 to 2014, oxycodone sales generated more than \$2 billion.³⁷

The industry's increased marketing and promotion of pain management created American "pill mills"—clinics that prescribed exorbitant amounts of opioids.³⁸ Addicts and dealers routinely drove from Appalachia to South Florida clinics in search of liberally prescribed oxycodone.³⁹ As a result of marketing and liberal prescribing, American opioid prescriptions increased from about 76 million in 1991 to 207 million in 2013.⁴⁰

The flood of pain medication to the market has had considerable effects in the United States.⁴¹ Opioid-related deaths from 2000 to 2015 more than doubled, while instances of opioid overdose more than tripled during that same period.⁴² In fact, in 2015, opioid-related deaths alone were found to reduce the "average American life expectancy" by two-and-a-half months.⁴³

Despite the implementation of prescription drug monitoring programs, which control and monitor opioid prescriptions, the damage has already been done.⁴⁴ Opioid-dependent Americans often now resort to

36. Sarpatwari et al., *supra* note 19, at 467.

37. *Id.*

38. *See generally* JOHN TEMPLE, AMERICAN PAIN: HOW A YOUNG FELON AND HIS RING OF DOCTORS UNLEASHED AMERICA'S DEADLIEST DRUG EPIDEMIC (Lyons Press ed. 2015) (describing the creation and operation of South Florida "pill mills," which aggressively prescribed opioids to patients). Doctors at American Pain, a pain clinic in Broward County, Florida, routinely prescribed individuals 240 30-milligram oxycodone pills, plus 60 15-milligram oxycodone pills each month. *Id.* at 150.

39. *Id.* at 176. There were also "pill mills" in West Virginia, like Sav-Rite Pharmacy in the small community of Kermit, West Virginia. Jacobs, *supra* note 18. Sav-Rite Pharmacy reportedly prescribed 3.2 million dosage units of hydrocodone in 2006. *Id.* Also, over the past decade, drug companies reportedly sent 20.8 million prescription painkillers to two nearby pharmacies in Williamson, a West Virginia town of 2,900 people. Eric Eyre, *Drug firms shipped 20.8M pain pills to WV town with 2,900 people*, CHARLESTON GAZETTE-MAIL (Jan. 29, 2018), <https://bit.ly/2nopk19>.

40. *America's Addiction to Opioids: Heroin and Prescription Drug Abuse: Hearing Before the Senate Caucus on International Narcotics Control*, 113th Cong. 3 (2014) (statement of Nora D. Volkow, Dir., Nat'l Inst. on Drug Abuse), <http://bit.ly/2BZoR1h>.

41. *See generally* Susan Okie, *A Flood of Opioids, a Rising Tide of Deaths*, 363 NEW ENG. J. MED. 1981 (2010) (describing the negative effects of opioids in the United States, and addressing the rising death rates associated with opioid abuse).

42. Kyle Swenson & Travis M. Andrews, *America's opioid problem is so bad it's cutting into U.S. life expectancy*, WASH. POST (Sept. 20, 2017), <https://wapo.st/2T8SAv7>.

43. *Id.*

44. Jane E. Brady et al., *Prescription Drug Monitoring and Dispensing of Prescription Opioids*, 129 PUB. HEALTH REPS. 139, 140 (2014) ("As of June 12, 2012, 50 states . . . had enacted laws establishing PDMPs [prescription drug management plans], and 40 states had operational PDMPs However, other studies found that state PDMPs had a minimal effect on the overall dispensing of opioids and overdose mortality."); Nick Miroff, *From*

heroin, which can be spiked with dangerous synthetic opioids like fentanyl.⁴⁵ The medical community's recognition of pain as "the fifth vital sign," in conjunction with Purdue Pharma's aggressive promotion of OxyContin, created a nationwide crisis.

B. West Virginia: A State in Crisis and a Legislature Using Outdated Methods

The opioid crisis may have affected the United States as a whole, but no state has fared worse than West Virginia.⁴⁶ The state's current economic climate creates a perfect storm for such a crisis.⁴⁷ To combat this crisis, the state legislature passed a series of harsh drug laws aimed at curbing the trafficking of drugs into the state.⁴⁸

1. West Virginia: A Struggling State Devastated by the Opioid Crisis

The opioid crisis has hurt West Virginia more than any other state.⁴⁹ Due to its current state of affairs, the Mountain State is ground zero for the opioid crisis.⁵⁰ For example, joblessness associated with the declining coal industry, labor-related injuries, and low education levels have all contributed to the meteoric rise of the state's opioid crisis.⁵¹

West Virginia is in the midst of a considerable economic struggle, as the state is currently one of the lowest-rated states for business activity and growth.⁵² West Virginia was also one of only seven states whose economy contracted in 2016, with a gross domestic product loss of 0.9%.⁵³ West

Teddy Roosevelt to Trump: How drug companies triggered an opioid crisis a century ago, WASH. POST (Oct. 17, 2017), <https://wapo.st/2RQu0h3>.

45. See Miroff, *supra* note 44; Brady et al., *supra* note 44, at 140. Fentanyl is "a powerful synthetic opioid analgesic that is similar to morphine but is 50 to 100 times more potent." *What is fentanyl?*, NAT'L INST. ON DRUG ABUSE, <http://bit.ly/2PvVB5T> (last updated June 2016).

46. Jacobs, *supra* note 18.

47. *Id.*

48. Brad McElhinny, *Lots of new WV laws go into effect this coming week*, W. VA. METRONews (July 30, 2017, 4:31 PM), <https://bit.ly/2OKe4eq>.

49. Jacobs, *supra* note 18.

50. See generally MICHAEL MEIT ET AL., APPALACHIAN REG'L COMM'N, APPALACHIAN DISEASES OF DESPAIR (Aug. 2017), <http://bit.ly/2Qku6S3>.

51. *Id.* at 1 ("Compared to the rest of the nation, the Appalachian Region faces disparities related to educational attainment, employment, income, and a number of health outcomes. . . . Socioeconomic factors, including education, employment, and income, are potential contributors to the growing opioid crisis in the United States.").

52. Scott Cohn, *In an economic death spiral: West Virginia is America's worst state for business in 2017*, CNBC (July 11, 2017, 4:44 PM), <https://cnb.cx/2l9EnOF> ("West Virginia has never done particularly well in our Top States rankings, but this year it hits bottom for the first time.").

