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# Expanding Therapeutic Jurisprudence Across the Federal Judiciary

Benjamin A. Barsky, JD, MBE, Heather Ellis Cucolo, JD, and Dominic A. Sisti, PhD

A patchwork of drug courts and other problem-solving courts currently exists to divert individuals with mental illness and substance use disorders away from the criminal justice system. We call for a broader implementation of problem-solving courts, particularly at the federal level, that would operate according to the principles of therapeutic jurisprudence (i.e., a framework that aims to maximize the health benefits of judicial and legislative policies and practices). Expanding federal problem-solving courts will better serve individuals with mental illness and substance use disorders in the federal criminal justice system and allow them to benefit from rehabilitation and diversion programs. This effort will also signal that the federal judiciary has recognized the criminal justice system's failure to address inmate mental health care, and that it is willing to institute changes to provide appropriate, evidence-based interventions.

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Therapeutic jurisprudence (TJ) refers to a conceptual and pragmatic orientation of the law.<sup>1</sup> TJ suggests that “law should value psychological health, should strive to avoid imposing anti-therapeutic consequences whenever possible, and when consistent with other values served by law, should attempt to bring about healing and wellness” (Ref. 2, p 214). Grounded in a harm-reduction approach to policy and ethics, TJ provides an interdisciplinary framework that aims to reform systems and offer rehabilitative resources to individuals.<sup>3,4</sup> TJ also offers policy strategies in various contexts, including the criminal justice system,<sup>5</sup> the insurance sector,<sup>6</sup> and the treatment for drug abuse.<sup>7</sup>

In the context of the criminal justice system, TJ focuses on respecting the dignity of individuals through the advancement of rehabilitation and

reintegration into society.<sup>8</sup> TJ advocates for the implementation of multidisciplinary support systems for criminal defendants, bringing to bear judicial, academic, government, and community-based resources to promote therapeutic outcomes for this segment of the population.<sup>9</sup>

Partly as a result of the deinstitutionalization movement that began in the 1960s and the unfulfilled promise of building a robust community-based system, correctional facilities now operate as *de facto* mental health institutions.<sup>10</sup> Persons with mental illness are often unable to escape the revolving door of the criminal justice system due to societal stigma and continued failure of effective and available community mental health supports.<sup>10</sup> According to the Bureau of Justice Statistics, more than half of the country's inmates have a mental illness, a finding that, as of the most recent comprehensive data differentiating state and federal numbers, compiled in 2005, placed the number at 705,600 in state prisons and 78,800 in federal prisons.<sup>5</sup> As a result, the criminal justice system has taken on the dual, and often contradictory, roles of incarceration and mental health care.<sup>11</sup>

In this paper, we discuss how tens of thousands of federal inmates are denied the benefits of TJ because advocacy has been primarily focused on state-level failures to provide adequate mental health care in

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correctional facilities. We argue that it is time to examine critically the dearth of federal mental health diversion courts, and to address gaps in behavioral health care provided in federal correctional facilities.

We first describe how problem-solving courts have functioned at the state level and provide a brief review of their outcomes. Despite the mixed results of current models, we contend that, with more resources and research, these courts can meet an ethics and societal obligation to appropriately serve individuals with mental illness involved with the criminal justice system.

We then argue that expanded implementation of federal problem-solving courts will achieve three primary goals. First, they will help address currently unmet mental health needs of defendants prosecuted in federal court. Second, they will provide improved resources to address local, community-specific mental health and substance abuse problems. Third, they will institutionalize the role that courts can play to mitigate risk during public health crises, such as the opioid addiction epidemic and the COVID-19 pandemic.

