

# Assessing the Case for Formal Recognition and Expansion of Federal Problem-Solving Courts

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## Introduction

Although not formally recognized by the Judicial Conference of the United States, nearly half of federal district courts operate some form of problem-solving court. Citing the positive energy those courts have produced and studies conducted in various jurisdictions, advocates argue it is time for federal problem-solving courts to be formally recognized and expanded. On the other hand, opponents argue that empirical support for problem-solving courts is lacking. There have only been a handful of federal studies with results that have been mixed at best, and all the research efforts have been subject to methodological limitations. Their impact on recidivism aside, federal problem-solving courts face issues of scalability, including cost, in the federal system. Observers, however, are increasingly positive about problem-solving courts' work in the areas of mentorship and managing the collateral consequences of a criminal conviction. Possibly greater focus in those areas and better division of duties among other problem-solving court members can drive down costs, enhance outcomes, and even avoid potential ethical issues. However, it will take more time and effort to determine if those benefits can, in fact, be realized. That all comes at the cost of other promising programs and those we already know reduce recidivism. The criminal justice system, unfortunately, has a history of

maintaining and expanding popular programs only to discover later that those programs are ineffective. Consequently, ongoing and meaningful assessment is vitally important.

**PROBLEM-SOLVING COURTS ARE** designed to promote public safety and stabilize communities. As part of the court program, judges work collaboratively with litigants and others to resolve personal and social problems presented by "justice-involved people."<sup>2</sup> By addressing those problems, courts mitigate

factors, such as substance abuse,<sup>3</sup> that are often associated with crime and recidivism.<sup>4</sup>

There are now thousands of problem-

<sup>3</sup> While criminal history remains a primary predictor of future criminal behavior, the five most common dynamic risk factors found among federal justice-involved people are (1) antisocial thinking patterns and values, (2) criminal and antisocial peers, (3) dysfunctional family, (4) lack of gainful employment or education, and (5) substance abuse. See, *An Overview of the Federal Post Conviction Risk Assessment*, Administrative Office of the U.S. Courts, Probation and Pretrial Services Office (September 2011), [www.uscourts.gov/file/2749/download](http://www.uscourts.gov/file/2749/download).

<sup>4</sup> Not all persons with such problems commit crimes. Consequently, at times there is a backlash against justice-involved persons being afforded special treatment, vocational training, and other rehabilitative-oriented benefits, whether from traditional probation and parole supervision or from problem-solving courts. That backlash has led to the imposition of statutory and regulatory "collateral consequences" to a criminal conviction, including barring justice-involved persons from certain welfare programs and public housing, precluding them from occupations, and restricting their right to vote, serve as a juror, and bear arms (Tonry & Petersilia, 1999). The use of collateral consequences is being increasingly challenged by the argument that the deficits that led to criminality in the first place are compounded by a criminal prosecution and sentence, and the addition of collateral consequences just makes it that much harder for justice-involved persons to overcome their past and convert themselves into assets, rather than liabilities, to society (See, *The Forever Scarlet Letter: The Need to Reform the Collateral Consequences of Criminal Convictions*, Widener Journal of Law, Economics & Race, Rouzhna Nayeri, pp 110-142 (June 2014).

<sup>2</sup> The terminology used to refer to persons charged and convicted of crimes has changed over time and is based on context. The contextual references link to the stage of the criminal justice process the person is in. For example, those pending trial or sentence are often referred to as "defendants." Those convicted and serving prison terms are usually referred to as "inmates." Persons released from prison and subject to community supervision terms are called "probationers," "parolees," and "releases," depending on the type of supervision that applies. Those who have fully satisfied sentence are sometimes referred to as "ex-cons" and "former felons." The Department of Justice, concerned about the ongoing stigma associated with the latter terms in particular, relies more now on the phrase "justice-involved person," and for the sake of simplicity and uniformity, that phrase is used in this article.

<sup>1</sup> The views expressed by the author are not necessarily those of the Administrative Office of the United States Courts or the Judicial Conference of the United States.

solving courts operating in state and local jurisdictions (Marlowe, Hardin, & Fox, 2016), and nearly half of federal district courts have programs as well (Meierhoefer & Breen, 2013). In the federal system, the programs are adopted at the discretion of interested districts, and they rely on decentralized funding allotments and volunteers for support. The Federal Judicial Center provides training for problem-solving courts (Sherman, Taxman, & Robinson, 2011), but the courts have not been formally recognized by the Judicial Conference of the United States,<sup>5</sup> and there are no judiciary-wide policies governing their operation. For those and other reasons, there is significant variability in and among federal problem-solving courts and they handle only a small number of cases each year (Meierhoefer & Breen, 2013).<sup>6</sup>

Advocates argue that the federal problem-solving courts have proven themselves effective and efficient, and should be formally recognized and expanded (Marlowe, Hardin, & Fox, 2016; Berman & Feinblatt, 2015).<sup>7</sup> Opponents, on the other hand, assert that it is not clear that problem-solving courts have met their primary goal of lowering recidivism while reducing social and economic costs. Moreover, the courts bring with them a variety of ethical, policy, and practical questions. Underscoring all these concerns is the criminal justice system's history of sustaining and expanding programs that seem promising but later prove to be ineffective and costly.