53. *Id.*

Virginia has struggled economically in large part due to decreased coal production.⁵⁴ Coal production within the state in 2016 was about half of the level seen in 2008.⁵⁵

The drastic reduction in coal production is the result of the “[d]eclining use of coal by domestic power plants—linked to the coincident timing of low natural gas prices and stricter emissions standards—weak export demand and the backdrop of declining productivity from Southern West Virginia coal seams.”⁵⁶ The decline of coal production has caused a decrease in jobs for rural communities, and the resulting increase in unemployment is a major factor contributing to the opioid problem in Appalachia.⁵⁷ The issue involves not only the lack of coal jobs, but West Virginia’s undiversified reliance on coal, with community members struggling to find other work after the closure of mines.⁵⁸ Accordingly, the coal decline has exacerbated the West Virginia opioid crisis because jobless West Virginians have resorted to opioids.⁵⁹

As Sean O’Leary and Ted Boettner of the West Virginia Center on Budget and Policy state:

[N]atural resource extraction tends to lead to economic boom and bust cycles, as production grows and shrinks, energy prices rise and fall, and the resources themselves are depleted over time. West Virginia has experienced this pattern over the past century. Since the state is so dependent upon natural resources, this pattern of booms and busts causes volatility in revenue streams, leaving communities vulnerable, underdeveloped, and less economically secure.⁶⁰

This lack of economic security in West Virginia is a major factor leading to the rapid succession of the opioid crisis because the high unemployment levels have led to opioid abuse.⁶¹

54. *Id.* The substantial drop in coal production, which has been the driver of the West Virginia economy, is a key reason for the economic hardship the state has experienced. *Id.*

55. BRIAN LEGO & JOHN DESKINS, W. VA. UNIV. BUREAU OF BUS. & ECON. RESEARCH, COAL PRODUCTION IN WEST VIRGINIA: 2017–2040, at 1 (2017), <http://busecon.wvu.edu/bber/pdfs/BBER-2017-08.pdf> (“[S]ince 2008 the state’s overall coal mine output plunged by almost half from over 157 million to 80 million short tons in 2016.”).

56. *Id.* at iv.

57. Tamarra Kemsley, *Appalachia: The Cradle of the Opioid Epidemic*, BLACK BEAR LODGE (Sept. 28, 2017), <https://blackbearrehab.com/blog/appalachia-cradle-opioid-epidemic/>.

58. Jacobs, *supra* note 18.

59. *Id.*

60. SEAN O’LEARY & TED BOETTNER, W. VA. CTR. ON BUDGET & POLICY, BOOMS AND BUSTS: THE IMPACT OF WEST VIRGINIA’S ENERGY ECONOMY 3 (July 2011), <http://bit.ly/2SCWGdL>.

61. MEIT ET AL., *supra* note 50, at 1; Jacobs, *supra* note 18.

In addition to its economic struggles, West Virginia also became a prime location for prescription pain medication because of the prevalence of labor-related injuries.⁶² The state has a significant number of workers in the timber, mining, and manufacturing fields, whose work injuries lead to opioid prescriptions.⁶³ Mining camps in West Virginia, where doctors are likely to give patients a pain medication prescription instead of rest and time off work, have led to the prevalence of opioid addiction in these mining communities.⁶⁴

The flooding of opioids into West Virginia during the opioid crisis is exemplified by a study from the Centers for Disease Control and Prevention finding that, in 2012, West Virginians were prescribed 137.6 opioid pain relievers per 100 people, among the highest in the country.⁶⁵ In addition, the state reported 15.7 long-acting or extended release opioid pain relievers per 100 people and 6.2 high-dose opioid pain relievers per 100 people.⁶⁶ Additionally, in 2015, West Virginia had the highest mortality rate due to drug overdose in the United States at 41.5 deaths per 100,000 citizens.⁶⁷ Despite efforts to monitor opioid prescriptions in West Virginia, the crisis has continued because individuals are now turning to other substances, such as heroin and fentanyl.⁶⁸

2. A Statewide War on Drugs: New Drug Penalties in West Virginia

In December of 2016, West Virginia Senator Joe Manchin called for a new “War on Drugs” in West Virginia.⁶⁹ Senator Manchin’s call for a War on Drugs would ultimately signal an eventful year to come in the Mountain State.⁷⁰ For instance, in 2017, the West Virginia Legislature reacted to the state’s opioid crisis by passing drug laws that imposed heavy penalties aimed at cracking down on those consuming, selling, trafficking,

62. Jacobs, *supra* note 18.

63. *Id.*

64. *See id.*

65. Leonard J. Paulozzi et al., *Vital Signs: Variation Among States in Prescribing Opioid Pain Relievers and Benzodiazepines — United States, 2012*, 63 *MORBIDITY & MORTALITY WKLY. REP.* 563, 564–66 (2014).

66. *Id.*

67. *Drug Overdose Death Data*, CTRS. FOR DISEASE CONTROL & PREVENTION (Dec. 16, 2016), <https://www.cdc.gov/drugoverdose/data/statedeaths.html>. The second highest rate was much lower, at 34.3 overdose deaths per 100,000 in New Hampshire, while the lowest rate was 6.9 overdose deaths per 100,000 in Nebraska. *Id.*

68. *West Virginia distributing 8,000 opioid antidote kits in effort to stem overdoses*, CBS NEWS (Feb. 6, 2017, 4:51 PM), <https://cbsn.ws/2K51010>.

69. *See* Schleifer, *supra* note 5; *see also infra* Section II.C.1 for a discussion of the 1980s War on Drugs.

70. *See* Schleifer, *supra* note 5.

or producing substances that have become increasingly common following the flood of opioids into West Virginia.⁷¹ House Speaker Tim Armstead stated that the new drug laws are aimed at “dealers who prey on our citizens.”⁷²

Senate Bill 219 gives birth to new felony conspiracy crimes.⁷³ The new conspiracy crimes include a two to ten year determinate sentence⁷⁴ for those conspiring to manufacture or deliver Schedules I, II, III, or IV drugs and counterfeit substances.⁷⁵ The Bill also creates three felonies for any person who “willfully conspires with one or more persons to manufacture, deliver, [or] possess with intent to manufacture or deliver” heroin, cocaine or cocaine base, PCP, LSD, and methamphetamine.⁷⁶ The determinate sentences for the three additional felonies are: (1) two to thirty years; (2) two to twenty years; and (3) two to fifteen years.⁷⁷ Interestingly, the new law also states that ownership of all drugs involved in the conspiracy may be attributed to all members.⁷⁸

Moreover, Senate Bill 220 creates two new drug crimes.⁷⁹ The Bill creates a felony for delivering a controlled substance illicitly that, when used, ingested or consumed by itself or with other substances, causes death.⁸⁰ This new felony is punishable by a determinate sentence of three

71. See McElhinny, *supra* note 48.

72. Lacie Pierson, *WV House Focuses on Drug Crime Measures*, HERALD DISPATCH (Mar. 6, 2017), <https://bit.ly/2mfhOd1>. These statements were made before the bills were signed into law. *Id.*

73. S.B. 219, 2017 Reg. Legis. Sess. (W. Va. 2017).

74. A determinate sentence is “definite and not subject to review by a parole board or other agency,” while an indeterminate sentence “has a minimum term but the release date, if any, [is] chosen by a parole board as it periodically reviews the case.” *Determinate Sentence*, CORNELL LEGAL INFO. INST., <http://bit.ly/2Ldl43v> (last visited Nov. 11, 2017).

75. S.B. 219, 2017 Reg. Legis. Sess. (W. Va. 2017). The statute excludes those who conspire to manufacture or deliver marijuana. *Id.* Controlled substances are scheduled I through V in the West Virginia Code, and controls and penalties are assessed depending on a substance’s schedule. See W. VA. CODE ANN. §§ 60A–2–201 to –213 (West 2018). For example, Schedule I substances are those deemed to have “high potential for abuse” and to have “no accepted medical use in treatment in the United States or lack[ing] accepted safety for use in treatment under medical supervision.” W. VA. CODE ANN. § 60A–2–203 (West 2018).