### **The Current Landscape at the State Level**

The implementation of TJ has created a legal sub-discipline within state laws and local initiatives. As Bruce Winick<sup>1</sup> noted, scholars and practitioners have applied TJ to areas of law typically governed by states, including drug-related criminal law,<sup>12</sup> the adjudication of sexual crimes,<sup>13</sup> juvenile delinquency,<sup>14</sup> domestic violence,<sup>15</sup> and child abuse.<sup>16</sup> The foundation of this interdisciplinary approach is supported by problem-solving courts that address the causes and not just the symptoms of social injustices.<sup>9</sup> The number of these courts has increased substantially in the past 20 years, a tribute to their value and success.<sup>17</sup>

These courts are diversionary and offer an alternative to traditional criminal adjudication processes. In lieu of punishment, they focus on rehabilitation and community reintegration via judicial intervention in nonadversarial proceedings.<sup>18</sup> Problem-solving courts have taken many forms, including drug courts, domestic violence courts, community courts, veterans treatment courts, driving-under-the-influence (DUI) courts, tribal wellness courts, and human trafficking courts (Table 1).<sup>9</sup>

Despite having different specific goals, problem-solving courts offer access to treatment opportunities and psychosocial services through coordinated case management.<sup>19,20</sup> Unfortunately, some problem-solving courts are far less structured and place the burden on the defendant to seek services and to comply with the mandates of the diversionary program.

Although criminal justice experts have lauded the therapeutic intention that motivates problem-solving courts, many temper their enthusiasm with caution. The literature on outcomes of problem-solving courts offers mixed but increasingly promising results. Studies of juvenile drug court programs provide little evidence of reductions in recidivism during or after the program period.<sup>21</sup> Conversely, nascent studies on tribal wellness courts have yielded results that point to effectiveness; for instance, court participants showed less substance abuse behavior and recidivism than non-court participants.<sup>22</sup> But these courts continue to require more empirical attention.<sup>22</sup> Methodological limitations have also hindered research on family drug courts, although some case studies suggest that these courts make parents more accountable to treatment needs and that they help reduce how long children spend in foster care.<sup>23</sup>

In contrast, research examining mental health courts, drug courts, and veterans treatment courts has shown that these courts lead to decreased recidivism, enhanced rehabilitation, and improved mental health care for participants. Honegger<sup>24</sup> conducted a meta-analysis of mental health courts, examining their ability to address psychiatric symptoms, connect defendants with behavioral health services, increase quality of life, and decrease recidivism rates. For each of these categories, the 20 peer-reviewed studies included in the meta-analysis demonstrated that problem-solving courts led to statistically significant favorable outcomes, although Honegger was careful to note that these favorable findings varied.<sup>24</sup> Three studies reported that mental health courts either worsened symptoms or led to higher recidivism rates.<sup>24</sup>

Another study, which focused on adult drug courts, reported promising findings. Mitchell and colleagues<sup>25</sup> noted that drug court participation led to notable decreases in general and drug-related recidivism. The authors also showed that the benefits of adult drug courts persist beyond the short term, pointing to decreases in recidivism for at least three years.<sup>25</sup> These findings indicate that drug courts

**Table 1** Examples of State Problem-Solving Courts in the United States

Problem-Solving Court	State Example and Description
Adult Drug Courts	New York: Defendants with “charges where drug addiction is a component of their offense may be eligible to participate in a criminal [drug treatment court] program. Those who successfully complete their drug treatment court program may have their charges dismissed or reduced or may receive a reduction in their sentence.” <sup>79</sup>
Veterans Treatment Courts	Michigan: Veterans treatment court “uses a hybrid integration of drug court and mental health court principles” and “promote sobriety, recovery, and stability through a coordinated response that involves collaboration with the traditional partners found in drug courts and mental health courts.” <sup>80</sup>
Juvenile Drug Courts	California: “Juvenile drug court programs provide the intensive judicial intervention and intensive community supervision of juveniles involved in substance abuse that is not generally available through the traditional juvenile court process.” <sup>81</sup>
Family Drug Courts	Washington: “A family dependency treatment court is a juvenile or family court docket of which selected abuse, neglect, and dependency cases are identified where parental substance abuse is a primary factor.” <sup>82</sup>
Driving-Under-the-Influence (DUI) Courts	Georgia: “The DUI Court Program is an interdisciplinary team approach” and “partners with the program participants throughout the treatment process to ensure individual needs are met while restoring accountability.” <sup>83</sup>
Tribal Wellness Courts	New Mexico: “The mission of the Urban Native American Healing to Wellness Court is to create an atmosphere of healing through best practices and traditional methods in pursuit of spiritual and physical recovery for Native Americans with two or more [driving while under the influence] convictions.” <sup>84</sup>
Mental Health Courts	Florida: Broward County’s Misdemeanor Mental Health Court “handles cases involving nonviolent, misdemeanor defendants identified as mentally ill or developmentally disabled. It is a voluntary pre-adjudication program, that is, it diverts people into treatment before they face trial if they agree to follow the court’s direction.” <sup>85</sup>
Human Trafficking Courts	Ohio: “CATCH blends punitive sentences with a 2-year treatment-oriented nonadversarial program for rearrested prostitutes who suffer from posttraumatic stress syndrome, depression, and drug addiction.” <sup>86</sup>

