

**Alternative Courts and the Right to Self-Care:
The Criminal Philosophy Behind a New Type of Sentencing**

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Abstract

Alternative courts, also known as problem-solving courts, sentence certain offenders to supervised treatment and rehabilitation instead of incarceration in order to break the cycle of arrest, imprisonment, and re-arrest. This paper describes how alternative courts developed, beginning with the first drug court in Dade County, Florida, in 1989; the main types, including drug, mental health, veterans', homeless, and community courts; and how offenders qualify for them. It weighs criticisms of alternative courts, including judicial discretion, the guilty plea often required for admission, and less supervision than in prison, and argues that ongoing program evaluation can address them. It then relates alternative courts to two philosophies of punishment. They resemble the therapy system described by Herbert Morris, who rejected it in favor of a right to be punished, and they fit parts of Jeremy Bentham's deterrence theory, especially the celerity of punishment. The paper concludes that alternative courts offer a more humane, correction-based sentence for offenders whose crimes stem from limiting factors such as drug addiction or mental illness, but that they should remain one option alongside incarceration for offenders who endanger the public.

Keywords: alternative courts, problem-solving courts, drug courts, sentencing, deterrence theory, philosophy of punishment

Alternative Courts and the Right to Self-Care: The Criminal Philosophy Behind a New Type of Sentencing

Alternative courts, also known as problem-solving courts, are a new form of sentencing designed to address the root causes of the cycle of arrest, imprisonment, and re-arrest. When individuals offend and reoffend, research shows that alternative courts that impose certain punishments and rehabilitation requirements are more effective in breaking the cycle of offending than repeated incarceration (Hamilton, 2010; Wilson et al., 2006). This paper describes the fundamentals of alternative courts: why they are important, why people are placed in them, how they relate to the theories of punishment of the philosophers Herbert Morris and Jeremy Bentham, and where they fit in the criminal justice system. Alternative courts are a great way to keep individuals with certain characteristics from ending up with an inconsistent sentence in a criminal court, and they provide rehabilitation and self-reflection under more humane conditions.

History and Purpose of Alternative Courts

Alternative courts emerged in the late 1980s and spread during the 1990s. Drug courts, the first type, were designed to combine drug treatment with court monitoring so that offenders could stay out of prison and avoid reoffending (National Institute of Justice & Bureau of Justice Assistance, 2009). The very first alternative court was a drug court introduced in Dade County, Florida, in 1989 (Miller et al., 2020). It came at the height of the crack cocaine epidemic in Miami and proved incredibly successful in rehabilitating offenders and preventing re-incarceration. The popularity of alternative courts grew slowly but extensively, and drug courts now operate in all 50 states (Office of National Drug Control Policy, 2011). There are many types of alternative courts; the most popular include drug courts, mental health courts, veterans' courts, homeless courts, and community courts.

Consider a drug court. An individual is arrested on illegal drug use charges for the third time. Instead of sentencing this individual to incarceration for the third time, the judge sentences the individual to drug court, where they must complete specific requirements to fulfill their sentence. These requirements could include attending a rehabilitation center or other programs, checking in with a probation officer, and completing random drug tests (Webster, 2015). Most people with strong, long-standing addictions would usually not enter a rehabilitation center voluntarily. Drug courts make the initial placement involuntary but promote voluntary involvement from then on. The offender in this example can therefore avoid repeated incarceration by going to a rehabilitation center, where they will have a voluntary chance for self-reflection and re-evaluation. The same setup applies to veterans' courts, in which veterans with disabilities who commit crimes against themselves or others receive care suited to the needs of a veteran, which may differ from the needs of other citizens. Many U.S. veterans live with mental illnesses such as posttraumatic stress disorder (PTSD), bipolar disorder, anger disorders, and depression. This makes them vulnerable to committing crimes, especially if they become jobless and homeless, as about 37,000 veterans were (U.S. Department of Veterans Affairs, n.d.). Instead of forcing individuals to adapt to a system of incarceration, alternative courts are meant to adapt to individuals and their special circumstances in order to help them most effectively.