76. S.B. 219, 2017 Reg. Legis. Sess. (W. Va. 2017). For cocaine and cocaine base under the new law, 5 kilograms triggers a 2- to 30-year sentence, 500 grams to 5 kilograms triggers a sentence of 2 to 20 years, while 2 grams to 10 grams triggers a sentence of 2 to 15 years. *Id.* Additionally, for heroin, 1 kilogram triggers a sentence of 2 to 30 years, while 100 grams to 1 kilogram triggers a sentence of 2 to 20 years, and 10 to 100 grams triggers a sentence of 2 to 15 years. *Id.*

77. *Id.*

78. *Id.*

79. S.B. 220, 2017 Reg. Legis. Sess. (W. Va. 2017) (amending W. VA. CODE ANN. § 60-4-414 (West 2018)).

80. *Id.*

to fifteen years.⁸¹ In addition, the Bill creates a felony for knowingly failing to seek medical assistance for a person using a controlled substance if the person overdoses or has an adverse reaction leading to death.⁸² This felony would lead to an indeterminate sentence of one to five years.⁸³

Additionally, House Bill 2083 addresses the exposure of a minor to the manufacture of methamphetamine, increasing the sentencing for such an act.⁸⁴ The sentencing is increased from one to five years to two to ten years, with an unchanged fine of up to \$10,000.⁸⁵ A new felony is also created for those who expose children to the manufacture of methamphetamine who suffer serious bodily injury while at the location, with a three to fifteen year penalty, as well as a potential fine of up to \$25,000.⁸⁶

Further, House Bill 2329 addresses fentanyl, analogs, or derivatives.⁸⁷ The Bill gives birth to a felony for the manufacture, delivery, transport, or possession of fentanyl, by itself or mixed with other controlled substances.⁸⁸ Manufacture, delivery, transport, or possession of less than one gram results in a sentence of two to ten years, one to five grams results in a sentence of three to fifteen years, and five grams or more results in a sentence of four to twenty years.⁸⁹

In addition, House Bill 2579 addresses the transportation of narcotics and other controlled substances into the state, increasing the penalties for such an act.⁹⁰ Interestingly, the Bill also applies to individuals who “*cause* [controlled substances] to be transported.”⁹¹ The penalty for transporting Schedule I or II narcotics remains unchanged at one to fifteen years imprisonment with a possible fine of up to \$25,000.⁹² The one to five year penalty for transportation of other Schedule I, II, or III substances increased to one to ten years imprisonment, with a possible fine of \$15,000.⁹³ The penalty for marijuana is one to five years, with a possible fine of \$10,000 or less, and transporting a Schedule IV drug increased from one to three years to one to five years, with a possible fine that

81. *Id.*

82. *Id.*

83. *Id.*

84. H.B. 2083, 2017 Reg. Legis. Sess. (W. Va. 2017).

85. *Id.*

86. *Id.*

87. H.B. 2329, 2017 Reg. Legis. Sess. (W. Va. 2017).

88. *Id.*

89. *Id.*

90. H.B. 2579, 2017 Reg. Legis. Sess. (W. Va. 2017).

91. *Id.* (emphasis added).

92. *Id.*

93. *Id.*

remains unchanged at \$10,000.⁹⁴ The Bill also increases penalties for the transportation of certain substances.⁹⁵ The substances include heroin, cocaine or cocaine base, PCP, LSD, and methamphetamine.⁹⁶ The sentences are, depending on the quantity transported, two to thirty years, two to twenty years, or two to fifteen years.⁹⁷

West Virginia's politicians reacted to the state's opioid crisis by announcing a "War on Drugs" in December 2016.⁹⁸ As a result, the West Virginia Legislature passed a series of harsh laws aimed at combating the drug problem.⁹⁹ Whether these laws will adequately fight the opioid crisis or create even more problems down the road remains to be seen. However, looking at past prosecution of drug-related offenses is helpful in predicting the success of the new drug laws.

C. *The 1980s Expansion of the War on Drugs: Mandatory Minimums and the Attack on Crack-Cocaine*

The new drug penalties in West Virginia resemble the approach taken in the 1980s as part of that decade's War on Drugs.¹⁰⁰ The harsh approach of the 1980s came about as a result of increased political attention towards drugs and the public hysteria surrounding crack-cocaine.¹⁰¹

1. The Nixon Era War on Drugs

The United States has a history of strict drug policies, which enjoyed popularity in the 1970s following President Richard Nixon's 1969 initiation of the American "War on Drugs."¹⁰² This initiative, along with other actions, led to the passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970.¹⁰³ Title II, called the Controlled

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* For cocaine or cocaine base, transporting 5 kilograms or more triggers a sentence of 2 to 30 years, 500 grams to 5 kilograms triggers a sentence of 2 to 20 years, and 50 to 500 grams triggers a sentence of 2 to 15 years. *Id.* For heroin, transporting 1 kilogram or more triggers a sentence of 2 to 30 years, 100 grams to 1 kilogram triggers a sentence of 2 to 20 years, and 10 to 100 grams triggers a sentence of 2 to 15 years. *Id.*

98. Schleifer, *supra* note 5.

99. McElhinny, *supra* note 48.

100. See VAGINS & MCCURDY, *supra* note 8, at 1–2 (describing the 1980s crack-cocaine hysteria and the changes to federal prison sentencing that occurred as a result).

101. *Id.*

102. Spencer A. Stone, *Federal Drug Sentencing-What Was Congress Smoking? The Uncertain Distinction Between "Cocaine" and "Cocaine Base" in the Anti-Drug Abuse Act of 1986*, 30 W. NEW ENG. L. REV. 297, 309 (2007).

103. Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970); Stone, *supra* note 102, at 310.

Substances Act, created the five drug schedules that are currently employed today.¹⁰⁴ The Controlled Substances Act also created 21 U.S.C. § 841(a)—a statute that made it unlawful to “manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.”¹⁰⁵

2. The 1980s: Mandatory Minimums and the Crack-Cocaine Hysteria

With the election of President Reagan in 1980, the following decade saw an increase in anti-drug policies compared to the decade before.¹⁰⁶ In 1982, for example, President Reagan doubled down on President Nixon’s War on Drugs and declared that “[d]rugs are bad, and we’re going after them. As I’ve said before, we’ve taken down the surrender flag and run up the battle flag. And we’re going to win the war on drugs.”¹⁰⁷ West Virginia Senator Joe Manchin’s rhetoric at the end of 2016 was strikingly similar.¹⁰⁸

In 1984, Congress passed the Sentencing Reform Act with the goal of limiting inequality in federal sentencing.¹⁰⁹ The Sentencing Reform Act sought to limit the sentencing disparities among defendants who committed the same types of crime.¹¹⁰ After Congress passed the Sentencing Reform Act, numerous new mandatory minimum penalties came into existence from 1984 to 1990.¹¹¹ Many of the mandatory minimum penalties that were created targeted drug-related and violent crimes.¹¹²

With these policies in place, the 1980s crack-cocaine hysteria took off, in large part due to media coverage.¹¹³ In 1985, the *New York Times* produced an article in which it became the first major news entity to use the term “crack–cocaine,” and published a front page follow-up two weeks

104. Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242 (1970) (codified as amended in scattered sections of 21 U.S.C.); Stone, *supra* note 102, at 310.