Source: Adapted from National Drug Court Institute.<sup>49</sup>

provide a sustainable means of rehabilitation and warrant more policy attention.

Research has also shown the benefits of veterans treatment courts. Tsai and colleagues<sup>26</sup> observed that veterans court participants received benefits, including an increase in housing and access to Veterans Affairs resources during the program. Moreover, recidivism rates among veterans who used the program were lower than the general recidivism rate among released prisoners in the United States, and program participants enjoyed better postsentence employment opportunities than those who did not participate in the program.<sup>26</sup> That said, despite the lower recidivism rate compared with the general U.S. prison population, veterans treatment court participants were more susceptible to later jail sanctions and incarcerations compared with veterans who did not use these programs.<sup>27</sup> Furthermore, critics, including the American Civil Liberties Union, have argued that veterans should not have criminal defense rights that other populations groups do not have just because of their military status.<sup>28</sup>

Since the combined data indicate that problem-solving courts hold promise for state-level judicial systems, we should expect little resistance to the broader establishment of federal problem-solving courts. As we know, tens of thousands of federal prisoners also have behavioral health conditions. But federal court-based intervention programs premised on

addressing psychiatric and substance abuse problems among criminal defendants remain uncommon. We argue that the federal judicial system has failed to realize fully its role in addressing ongoing public health problems, most notably demonstrated in the context of the opioid addiction epidemic and the COVID-19 pandemic.

In the next section, we summarize the factors that have disincentivized the creation of federal problem-solving courts. We then provide evidence-based policy recommendations to incentivize the expansion of federal TJ programs.

## Federal Problem-Solving Courts Today

State efforts provide examples of how policy-makers, judges, practitioners, advocates, and scholars can harness TJ as a tool for both public health and advocacy. In contrast, at the federal level, the application of TJ through problem-solving courts that focus on diversion is far less common. This discrepancy is a missed opportunity to improve outcomes for defendants and for society more generally.

One notable exception exists. The federal government, through its grant-making powers, has created funding opportunities for states to bolster services for substance use disorder treatment in already established problem-solving courts. In this way, the federal government has sought to expand its support of

problem-solving court initiatives through grants for which states may apply.

For instance, grants have been available to states that want to expand substance abuse treatment resources in family treatment drug courts. These courts assist parents with substance use disorders who are at risk of losing parental custody due to allegations of child abuse.<sup>29</sup> The federal government has thus shown some enthusiasm for the drug court model, particularly by offering grants for various drug court programs. But this enthusiasm has not led to the creation of new federal problem-solving courts, nor has it had a notable effect on how the federal judicial system deals with litigants with mental health or substance use disorders.<sup>30</sup> We next summarize several key obstacles inhibiting the creation of federal problem-solving courts.