Alternative courts offer a helpful solution for individuals with certain characteristics who harm themselves, others, or both. An alternative court is still a sentence from criminal court proceedings, but whereas most proceedings end in a sentence of incarceration, individuals with specific characteristics are directed to a different rehabilitation process (assuming prison is also meant to rehabilitate, which it currently does not). A sentence of incarceration is nowhere near as helpful as an alternative court for an individual with PTSD, hence the veterans' courts described

above. Likewise, incarceration for a person who repeatedly uses drugs is far less helpful than a drug court that requires the individual to go through self-evaluating rehabilitation. As a criminal court sentence, alternative courts are much more correction-based than incarceration because they allow individuals to go through a process of self-inflicted corrective punishment (Berman et al., 2005). This type of punishment requires individuals to evaluate themselves and their actions, which is also the first step in changing those factors.

Eligibility and Criticisms

Critics point to potential downsides of alternative courts, including how much discretion they involve. It can be hard to be sentenced to an alternative court even when the offender would benefit from it, while for others it may be too easy or undeserved. A system of policies has been created to prevent both problems. Admission to an alternative court comes with required guidelines that the offender must meet, which depend on the court they should (or should not) attend (Miller et al., 2020). For example, admission to a mental health court requires the offender to undergo a mental health evaluation to determine whether they have a disorder recognized in the DSM-5. Examples range from antisocial personality disorder to anxiety and substance use disorders (American Psychiatric Association, 2020). If the evaluation finds one or more DSM-5 disorders, this information is passed to the judge in the criminal court, who has the option to sentence the offender to a mental health court. The same process applies, under different requirements and circumstances, to other alternative courts. The policies set for each alternative court are important in determining who may participate in a second-chance opportunity, one that is much more effective in reducing recidivism than incarceration.

While alternative courts are an excellent tool for reducing mass incarceration and recidivism, the system is fallible. Alternative courts are relatively new to the criminal justice

system and should be evaluated constantly to determine the best possible outcomes for offenders. Critics argue that their discretion is unnecessary and may often let offenders off too easily. However, every human system is fallible, so discretionary standards may not be the strongest argument against alternative courts. Other factors need to be examined when evaluating the effectiveness of alternative courts, including supervision standards, entry into the program, and personal rights regarding the trial. To be admitted to many alternative courts, the defendant must plead guilty in a criminal court, which puts a permanent mark on their record when they might otherwise have avoided a conviction (Webster, 2015). In effect, the defendant trades their innocence for help, giving up the right to a fair trial because pleading guilty is often the only way to be admitted. Entry into a program is another factor, because a person can usually be directed to an alternative court only after committing a crime and being arrested and convicted.

Although many programs exist to help people such as those with drug addictions and veterans, experience shows that most would not usually seek help voluntarily. In addition, alternative courts provide much less supervision than prison would. This can benefit some individuals, because it teaches self-awareness and decision-making, two skills that were not necessarily present in the individual in the first place, which is why they are in an alternative court. It can be argued that stronger guidelines, such as stricter probation requirements, could be put in place to make sure that individuals stay on course. But these are small potential downsides that can be fixed or regulated by using simple program evaluation techniques. As long as alternative courts continue to be evaluated as an intervention program in the criminal justice system, their effectiveness should continue to rise in the years to come.

Philosophies of Punishment

Herbert Morris and the Right to Punishment

Alternative courts are consistent with some of Herbert Morris's ideas about punishment, but they are not what Morris would consider fair to the offender. Morris received his Doctor of Philosophy from Oxford in 1956 and became a professor of philosophy and law at the University of California, Los Angeles (UCLA). He argues for the right to punishment by contrasting two systems of social control: the punishment system and the therapy system (Green, 2007; Sverdlik, 2012). The punishment system holds people responsible for their actions by punishing them for doing wrong. It emphasizes responsibility, treating the criminal's act and the punishment that answers it as a just act and a just response by the social system. The therapy system is different: its priority is to change and help those who hurt others. Helping the individual change matters more than punishing them for what they have done; instead of giving the individual the right to be punished for an action, the therapy system tries to make sure that the individual never repeats the action. The punishment system, by contrast, simply punishes the individual for the past action and hopes that the punishment will deter them from doing it again.