105. Stone, *supra* note 102, at 310 (discussing 21 U.S.C. § 841(a) (2012 & Supp. 2017)).

106. *Id.*

107. Ronald Reagan, *Radio Address to the Nation on Federal Drug Policy*, RONALD REAGAN PRESIDENTIAL LIBRARY & MUSEUM (Oct. 2, 1982), <http://bit.ly/2RNMGhO>; see also Stone, *supra* note 102, at 310.

108. See Schleifer, *supra* note 5 (quoting Sen. Manchin as stating, “[w]e need to declare a war on drugs It’s just been unbelievable”).

109. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984); see also VAGINS & MCCURDY, *supra* note 8, at 1.

110. See Sentencing Reform Act; see also VAGINS & MCCURDY, *supra* note 8, at 1.

111. See VAGINS & MCCURDY, *supra* note 8, at 1.

112. See *id.*

113. See Alyssa L. Beaver, *Getting A Fix on Cocaine Sentencing Policy: Reforming the Sentencing Scheme of the Anti-Drug Abuse Act of 1986*, 78 FORDHAM L. REV. 2531, 2539 (2010).

later describing the risks and addictive qualities of crack–cocaine.¹¹⁴ In 1986, explosive articles from the *New York Times*, *Newsweek*, and other news outlets were published that portrayed a crack–cocaine epidemic in the United States.¹¹⁵

Possibly most inflammatory was the high-profile death of Len Bias (“Bias”), a former University of Maryland basketball star, who overdosed soon after being drafted by the Boston Celtics.¹¹⁶ Rumors spread that Bias died due to smoking crack–cocaine; however, Bias had actually snorted powder cocaine.¹¹⁷ Despite the inaccuracy in reporting that Bias had died from smoking crack–cocaine, Bias’s death amplified the media frenzy surrounding crack–cocaine.¹¹⁸

At that time, media reports about a “crack baby” crisis also flooded the public.¹¹⁹ Crack baby anecdotes fueled the anti-crack–cocaine movement, despite the fact that the “crack baby syndrome” has now been largely disproven.¹²⁰ The media’s largely inaccurate and frenzied depiction of the crack–cocaine crisis influenced the public to view crack–cocaine as far more dangerous than its powder cocaine counterpart.¹²¹

The public hysteria surrounding crack-cocaine led to swift governmental action.¹²² At the state level, new mandatory minimum sentences were employed, statutory maximums were increased, and in certain jurisdictions, a mandatory sentence of life without parole was employed for crack–cocaine offenses.¹²³ Perhaps the most famous reaction, however, was Congress’s passage of the Anti-Drug Abuse Act of 1986.¹²⁴

114. *See id.*

115. *See* Deborah Ahrens, *Methademic: Drug Panic in an Age of Ambivalence*, 37 FLA. ST. U. L. REV. 841, 853 (2010).

116. *See* Beaver, *supra* note 113, at 2539.

117. John Schuppe, *30 Years after Basketball Star Len Bias’ Death, Its Drug War Impact Endures*, NBC NEWS (June 19, 2016, 8:37 AM), <https://nbcnews.to/2QDzmfq>.

118. *See* Beaver, *supra* note 113, at 2539.

119. *See* Ahrens, *supra* note 115, at 854–55 (“Crack cocaine . . . produced headlines and prosecutions related to an alleged ‘crack baby’ epidemic, where, per the media and other sources, crack cocaine caused large numbers of infants to suffer severe, irreversible health problems resulting from maternal use of crack cocaine.”).

120. *See id.*

121. *See id.* at 856 (“[M]any of the health problems found with babies born to mothers who had used crack were attributable to lack of prenatal care, poor nutrition and personal care, and co-existing substance use such as tobacco and alcohol.”).

122. *See id.*

123. *See, e.g.*, MICH. COMP. LAWS ANN. § 333.7403(2)(a)(i) (West 2018) (calling for a mandatory life sentence for individuals with certain quantities of Schedule I and II narcotic drugs); *see also* Harmelin v. Michigan, 601 U.S. 957, 957–58 (1991) (upholding the Michigan law’s constitutionality, which led to a life sentence for possession of over 650 grams of cocaine).

124. Anti-Drug Abuse Act of 1986, Pub. L. No. 99–570, 100 Stat. 3207 (1986).

The Anti-Drug Abuse Act of 1986—drafted, debated, and passed in just over a month—imposed new mandatory minimum sentences.¹²⁵ Famously, the Act put in place the one-hundred-to-one (“100:1”) policy, which required every one gram of crack–cocaine to be sentenced the same as one-hundred grams of powder cocaine.¹²⁶ For example, crimes involving just five grams of crack–cocaine would be sentenced the same as crimes involving 500 grams of powder cocaine.¹²⁷ Crimes involving 500 grams of powder cocaine or five grams of crack–cocaine each were to receive sentences of five or more years.¹²⁸ Those convicted of crimes involving 5,000 grams of powder cocaine, and 50 grams of crack–cocaine, were to receive ten-year sentences.¹²⁹

More recently, the opioid crisis has devastated the United States, but no state has been affected more than West Virginia.¹³⁰ Similar to the 1980s crack–cocaine hysteria and War on Drugs, West Virginia is currently in a state of panic, with politicians calling for a newfound War on Drugs.¹³¹ In response to the opioid crisis, the West Virginia Legislature passed a series of harsh laws increasing mandatory minimum sentences and creating new drug crimes.¹³² These new laws are similar to the harsh drug laws that came about in the 1980s.¹³³ Therefore, the outcomes associated with the 1980s drug laws suggest that the new West Virginia drug laws could do considerable damage.¹³⁴

Therefore, West Virginia should take alternative routes to combat the opioid crisis. First, the state should invest more heavily in its drug court program, focusing on rehabilitation instead of incarceration.¹³⁵ In addition,

125. Beaver, *supra* note 113, at 2454.

126. VAGINS & MCCURDY, *supra* note 8, at 1–2.

127. *Id.* at 2.

128. *Id.*

129. *Id.*

130. See Jacobs, *supra* note 18.

131. See Schleifer, *supra* note 5. However, the War on Drugs, which began under President Nixon, has been largely viewed as a failure. *Id.*

132. See legislation cited *supra* note 6; see also McElhinny, *supra* note 48; Pierson, *supra* note 72.

133. See legislation cited *supra* note 6; see generally VAGINS & MCCURDY, *supra* note 8 (outlining the negative effects of the 1980s crackdown on drugs, mandatory minimum sentences, and the crack-cocaine hysteria).

134. See generally Angela J. Davis, *The Prosecutor’s Ethical Duty to End Mass Incarceration*, 44 HOFSTRA L. REV. 1063 (2016) (calling for an end to mass incarceration and analyzing the negative effects of mandatory minimum sentences); see also VAGINS & MCCURDY, *supra* note 8, at 1–2 (discussing negative outcomes resulting from 1980s drug policy).