### **The Federal Sentencing Guidelines**

The Federal Sentencing Guidelines and the U.S. Supreme Court's interpretations of the Guidelines are an obstacle in the expansion of federal problem-solving courts. The Guidelines incorporate a series of grids listing specific aggravating and mitigating factors, and they use an algorithm to arrive at the presumptive sentence.<sup>31</sup> In *Mistretta v. United States*,<sup>32</sup> the Supreme Court held that following the Guidelines was mandatory. Sixteen years later, the Court modified *Mistretta* and held in *United States v. Booker*<sup>33</sup> that the Guidelines were advisory.<sup>32</sup>

One analysis suggests that, prior to *Booker*, federal district courts did not possess enough discretion to divert defendants with mental illness away from incarceration and toward institutional treatment.<sup>34</sup> And in the aftermath of *Booker*, some courts did, in fact, appear more receptive to evidence of mental illness at sentencing.<sup>35</sup> For instance, in *United States v. Anderson*,<sup>36</sup> an application of *Booker* allowed the reviewing court to vacate the defendant's sentence. The court specifically noted a failure on the part of the government "to account for the district court's consideration and discussion of Anderson's 'serious mental health issues,' presented in support of his request for a downward departure" (Ref. 36, p 93).

Several other cases after *Booker* have rejected the advisory mandate and instead made sentencing decisions as if they were still under the thrall of *Mistretta v. United States*.<sup>37,38</sup> For example, the First Circuit in 2005 remanded a case in which the trial judge denied a defendant's request for a

sentence below the guideline minimum on the basis of mental illness because the judge believed the guidelines allowed for no such downward departure.<sup>39</sup> Perlin finds this troubling "on many levels, not the least of which is the courts' sorry history of ignoring or misusing mental disability under the Guidelines, and in some instances, using it as an *aggravating* rather than *mitigating* factor" (Ref. 40, p 886, emphasis in original). According to Judge Mark W. Bennett, "*Booker* clearly gave federal sentencing judges more discretion, but not much clarity" (Ref. 41, p 514).

### **Blame and Priority Setting**

Despite, or perhaps because of, the decision in *Booker*, the Department of Justice under President George W. Bush took the policy position that problem-solving courts, and specifically federal drug courts, were inappropriate at the federal level.<sup>42</sup> As Perlin noted, a "powerful current of *blame* underlied much of the Guidelines case-law [related to drug offenses]: the defendant *succumbed to temptation* by not resisting drugs or alcohol, by not overcoming childhood abuse, and so forth" (Ref. 40, p 908, emphasis in original).

The Department of Justice contended that U.S. Attorneys' Offices should instead invest their prosecutorial resources on violent offenders who do not fit traditional criteria for drug courts, and it suggested that implementing federal drug courts would divert resources away from more important needs. Although the Department of Justice, to our knowledge, has not taken a firm position toward other types of problem-solving courts, the justifications invoked in the drug court context seem applicable across the board.

### **The Difficulty of a Unified Model**

The federal judiciary's multifaceted structure makes the implementation of any one problem-solving court model difficult.<sup>43</sup> Federal district courts, despite belonging to a cohesive and unified court system, operate within distinct legal environments.<sup>43</sup> Federal district courts often apply circuit-specific and local rules that could hinder implementing a one-size-fits-all problem-solving court model. They also have to shape their practices around the geography-specific characteristics and needs of court participants.<sup>43</sup> These challenges span the various types of problem-solving courts and compound the difficulty of implementing one model across the federal judiciary.



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**Table 2** Current Federal Problem-Solving Courts

District	Court Program	Court Program Type
Central District of California	Conviction and Sentencing Alternatives Program (CASA)	Generic Alternative to Incarceration
Northern District of California	Diversion/Deferred Sentencing Court	Generic Alternative to Incarceration
Southern District of California	Alternative to Prison Sentence Program (APS)	Youthful Defendant Program
District of Connecticut	Support Court	Drug Court
Central District of Illinois	Pretrial Alternatives to Detention Initiative (PADI)	Drug Court
Northern District of Illinois	Sentencing Options that Achieve Results (SOAR)	Generic Alternative to Incarceration
District of Massachusetts	RISE	Generic Alternative to Incarceration
Eastern District of Missouri	SAIL Program	Generic Alternative to Incarceration
District of New Hampshire	LASER Docket	Drug Court
District of New Jersey	Pretrial Opportunity Program (POP)	Drug Court
Eastern District of New York	Special Options Service Program (SOS)	Youthful Defendant Program
	Pretrial Opportunity Program (POP)	Drug Court
Southern District of New York	Young Adult Opportunity Program	Youthful Defendant Program
Southern District of Ohio	Special Options Addressing Rehabilitation (SOAR)	Youthful Defendant Program
District of Rhode Island	Deferred Sentencing Program	Generic Alternative to Incarceration
District of South Carolina	BRIDGE Program	Drug Court
District of Utah	Utah Alternatives to Conviction Track (U-ACT)	Generic Alternative to Incarceration
	Veterans Court	Veterans
District of Vermont	Rutland Drug Court	Drug Court