Alternative courts try to help individuals change the way they are, to remove the negative or inciting factors, and to produce a result that will not reoffend. There is an internal punishment rather than an external one. Incarceration is an external punishment that serves simply as a placeholder, while alternative courts focus on internal punishment: they make individuals think about their actions and what incited them, then try to remove whatever the inciting factor was. Morris argues against the therapy system, and would therefore argue against alternative courts, because he believes it does not treat people as people. Morris holds that a person has an inalienable right to be punished in proportion to the crime. To him, failing to uphold that right

would be unjust not only to the victim but also to the offender. Morris argues that a person who commits a crime takes an unfair advantage: by throwing off the burden of self-restraint that others accept, the offender upsets the fair distribution of benefits and burdens, and punishment restores the balance (Green, 2007). So, while the therapy system Morris describes is similar to alternative courts in working to correct the source of the problem instead of delaying it from acting again, Morris believes that, to be most fair to the offender, punishment must follow the fundamentals of the punishment system.

Jeremy Bentham and Deterrence Theory

Bentham's theory of deterrence relates to alternative courts more selectively, but it can still be closely associated with them. Jeremy Bentham was an English philosopher, jurist, and social reformer, widely regarded as the founder of modern utilitarianism. His theory developed from the work of Thomas Hobbes, a philosopher who wrote on a wide range of subjects, and Cesare Beccaria, often called the father of modern criminal law. The theory has three main components of punishment: severity, certainty, and celerity (Tomlinson, 2016). The severity of the punishment should match the severity of the crime, no more and no less. Certainty is arguably the most important part of deterrence theory: the certainty that a crime will be punished deters the crime from occurring. Celerity describes the swiftness with which the crime is processed and tried, because an immediate punishment is both a righteous and a deterring punishment. Alternative courts may not necessarily match the severity of the initial crime, depending on how one views alternative courts as a punishment. Self-inflicting crimes are most certainly in line with this aspect of deterrence theory, because understanding one's own failings (such as drug addiction) is a mental and emotional punishment for the mental, emotional, and physical punishment one already inflicts on oneself. Additionally, the certainty of being admitted

to an alternative court is even less present. However, the celerity of alternative courts is very present, because there is minimal or no criminal trial when the defendant immediately pleads guilty to be admitted to an alternative court. The punishment is then delivered in a clear and immediately productive way. Admitting one has a problem is not only a punishment in itself (an immediate one, since pleading guilty partly does this) but also the first step to rehabilitation. These three components of Bentham's deterrence theory show how it relates to alternative courts and the similarities in admitting, punishing, and rehabilitating the offender.

The Limits of Alternative Courts

While alternative courts are a great way for individuals with certain characteristics to stay out of the growing numbers of people incarcerated and re-incarcerated, they should not be the final answer for every punishment. Some crimes, and the ways they are committed, arguably make the offender undeserving of an alternative court. Offenders who commit certain crimes, such as those who are a danger to the public, require incarceration as a punishment. For example, a criminal who has committed three murders on three different occasions is a clear danger to the public, and a Sunday at the local church program center is unlikely to change this. While mass incarceration is a growing problem, and alternative courts help reduce the numbers, they are meant to be *a* solution, not *the* solution. Understanding that some individuals may need harsher punishments is key to recognizing that others do not need punishments as harsh. This cannot be decided until the individual commits the act and is brought to criminal court. If their decisions were driven by limiting factors (drug use, mental illness), then those decisions were not fully their own. If they have few or no limiting factors and do not meet the policy guidelines for entry into alternative courts, they do not deserve such an *easy* punishment. For those who truly have those limiting factors, the rehabilitation required by a drug court will be *just as hard* as, if not

harder than, completing a prison sentence. Therefore, alternative courts are simply one option for criminal rehabilitation, and keeping incarceration as a sentencing option for criminals who do not fit alternative court categories is imperative to upholding the criminal justice system.

Conclusion

Alternative courts provide an opportunity alongside criminal courts because they recognize the differences in types of harm and methods of punishment. They are a great way to keep offenders with certain characteristics from ending up with an inconsistent sentence in a criminal court, and they provide rehabilitation and self-reflection under more humane conditions. Further analysis could make sure that the nonoptional punishment of criminal courts is a self-correcting action. However, inflicting certain harms on others, which is the same as taking away their freedoms, with no true factors affecting that decision, should result in the perpetrator's freedoms being taken away as well. This includes the opportunity to self-punish through the different types of self-evaluation provided in alternative courts. If an individual's freedoms are already being taken away, for example by drug abuse or mental illness, this should be analyzed when determining proper sentencing and brought before an alternative court. Further research and evaluation of alternative courts should be done to support upholding the sanctity of the meaning of "justice" in the criminal justice system.

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