135. See generally RYAN S. KING & JILL PASQUARELLA, THE SENTENCING PROJECT, DRUG COURTS: A REVIEW OF THE EVIDENCE (2009), <https://bit.ly/2PTxD8M> (discussing the history and positive results of drug courts in the United States); see also LUKE YINGLING, W. VA. CTR. ON BUDGET & POLICY, A LOOK AT DRUG COURTS IN WEST VIRGINIA (2017),

the state must stimulate and diversify its struggling economy and put West Virginians back to work.¹³⁶ Only when these measures have been taken will West Virginians begin to see a recession of the state's current opioid crisis.¹³⁷

III. ANALYSIS

The new drug laws in West Virginia largely mirror the 1980s mandatory minimum sentences.¹³⁸ As with the laws passed in the 1980s aimed at fighting the perceived crack-cocaine crisis, the new West Virginia drug laws aim to fight the opioid crisis by creating new felonies and increasing mandatory minimum sentences.¹³⁹ The outcomes associated with the 1980s drug policy therefore must be analyzed in assessing whether West Virginia's new laws will be successful. Ultimately, this Comment concludes that the new laws will do damage, and West Virginia should instead bolster its drug courts, while also improving the economy and putting West Virginians back to work.¹⁴⁰

A. *Analyzing the 1980s Crackdown: Did Mandatory Minimums Work?*

Researchers have consistently found that the drug-sentencing policies of the 1980s led to negative systemic outcomes.¹⁴¹ For example, the harsh

<https://bit.ly/2Prg9Bi> (discussing the positive effects of drug courts in West Virginia, as compared to traditional prison sentencing models).

136. Jacobs, *supra* note 18 (noting that unemployment is one of the key causes of the West Virginia opioid crisis); *see also* Cohn, *supra* note 52 (discussing West Virginia's struggling economy, which is currently among the worst in the United States). Initiatives like ScaleUp West Virginia are seeking to diversify West Virginia's stagnant economy by providing support to entrepreneurs and small businesses. John Dahlia, *TechConnect's ScaleUp Boosts Economy, One Innovation at a Time*, EXPONENT TELEGRAM (Mar. 6, 2017), <https://bit.ly/2OKr83D>.

137. Jacobs, *supra* note 18; Cohn, *supra* note 52; Dahlia, *supra* note 136; YINGLING, *supra* note 135.

138. *See* legislation cited *supra* note 6.

139. *See* legislation cited *supra* note 6.

140. *See* VAGINS & MCCURDY, *supra* note 8, at 1–2 (discussing negative outcomes associated with 1980s drug policy); YINGLING, *supra* note 135 (analyzing the positive effects drug courts have had in West Virginia, and the need to increase access to drug courts throughout the state); Jacobs, *supra* note 18 (discussing the negative economic climate in West Virginia, and its effects on the opioid crisis in the state); Dahlia, *supra* note 136 (highlighting ScaleUp West Virginia, an initiative that helps support innovative entrepreneurs and small businesses in West Virginia).

141. *See* Davis, *supra* note 134, at 1063 (calling for an end to American mass incarceration and analyzing the negative effects of mandatory minimum sentences); VAGINS & MCCURDY, *supra* note 8, at 1–2 (discussing the negative effects of the 1980s drug laws, especially on African-Americans and women).

sentencing laws of the 1980s led to American mass incarceration.¹⁴² The impact of the 1980s drug laws on the American prison population is astonishing, as the prison population has increased approximately 800% since 1980.¹⁴³ Crack-cocaine laws, where even first-time offenders with small amounts received a five-year sentence, largely contributed to this problem.¹⁴⁴

In the United States today, 2.3 million people are incarcerated in state or federal prisons, and almost half a million people are incarcerated for drug-related offenses.¹⁴⁵ These numbers are not the worldwide norm.¹⁴⁶ The United States has, by far, the highest prison population in the world.¹⁴⁷ In fact, studies show that the United States imprisons almost 25% of the world's prison population.¹⁴⁸

In addition to causing mass incarceration, the 1980s drug laws also brought about considerable racial discrepancies.¹⁴⁹ Critics have gone as far as calling the War on Drugs “a war on African-Americans.”¹⁵⁰ The 100:1 policy for crack-cocaine has disproportionately affected the African-American community.¹⁵¹ For example, data show that African-Americans make up 15% of American drug users, yet account for 74% of those

142. See Davis, *supra* note 134, at 1065–70 (stating that the harsh mandatory minimum sentences of the 1980s led to mass incarceration in the United States); see also Matthew C. Lamb, *A Return to Rehabilitation: Mandatory Minimum Sentencing in an Era of Mass Incarceration*, 41 J. LEGIS. 126, 127–28 (2015) (“Fortunately, no one seriously debates the damaging effects associated with the penal policy of the War on Drugs. After the proliferation of these policies, most notably mandatory minimum sentences, the prison population skyrocketed.”).

143. Mortimer B. Zuckerman, *Get a Little Less Tough on Crime*, U.S. NEWS & WORLD REP. (May 9, 2014, 1:00 PM), <https://bit.ly/2rmIqkx>. Meanwhile, the American population as a whole has increased by only a third. *Id.*

144. *Id.*

145. Peter Wagner & Bernadette Rabuy, *Mass Incarceration: The Whole Pie 2017*, PRISON POLICY INITIATIVE (Mar. 14, 2017), <http://bit.ly/2EktKV7>.

146. See *Highest to Lowest*, WORLD PRISON BRIEF, <https://bit.ly/2RTsSjt> (last visited Dec. 9, 2018) (providing country-by-country statistics regarding the worldwide prison population). This study reports that Brazil has the second highest prison population, with less than 700,000 total inmates. *Id.* This number is less than one third of the United States prison population. *Id.*

147. See *id.*

148. *Mass Incarceration*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/issues/smart-justice/mass-incarceration> (last visited Dec. 9, 2018) [hereinafter ACLU, *Mass Incarceration*].

149. See generally VAGINS & MCCURDY, *supra* note 8 (criticizing mandatory minimum sentences, the 100:1 policy, and noting the effects of such policies on the African-American community).

150. See Ahrens, *supra* note 115, at 858.

151. See VAGINS & MCCURDY, *supra* note 8, at i.

imprisoned for drug offenses.¹⁵² Additionally, in 1986, before the passage of the Anti-Drug Abuse Act, average drug sentences for African-Americans were 11% higher than those for Caucasians; however, just four years later, that same number rose to 49%.¹⁵³

The mass incarceration and racial discrepancies experienced nationwide as a result of stricter drug laws provide a cautionary tale for West Virginia.¹⁵⁴ West Virginia is less diverse than the United States as a whole, but harsh penalties could lead to negative discrepancies for minorities and those of a lower socioeconomic status.

The 1980s drug laws, like the West Virginia drug laws, were passed with the aim of bringing down heavily involved drug traffickers and dealers.¹⁵⁵ However, the 1980s penalties led to minor offenders serving long sentences.¹⁵⁶ Data show that “73% of crack defendants have only low-level involvement in drug activity, such as street-level dealers, couriers, or lookouts.”¹⁵⁷ According to the Pew Research Center, prisoners sentenced for minor roles make up the largest share of federal drug offenders.¹⁵⁸ These statistics are concerning for West Virginia, where lawmakers claim the new penalties will attack out-of-state, large scale trafficking.¹⁵⁹ The West Virginia laws, similar to those of the 1980s, could lead to low-level dealers and users being incarcerated for long periods of time.¹⁶⁰

152. *Id.* (“African Americans make up 15% of the country’s drug users, yet they comprise 37% of those arrested for drug violations, 59% of those convicted, and 74% of those sentenced to prison for a drug offense.”).