Source: Adapted from the United States Sentencing Commission.<sup>34</sup>

### Legitimacy

Concerns exist about how implementing problem-solving courts would affect the legitimacy of the federal judiciary.<sup>43,44</sup> The principle underlying these concerns is that “problem-solving courts are inconsistent with the judiciary’s long-standing position against specialized courts and the direct assignment of cases to judges” (Ref. 33, p 4). For instance, Rowland<sup>43</sup> cited the reluctance of the Judicial Conference of the United States to incorporate patent and tax courts within the federal judicial branch.<sup>45</sup> The Judicial Conference has also emphasized that the specialization of federal courts could lead to the risk of so-called judge shopping, which would hinder a longstanding principle of the judiciary.<sup>46</sup> This critique would thus imply that state courts, as well as the roles of state judges, have more flexibility than federal courts. We would also anticipate resistance based on the cost of problem-solving courts, although these costs are still lower than the costs of incarceration and recidivism.<sup>28</sup>

### Research Limitations

Along with the research challenges noted above, studies on the effectiveness of federal reentry courts at lowering recidivism among participants have produced mixed results. For instance, one study reported small reductions in recidivism,<sup>47</sup> while another noted similar or higher recidivism.<sup>48</sup> Underlying these mixed

results are important methodological limitations, including selection bias, not accounting for confounding factors, and flawed statistical control procedures.<sup>43</sup>

The factors that have contributed to the small number of federal problem-solving courts revolve around three central themes: research limitations, structural drawbacks, and politics. Due to these factors, problem-solving courts at the state level vastly exceed their federal counterparts (Table 2). This reality remains even though the Bureau of Justice Statistics has reported that 45 percent of the approximately 175,000 federal inmates have a mental illness, and 50 percent reported drug use before their conviction.<sup>5,49–51</sup> Although hundreds of thousands of lower-level offenders have participated in drug courts, numbers in federal court appear much smaller (i.e., most likely in the low hundreds) according to findings by the United States Sentencing Commission findings.<sup>34</sup>

Indeed, more than 130 veterans treatment courts exist across the country, but only one of this type of court exists at the federal level (i.e., in Utah).<sup>17,34</sup> In the context of drug treatment courts, the numbers are even more disparate. States have created over 1,300 adult drug courts, 180 driving-under-the-influence (DUI) courts, and 260 family drug courts.<sup>17</sup> But only seven drug courts at the federal district level exist in the United States.<sup>34</sup>

Based on the latest accounts, less than 20 percent of federal districts across the country (i.e., 17 of 93)

have implemented some form of problem-solving court (Table 2).<sup>34</sup> Only a small number of criminal defendants sentenced in those districts (often in the high teens or low hundreds) have benefited from therapeutic resources.<sup>34</sup> There remains a significant unrealized benefit of these courts, especially given the large number of drug-related charges in federal courts.<sup>52</sup> The gap in treatment courts at the federal level may exacerbate the overcrowding of individuals with mental illness in correctional facilities. In effect, the federal judiciary has failed to develop alternative sentencing programs, thereby punishing individuals with severe mental illness or habitual drug use who might otherwise be diverted to problem-solving courts specifically dedicated to rehabilitation and reintegration.

Although exact numbers are unavailable, the data that are available suggest that federal inmates with mental illness number in the tens of thousands, perhaps as many as 80,000 if we assume that 45 percent of current federal inmates have a mental illness or substance abuse disorder or both.<sup>5,49–51</sup> Dismissing the possibility that these and future individuals might benefit from problem-solving courts departs from the rehabilitative aims of the criminal justice system.

## **A Status Quo in Need of Reevaluation**

### ***Needs Exist at the Federal Level***

The George H. W. Bush administration maintained skepticism about the viability of problem-solving courts at the federal level. Underpinning these views was the belief that program participants at the state level were better suited for diversion than those at the federal level.<sup>43–45</sup> But changes over the past decade in the carceral landscape undermine the validity of this argument.

As of 2017, jails and prisons nationwide housed around 2.2 million inmates,<sup>53</sup> with around 146,000 under the jurisdiction of the Federal Bureau of Prisons and 30,000 detained in other types of federal facilities.<sup>52</sup> So the federal prison population amounts to around seven percent of the total U.S. inmate population.<sup>52,53</sup> According to a U.S. Government Accountability Office report, the Bureau of Prisons considered a mere four percent of total federal inmates as having a serious mental illness.<sup>54</sup>

The Bureau of Prisons definition of serious mental illness includes schizophrenia, bipolar disorder, and major depressive disorder diagnoses.<sup>55</sup> Under more

limited circumstances, trauma-based disorders (e.g., posttraumatic stress disorder [PTSD]), personality disorders, and developmental and cognitive disorders are listed, although these criteria are not precisely defined.<sup>55</sup> Moreover, the Bureau of Prisons does not account for substance abuse disorders or the mental health concerns that develop while an inmate is incarcerated as a result of the conditions of prison confinement.

Reports by the Bureau of Justice Statistics and the National Commission on Correctional Health further contradict the low incidence of severe mental illness among inmates reported by the Government Accountability Office.<sup>5,50,56</sup> The Bureau of Justice Statistics found that, as of 2005, 45 percent of federal inmates reported having a mental illness, a number based on either a recent history of clinical treatment or self-reported symptoms.<sup>5</sup> Around 10 percent of the approximately 3,600 inmates surveyed expressed having symptoms of psychosis (e.g., hallucinations or delusions).<sup>5</sup> The Bureau of Justice Statistics also reported that half of federal offenders reported having used drugs at least one month before their offense, and 43 percent among this population reported having substance abuse disorders.<sup>50</sup> Finally, a study using a nationally representative interview-based survey of 8,098 inmates reported that 13 to 16 percent of federal offenders have major depression.<sup>56</sup> Although the prevalence of mental illness and substance abuse among inmates in federal correctional facilities is somewhat lower than in state correctional facilities, we can infer that tens of thousands of federal inmates have a diagnosable mental health condition.

### ***Severity of Offenses***

The argument that the severity of the offenses committed by federal inmates makes them unsuitable for problem-solving courts is also problematic. For instance, studies have reported that problem-solving courts that deal with violent felony offenders have had success in reducing recidivism among participants.<sup>57,58</sup> Saum and colleagues<sup>59</sup> also noted that, in the context of state drug courts, participants with a history of violence had the same success rate as non-violent participants.

Factoring in offense characteristics, therefore, we could conclude that persons with mental illness would be suitable for adjudication in a federal problem-solving court, whether they committed a felony or a misdemeanor. In addition to providing

rehabilitative benefits to both categories of offenders, the expansion of these courts could also alleviate clinical challenges associated with providing mental health care inside federal prisons, including staff shortages, suicide, and high rates of solitary confinement.<sup>60</sup> Expanding eligibility for these courts would thus result in both rehabilitative benefits for more criminal justice participants and clinical improvements in carceral institutions.

### **Decentralization and Legitimacy**

We also question the assertion that federal problem-solving courts would undermine the legitimacy of the federal judiciary. Although it is true that the role of federal district judges is not to act as clinicians for defendants who pass through their courtrooms, they should still have the flexibility to extend their duties to problem-solving courts. Doing so in a manner sensitive to local needs is likely a path for positive reform.