153. *Id.* at ii.

154. *See id.*; *see also* Lamb, *supra* note 142, at 128 (“Through its steadfast commitment to the mandatory-minimum model, the War on Drugs inflicted steep fiscal and social costs on the American population.”).

155. *See Federal Drug Sentencing Laws Bring High Cost, Low Return*, PEW CHARITABLE TRUSTS (Aug. 27, 2015), <https://bit.ly/1WUBHky>; *see also* Pierson, *supra* note 72 (discussing the West Virginia Legislature’s goals of cracking down on drug dealers with the new drug laws); Linda Harris, *New Laws for Stiffer Penalties, Centralized Reporting Aimed at Addiction Epidemic*, STATE JOURNAL (June 26, 2017), <http://bit.ly/2L7nFfh> (highlighting the new drug conspiracy penalties, aimed at stopping Detroit dealers from bringing illicit drugs into West Virginia).

156. PEW CHARITABLE TRUSTS, *supra* note 155 (“Federal sentencing laws that were designed with serious traffickers in mind have resulted in lengthy imprisonment of offenders who played relatively minor roles.”).

157. VAGINS & MCCURDY, *supra* note 8, at ii.

158. *See* PEW CHARITABLE TRUSTS, *supra* note 155.

159. *See* Harris, *supra* note 155; *see also* Pierson, *supra* note 72 (discussing the West Virginia Legislature’s goals of cracking down on drug dealers with the new 2017 drug laws).

160. *See* PEW CHARITABLE TRUSTS, *supra* note 155.

Finally, the 1980s mandatory minimum sentences did little to curtail drug use in the United States.¹⁶¹ Recidivism rates in the United States are high.¹⁶² Close to a third of drug offenders who leave federal prison commit crimes again, or violate conditions of their release.¹⁶³ This statistic has not changed significantly in decades.¹⁶⁴ Research shows that increased sentences do not lower recidivism rates, and that decreased sentences do not lead to increased rates of recidivism.¹⁶⁵ Increased incarceration rates have also led to a surge in federal prison spending, while state prison spending has also risen dramatically.¹⁶⁶

In addition, overall access to illegal drugs has not significantly changed as a result of increased sentencing.¹⁶⁷ In fact, drug prices have declined and drug use has increased.¹⁶⁸ The trend of decreased prices and increased demand shows that the 1980s drug laws failed to limit the supply or demand of illicit drugs.¹⁶⁹

The 1980s drug statutes were clearly unsuccessful in achieving the goals of fighting the drug trade and ultimately caused considerable systemic problems.¹⁷⁰ West Virginia should reconsider adopting outdated policies that have caused so many negative outcomes.¹⁷¹ The new drug laws in West Virginia have similar goals to those of the 1980s and prescribe similar measures to reach these goals.¹⁷² Unfortunately, the

161. *See id.*

162. *See id.*

163. *See id.*

164. *See id.*

165. *Id.* (“[Mandatory minimums] have failed to reduce recidivism.”).

166. *See id.* (stating that 1980 federal prison spending increased from \$970 million to over \$6.7 billion in inflation-adjusted dollars from 1980 to 2013); *see also* STEPHANIE STULLICH ET AL., U.S. DEP’T. OF EDUC., STATE AND LOCAL EXPENDITURES ON CORRECTION AND EDUCATION 1 (2016), <http://bit.ly/2G7vHFP> (“From 1979–80 to 2012–13, public PK–12 expenditures increased by 107 percent (from \$258 to \$534 billion), while total state and local corrections expenditures increased by 324 percent (from \$17 to \$71 billion)—triple the rate of increase in education spending.”).

167. *See* PEW CHARITABLE TRUSTS, *supra* note 155.

168. *See id.* (“[T]he estimated retail prices of cocaine, heroin, and methamphetamine all decreased from 1981 to 2012, even as the purity of the drugs increased . . . [Also,] [t]he share of Americans age 12 and older who said in a national survey that they had used an illicit drug during the previous month increased from 6.7 percent in 1990 to 9.2 percent—or nearly 24 million people—in 2012.”).

169. *See id.*

170. *See* PEW CHARITABLE TRUSTS, *supra* note 155; VAGINS & MCCURDY, *supra* note 8, at 1–2; ACLU, *Mass Incarceration*, *supra* note 148; Wagner & Rabuy, *supra* note 145.

171. *See* legislation cited *supra* note 6; *see also* PEW CHARITABLE TRUSTS, *supra* note 155 (presenting many of the failures of the 1980s drug policy).

172. *Compare* Anti-Drug Abuse Act of 1986, Pub. L. No. 99–570, 100 Stat. 3207 (1986), *with* legislation cited *supra* note 6. *See generally* VAGINS & MCCURDY, *supra* note 8 (describing the nature of the 1980s mandatory minimum sentences and drug policy);

current economic situation in West Virginia suggests that severe drug laws could lead to similarly damaging results.

B. *A Viable Alternative to Increased Mandatory Minimums:
Increased Investment in Drug Courts*

West Virginia should invest more in its drug court program, as opposed to adopting outdated and harsh drug laws. Drug courts, an alternative to traditional sentencing models, have achieved many positive results that would benefit West Virginia.¹⁷³ While there are over 3,000 drug courts in the United States, West Virginia has adult drug courts serving only 46 of 55 counties, and juvenile drug courts serving only 23 of 55 counties.¹⁷⁴

Drug courts were created to respond to the poor outcomes associated with traditional criminal sentencing.¹⁷⁵ This alternative system is focused on “treating offenders with a history of drug abuse for their addiction, while simultaneously ensuring supervision, and sanctions when needed, from the courts.”¹⁷⁶ The drug court framework includes screening and assessment, judicial interaction, monitoring and supervision, sanctions and incentives, and treatment and rehabilitation services.¹⁷⁷ The broad goal of drug court programs is to decrease drug demand by limiting recidivism and encouraging treatment.¹⁷⁸ These programs incorporate considerable judicial discretion and frequent interaction between the offender and the judge.¹⁷⁹

Harris, *supra* note 155 (discussing the new laws’ aims to curb traffickers and dealers); Pierson, *supra* note 72 (providing quotes regarding the West Virginia Legislature’s goal of curbing dealers).

173. See KING & PASQUARELLA, *supra* note 135, at 19; see also David Festinger & Karen Leggett-Dugosh, *Commentary: Drug Courts’ Positive Effects on Families and Society*, PARTNERSHIP FOR DRUG-FREE KIDS (May 17, 2013), <https://bit.ly/2QFYiDb> (discussing the positive effects of drug courts on society and on families in particular).

174. See *Adult Drug Courts*, W. VA. JUDICIARY [hereinafter *W. Va. Adult Drug Courts*], <https://bit.ly/2qSL5vD> (last visited Dec. 9, 2018); see also *Juvenile Drug Courts*, W. VA. JUDICIARY [hereinafter *W. Va. Juvenile Drug Courts*], <https://bit.ly/2DkKLNt> (last visited Dec. 9, 2018); *Drug Courts*, NAT’L INST. OF JUSTICE, <https://bit.ly/2pGAvtA> (last updated Aug. 23, 2018) (reporting that in the United States, as of 2015, there were 1,558 adult drug courts, and 3,142 total drug courts). While numbers may have increased overall, a 2017 study found that West Virginia had only 31 drug courts serving 46 counties. YINGLING, *supra* note 135.