As of now, federal policymakers have limited their involvement in this area. One notable exception concerns a recent amendment to the Federal Sentencing Guidelines, which has made sentencing more hospitable to veterans who have PTSD, anxiety, and depression after their service.<sup>61</sup> This amendment notes that military service may be an appropriate mitigating factor “in determining whether a departure is warranted, if the military service, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines” (Ref. 61, p 462).

Veterans treatment courts have also focused on providing veterans with community-based resources and mental health services, including PTSD treatment, that the criminal justice system cannot provide.<sup>62</sup> The rationale for these courts is to facilitate community integration for veterans, who often experience combat-related trauma and financial difficulties after returning home.<sup>62</sup> Ultimately, the goal is to create a specialized federal veterans court to embrace all persons who have served in the military, have a disability following such service, and are caught in the web of the criminal justice system.

This idea resonates with Lanni’s depiction<sup>63</sup> of problem-solving courts as fitting within a community justice framework, which promotes restoration and rehabilitation over punishment. Besides raising the need for a deliberative process between the actors (i.e., the judge, the prosecutor, the defendant, and

the mental health team), the problem-solving process should respond to both the context and the needs of the defendant. This process, co-occurring within the bounds of the specific case and within a broader sociological context, raises the legitimacy question in a multifaceted light.

The two legitimacy concerns reveal a judicial Catch-22. On the one hand, critics may emphasize the weakened role of the defense during the problem-solving process,<sup>44</sup> as well as the arguably unhindered discretion afforded to judges. Additionally, defense attorneys may push their clients into entering problem-solving courts programs to avoid the traditional legal process altogether.<sup>64</sup> Taken together, these criticisms will point to concerns about weakened procedural protections for defendants during the problem-solving process.

On the other hand, a broader legitimacy question exists in the background of these concerns, namely that of a criminal justice system ill-suited to care for inmates with mental illness. This question, in turn, highlights the tension between the traditional criminal justice process, which Lanni<sup>63</sup> describes as plagued with punishment-oriented policies, and the ability of defendants with mental illness to receive the treatment and care they need.

Answering legitimacy concerns about federal problem-solving courts will be critical. Decentralization and the rejection of a unified federal problem-solving court model may answer these concerns. This approach has been adopted by the 17 federal diversion courts currently in place across the country.

Federal judicial districts should have the discretionary ability to integrate community input into the creation of problem-solving courts. By doing so, the processes implemented within federal problem-solving courts will respond to the needs of both the singular participant and the community at large.<sup>65</sup> Although this configuration might hinder the generalizability of district-specific research because of inter-district variation in court processes and inmate populations, policymakers should still have confidence that decentralization remains at the heart of sound mental health policy.<sup>66</sup> There is no good reason to centralize operations now.

### **Legal Ethics and Empiricism**

Proponents of federal problem-solving courts face a choice. They must either surrender to what



Slobogin<sup>67</sup> termed as TJ's empirical indeterminacy (i.e., the inability of problem-solving courts to yield systematically favorable empirical results), or they must maintain that, despite the current state of uncertainty, problem-solving courts remain a reasonable way to hold the federal criminal justice system accountable for addressing the needs of criminal justice participants with mental illness. Given the important role, both legal and ethical, that courts and prosecutors have related to ongoing public health crises, we advocate for the latter choice and emphasize the importance of perseverance in the face of promising, though incomplete, data.

### **Law and Public Health Crises**

Recent literature on the role of courts and prosecutors' offices in public health crises has focused on the opioid crisis. For instance, Gluck and colleagues<sup>68</sup> explored the mechanics and strategies employed in civil cases against actors responsible for the wave of opioid addiction and overdoses. Comparing today's opioid litigation landscape to the tobacco litigation during the 1990s, they underscore how courts, through the adversarial process, can become vehicles for health care reform, a topic that other scholars have explored in different policy areas like gun regulation.<sup>69</sup>