175. See KING & PASQUARELLA, *supra* note 135, at 1.

176. *Id.*

177. See generally NAT’L INST. OF JUSTICE, *supra* note 174.

178. See KING & PASQUARELLA, *supra* note 135, at 1.

179. See *id.* at 4, 12.

There are numerous benefits associated with drug courts, including decreased recidivism rates.¹⁸⁰ One study of seventy-six drug courts noted a 10% decrease in rearrest.¹⁸¹ In addition, six New York drug courts experienced a 29% reduction in rearrest over the three years following the offenders' original arrest.¹⁸² In addition to decreased recidivism rates, drug courts save money.¹⁸³ The average annual cost of incarceration is about \$23,000 per person, while the average annual cost of drug court is about \$4,300 per person.¹⁸⁴ These numbers only reflect the direct cost savings, and not overall savings associated with lower recidivism rates.

In 2005, West Virginia followed the national trend and opened its first drug court in the Northern Panhandle.¹⁸⁵ Since 2005, drug courts have sprouted up around the state.¹⁸⁶ Presently, forty-six of West Virginia's fifty-five counties have adult drug courts, while only twenty-three counties have juvenile drug courts.¹⁸⁷ As of January 2017, thirty-one total drug courts served forty-six counties in the state.¹⁸⁸ The slim number of juvenile drug courts in West Virginia is alarming because each day 7,000 West Virginia juveniles are under court-ordered supervision.¹⁸⁹ In addition, "[a]nnual West Virginia juvenile probation reports demonstrate that controlled substance violations are the third largest category of offenses charged."¹⁹⁰

The cost savings West Virginia has experienced as a result of drug courts has been considerable.¹⁹¹ Data released in 2013 reflect the following with regard to West Virginia:

[A] year stint in prison cost[s] \$24,000, the same period of time in jail cost[s] \$18,250, and a year in drug court cost[s] \$7,100. Considering the cost of jail as of 2013, if the 1,002 [West Virginia] drug court

180. *See id.* at 5–9.

181. *Id.* at 5 (citing Deborah K. Shaffer, *Looking Inside the Black Box of Drug Courts: A Meta-Analytic Review*, 28 JUST. Q. 493 (2011)).

182. *Id.* at 6 (citing MICHAEL REMPEL ET AL., CTR. FOR CT. INNOVATION, *THE NEW YORK STATE ADULT DRUG COURT EVALUATION: POLICIES, PARTICIPANTS, AND IMPACTS* (2003)).

183. *See* YINGLING, *supra* note 135.

184. *See* KING & PASQUARELLA, *supra* note 135, at 8.

185. *See* YINGLING, *supra* note 135.

186. *See id.*

187. *W. Va. Adult Drug Courts*, *supra* note 174; *see also W. Va. Juvenile Drug Courts*, *supra* note 174.

188. *See* YINGLING, *supra* note 135.

189. *W. Va. Juvenile Drug Courts*, *supra* note 174; *see also* NAT'L INST. OF JUSTICE, *supra* note 174 (reporting that, as of 2015, there were 409 juvenile drug courts in the United States).

190. *Id.*

191. *See* YINGLING, *supra* note 135.

graduates had served a year sentence in jail rather than an equal term in drug court, the cost savings would total more than \$11 million.¹⁹²

Additionally, drug courts have improved the state's issue with recidivism.¹⁹³ According to former West Virginia Supreme Court of Appeals Justice Brent Benjamin, data show that just 9% of adults and 14% of minors who graduate the drug court program recidivate.¹⁹⁴ When compared to the federal prison recidivism rates of almost one third, the positive impact drug court programs have had in West Virginia is clear.¹⁹⁵

Despite the positive effects of drug courts in West Virginia, many issues exist that must be addressed.¹⁹⁶ First, nine of the state's fifty-five counties do not currently have an adult drug court.¹⁹⁷ In addition, juvenile drug courts serve only twenty-three counties.¹⁹⁸ Ensuring that all fifty-five counties have a drug court for adults *and* minors is the first step in continuing the fight against opioid addiction.

In addition, West Virginia needs to increase overall funding for its drug courts.¹⁹⁹ West Virginia is ground zero for opioid addiction and deserves a drug court system that can adequately reach its people.²⁰⁰ The U.S. Department of Justice awarded West Virginia a 1.4 million dollar grant to support its drug courts and Veterans Treatment Courts.²⁰¹ This grant is encouraging, but additional funding is necessary to cover a state that is in desperate need of solutions.

192. *Id.* Yet, this number does not reflect long-term, systemic savings created by drug courts and their overall reduction in recidivism. *Id.*

193. See Brent D. Benjamin, *A Year of Progress for West Virginia Courts*, W. VA. LAWYER, Apr.–June 2013, at 14, 15.

194. *Id.*

195. See PEW CHARITABLE TRUSTS, *supra* note 155 (“Of the more than 20,000 federal drug offenders who concluded periods of post-release community supervision in 2012 . . . 29 percent either committed new crimes or violated the conditions of their release.”).

196. See YINGLING, *supra* note 135 (discussing the need for more drug courts, more data compilation, and more access for minors to drug court programs); see also *W. Va. Adult Drug Courts*, *supra* note 174 (showing access to adult drug courts in 46 of 55 West Virginia counties); *W. Va. Juvenile Drug Courts*, *supra* note 174 (showing that only 23 of 55 counties in West Virginia have access to juvenile drug courts).

197. See *West Virginia Adult Drug Court Map*, W. VA. JUDICIARY, <http://bit.ly/2SxCjyO> (last visited Dec. 9, 2018).

198. See *W. Va. Juvenile Drug Courts*, *supra* note 174.

199. See YINGLING, *supra* note 135.

200. See *id.*; see also Jacobs, *supra* note 18 (discussing West Virginia's grim struggles with the opioid crisis); Kemsley, *supra* note 57 (analyzing the opioid crisis in Appalachia, and some causes, including unemployment, work-related injuries, and low education levels); Paulozzi et al., *supra* note 65, at 564–66 (providing data showing that West Virginia has been flooded with opioids).

201. See Alex Wiederspiel, *West Virginia Supreme Court of Appeals receives largest individual federal award to support drug court programs*, W. VA. METRONews (Sept. 22, 2017, 5:17 PM), <https://bit.ly/2FnrJZD>.

In light of the positive trends associated with drug courts, the West Virginia Legislature should increase the West Virginia Supreme Court of Appeals' funding for drug court programs.²⁰² West Virginia needs a drug court system that is adequately funded and present in all fifty-five counties for adults and juveniles.²⁰³ Giving more West Virginians access to drug courts would greatly aid the state's fight against the opioid crisis.