Closer to the topic of federal problem-solving courts is Rothberg and Stith's investigation<sup>70</sup> of efforts conducted by U.S. Attorney's Offices across the country to remedy the opioid crisis. They cite community outreach programs, particularly in the U.S. District Court for the District of Connecticut where deaths caused by the opioid crisis recently peaked, that seek to go beyond the remedial effects of criminal prosecutions.<sup>70</sup> They discuss, for instance, the Heroin Education Action Team, a coordinated community education effort between the judicial district, the U.S. Attorney's Office, and families affected by the opioid crisis, as a valuable sign of progress.<sup>70</sup>

That civil public health litigation, community outreach programs, and problem-solving courts differ in their mechanics is obvious. Foundational to these three initiatives is the idea that courts and prosecutors' offices have a responsibility to the communities within which they operate. This responsibility goes well beyond what empirical research can capture.<sup>71</sup> It reflects the ethics virtues, including equity, that Solum defined as "the tailoring of the law to the

demands of the particular situation" (Ref. 72, p 206), that courts should embrace and embody. In this way, federal problem-solving courts can become conduits for change in mental health care, including in combating the opioid crisis,<sup>73</sup> without the risk of deviating from established judicial and prosecutorial norms. They would, in other words, become an extension of how the legal system has worked and should continue to work.

### **Advocacy and Government-Collected Data**

Critics often point to the gaps in evidence about the efficacy of federal problem-solving courts. But the federal government is in the process of refining its data collection and analysis processes, a development that should, and likely will, carry over to the federal criminal justice system.

This development could undercut fundamental criticisms about the empirical legitimacy of problem-solving courts at the federal level. This would hold especially true if the U.S. Congress would design its grants not only to create problem-solving courts, but also to perfect the research methodology used to study them. We believe that the federal government is better situated than state governments to establish cost-effective problem-solving courts because of pre-existing legislative mandates.

Congress has highlighted the need for a shift in the paradigm of policy and program analysis, as demonstrated by the recently enacted Foundations for Evidence-Based Policymaking Act (Evidence Act).<sup>74,75</sup> Under the Evidence Act, major agencies, including the Department of Justice, which governs the Federal Bureau of Prisons, will establish so-called learning agendas that lay out research questions that require rigorous, evidence-based answers. The Evidence Act also requires applicable federal agencies to make the data they collect available for the public, creating research opportunities for institutions across the country.

The Evidence Act offers advocates tools to promote further study of federal problem-solving courts. The ripeness of this opportunity comes at a time when the federal government expends tens of billions of dollars on mental health care,<sup>76</sup> as well as an average of \$36,000 for the incarceration of one inmate per year.<sup>77</sup> As Darryl K. Brown<sup>78</sup> has already proposed, a benefit-cost analysis of preexisting federal problem-solving courts could be one way to leverage advocacy in an era of changing regulatory practices. This proposal, in turn, assumes that the current *ad hoc* method

of administering federal problem-solving courts is sub-optimal. The robustness of these courts' design will allow for a more systematic assessment of their utility. For better or worse, however, advocates will have to bear the burden of building the bridge between today's state of affairs and this proposal.

Within the theory of TJ, this proposal is not controversial. As Winick<sup>1</sup> stated two decades ago, TJ calls, and perhaps depends, on empiricism to improve the therapeutic effects of mental health policymaking. If used carefully, empirical work "can become the grist for legal advocacy in the judicial, legislative, and administrative arenas, and ultimately can provide valuable material from which legal decision makers can craft legal rules" (Ref. 1, p 197).

## Conclusion

Problem-solving courts deserve further expansion, especially at the federal level. If research indicates that their use in states across the country has engendered valuable reform in mental health policy, neither logic nor theory suggests that TJ should limit its applications to state-based initiatives. With the growing array of analytical tools at the disposal of policymakers, TJ may prove invaluable for steering mental health policymaking in the right direction. Considering the scope of the challenges in correctional mental health care and the alarming statistics that have captured national headlines, new efforts to bring consistency and rigor to the creation and evaluation of problem-solving courts are urgent. The time is now to scale up new problem-solving courts at the federal level.

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