C. *West Virginia Must Stimulate Its Economy and Put People Back to Work to Reduce the Opioid Problem*

As mentioned above, West Virginia's economy has suffered greatly, and West Virginia's employment rate is currently ranked forty-first out of fifty states.²⁰⁴ In 2012, the National Survey on Drug Use and Health found a link between unemployment and substance abuse.²⁰⁵ The study discovered that one in six unemployed individuals has a substance abuse problem, almost double the rate of working individuals.²⁰⁶ A separate study also suggests that lack of employment likely contributes to substance abuse.²⁰⁷

West Virginia can start to fight the opioid problem by diversifying its economy and breaking away from its reliance on coal.²⁰⁸ Investment in innovative businesses is one solution to this issue. ScaleUp West Virginia, launched in 2015, exemplifies such a solution.²⁰⁹ ScaleUp West Virginia provides assistance and support to entrepreneurs in the Mountain State.²¹⁰ This small operation received \$500,000 from the United States Economic

202. See *supra* Section III.B for a discussion of the positive trends associated with drug courts.

203. See *W. Va. Adult Drug Courts*, *supra* note 174 (providing data showing that adult drug courts serving only 46 of 55 counties); see also *W. Va. Juvenile Drug Courts*, *supra* note 174 (providing data showing that juvenile drug courts serve only 23 of 55 counties).

204. *Local Area Unemployment Statistics*, BUREAU OF LABOR STATISTICS, <https://www.bls.gov/web/laus/laumstrk.htm> (last visited Dec. 9, 2018). The state's unemployment rate was even higher in 2016, trailing only Alaska. Jacobs, *supra* note 18.

205. See Annalyn Kurtz, *1 in 6 unemployed are substance abusers*, CNN MONEY (Nov. 26, 2013, 8:12 AM), <https://cnmmon.ie/2VL5YH8> (reporting on results generated by a 2012 study that show a link between unemployment and drug abuse).

206. *Id.*

207. See Alejandro Badel & Brian Greaney, *Exploring the Link Between Drug Use and Job Status in the U.S.*, REG'L ECONOMIST (Fed. Reserve Bank of St. Louis, July 2013), <https://bit.ly/1cq703N>.

208. See *West Virginia Sticks With Coal Despite Trends in Favor of Clean Energy*, ENVTL. & ENERGY STUDY INST. (Feb. 12, 2015), <https://bit.ly/2FuuCrE> (discussing West Virginia's continued reliance on coal despite the industry's decline since the 1980s).

209. See Dahlia, *supra* note 136.

210. See *id.*

Development Administration, and West Virginia added \$210,000 in funding.²¹¹

ScaleUp West Virginia is stimulating business “through programs designed to encourage entrepreneurship, help startups find the assistance needed to successfully launch, and support existing businesses in devising strategies for growing and adapting to new markets.”²¹² In March 2017, Executive Director Ann Barth stated that ScaleUp West Virginia has already created or retained forty jobs, and helped create twelve new companies.²¹³

This program alone is not enough, but it is one example of how the state and federal government have recognized the need to create innovative new businesses in West Virginia.²¹⁴ Initiatives like ScaleUp West Virginia, but on a larger scale, could assuage the opioid crisis by putting West Virginians back to work.

In addition, communities are slowly implementing retraining programs to help former miners find employment during the modern energy transition.²¹⁵ One study, conducted in rural West Virginia, found that former miners have become receptive to retraining to become electricity linemen, solar installers, wind installers, truck drivers, tourism employees, and construction workers.²¹⁶ Although this movement is encouraging, former miners often are required to travel long distances and spend time away from home in order to seek these opportunities.²¹⁷ More work must be done to provide mining communities with retraining and employment opportunities close to home.²¹⁸ Providing former miners with meaningful career opportunities close to home will help fight West Virginia’s opioid crisis.²¹⁹

D. Recommendation

West Virginia should repeal its attempt to combat the opioid crisis through strict drug laws.²²⁰ These harsh laws will likely produce the same

211. *Id.*

212. *Id.*

213. *See id.*

214. *See id.*

215. *See* Ken Ward, *Study finds movement to diversify economy of WV coalfields*, CHARLESTON GAZETTE-MAIL (Oct. 11, 2017), <https://bit.ly/2T5RQqy> (reporting on Sanya Carley et al., *Adaptation, culture, and the energy transition in American coal country*, 37 J. ENERGY RES. & SOC. SCI. 133 (2018)).

216. *See id.*

217. *See id.*

218. *See id.*

219. *See id.*

220. *See supra* Section III.A, which analyzes the results of the similar drug laws of the 1980s that resulted from that decade’s War on Drugs and crack-cocaine hysteria.

systemic problems that arose as a result of the nation's 1980s attempt to combat crack-cocaine.²²¹ Instead, West Virginia should focus on bolstering its drug court program.²²² Currently, nine counties are not served by an adult drug court, and thirty-two counties are not served by a juvenile drug court.²²³ However, drug courts are more cost-effective than incarceration and deter recidivism.²²⁴ In addition, West Virginia needs to diversify its economy to decrease reliance on coal extraction.²²⁵ Diversifying the struggling economy and putting West Virginians back to work is necessary to fight the vicious opioid crisis.²²⁶

IV. CONCLUSION

The United States has been overwhelmed by the modern opioid crisis, which was created by shifting views of pain management and aggressive marketing of prescription pain medication in the 1990s.²²⁷ However, no state has been affected by opioids more than West Virginia.²²⁸ The Mountain State's unemployment, labor-related injuries, and poor educational outcomes have made it especially vulnerable to the crisis.²²⁹ In response, the West Virginia Legislature passed a series of harsh drug laws in 2017 aimed at combating the opioid crisis.²³⁰ These laws created new drug felonies and increased mandatory minimum sentences.²³¹

Unfortunately, these laws will likely lead to more problems for West Virginia.²³² The 1980s War on Drugs saw similar laws passed in an effort to fight illicit drugs, particularly crack-cocaine.²³³ However, these harsh laws led to mass incarceration, racial discrepancies, and the incarceration of small-time offenders.²³⁴ In addition, illicit drug prices have dropped and illicit drug demand has risen since the 1980s laws went into effect.²³⁵ These results suggest that harsh drug penalties and mandatory minimum sentences are not the answer for West Virginia.²³⁶

221. *See supra* Section III.A.

222. *See supra* Section III.B.

223. *See supra* Section III.B.

224. *See supra* Section III.B.

225. *See supra* Section III.C.

226. *See supra* Section III.C.

227. *See supra* Section II.A.

228. *See supra* Section II.B.1.

229. *See supra* Section II.B.1.

230. *See supra* Section II.B.2.

231. *See supra* Section II.B.2.

232. *See supra* Section III.A.

233. *See supra* Section II.C.2.

234. *See supra* Section III.A.

235. *See supra* Section III.A.

236. *See supra* Section III.A.

Instead, the Mountain State should invest more heavily in its drug court program.²³⁷ Drug courts, with their rehabilitative focus, are cost-effective and lead to lower recidivism rates.²³⁸ Unfortunately, nine counties currently have no adult drug courts, and thirty-two counties currently have no juvenile drug court.²³⁹ Increased access to drug courts in West Virginia is essential.²⁴⁰ In addition, the state must diversify and stimulate its coal-reliant economy.²⁴¹ Putting West Virginians back to work will help the state fight the opioid crisis.²⁴²

237. *See supra* Section III.B.

238. *See supra* Section III.B.

239. *See supra* Section III.B.

240. *See supra* Section III.B.

241. *See supra* Section III.C.

242. *See supra* Section III.C.