<sup>5</sup> Pursuant to 28 U.S.C. § 331, the Judicial Conference of the United States is the national policy-making body for the federal courts. Its Committee on Criminal Law has been monitoring federal problem-solving programs for some time and has found them to be "an energetic commitment to the betterment of federal offenders and an enthusiasm that should be commended." However, the Committee also noted "[t]he proliferation of these programs around the country could have budgetary and other resource impact." See, Criminal Law Committee Report to the Judicial Conference of the United States (Sept. 2009).

<sup>6</sup> A November 2016 survey of all United States chief probation and pretrial services officers indicated that all the federal problem-solving court programs combined in the preceding 12-months graduated 326 people. The federal supervision population in that same time frame totaled 235,721 persons according to the Administrative Office of the U.S. Courts, Workload Report.

<sup>7</sup> The SAFE Justice Reinvestment Act of 2015, H.R. 2944, would allow for establishment of federal problem-solving courts and require the Director of the Administrative Office and U.S. Sentencing Commission to identify and disseminate best practices and other related information to the courts.

Possibly unique to the federal context, there is also concern that problem-solving courts are inconsistent with the judiciary's long-standing position against specialized courts and the direct assignment of cases to judges.<sup>8</sup> Further working against expansion of problem-solving courts in the federal system is the sheer size and diversity of the system itself.<sup>9</sup>

This article seeks to assist in answering the question whether federal problem-solving courts should be expanded. An important point to be made in the analysis is that the federal programs are modeled after those developed in state and local courts. The probation and parole systems in those jurisdictions have historically been underfunded and associated with recidivism rates two or three times those of the federal system. The relatively low recidivism rate in the federal system may explain why federal problem-solving courts have not, to date, been able to document any reductions in recidivism. This is in contrast to recidivism reductions reported in other jurisdictions that federal court operators hoped to at least match.<sup>10</sup> Observers report, however, that federal problem-solving courts are increasingly focusing in on "value-added" activities that complement traditional federal probation and pretrial services supervision. Those activities leverage the unique position and skill sets of judges and lawyers. This is particularly the case in helping program participants manage and overcome the collateral consequences associated with their prosecution and conviction (Parker, 2016). The legal team's focus on the legal and quasi-legal issues allows probation and pretrial officers

<sup>8</sup> See, September 1990 Session, Conf. Rpt., p 82 and March 1999 Session, Conf. Rpt., pp. 12-13. The Conference seeks to avoid balkanization of judicial operations while upholding the broad jurisdictional capacity of district courts and enhance procedural fairness through random assignment of cases. In many jurisdictions, problem-solving courts assign or transfer cases to a single judge or group of judges based on the judges' specialized training or interest (Berman & Feinblatt, 2002).

<sup>9</sup> The size and diversity of the federal system make it difficult for any single "program" to be effective and to be implemented the same way in all districts. For example, the most recent study of federal reentry courts by the Federal Judicial Center showed that, despite joint training and collective oversight, it was difficult for just five volunteer courts to remain consistent with one another and to follow a single set of evidence-based principles.

<sup>10</sup> A meta-analysis of state and local drug court studies, for example, showed reductions in felony rearrest rates of 28 percentage points (Department of Justice, Office of Justice Programs, 2008).

and treatment providers to focus more on rehabilitative programming and behavioral monitoring. So even if empirical evidence does not exist to justify expanding problem-solving courts at this time, this newer trend and the syngeneic effect it is likely to produce may be worth ongoing study.

## The Background of Problem-Solving Courts

The problem-solving court model calls for the formation of a team led by a judge and joined by the prosecutor and defense attorney, a probation officer, and usually a treatment provider. The judge and attorneys are asked to transcend their traditional roles and broaden their normal objectives in a criminal case. Specifically, judges and attorneys are tasked with working collaboratively to help justice-involved persons remain law-abiding. The legal team reduces reliance on the adversarial process and is driven by more than a legal disposition alone. In effect, the legal process becomes more a means to an end, not an end unto itself. The features of the transformed process, sometimes referred to as therapeutic jurisprudence, are summarized in Table 1.

There are various types of problem-solving courts, all with their roots in "drug courts." Drug courts began in the 1980s in response to the escalating cocaine epidemic. With subsequent endorsement from United States Attorney General Janet Reno and grant funds provided by the Department of Justice, drug courts spread quickly throughout state and local jurisdictions (Steadman, 2001). Initial anecdotal claims of drug courts' effectiveness were eventually coupled with formal studies attesting to their positive impact (Wolf, 2007). The Executive Office of the President of the United States highlighted one of the pivotal studies:

The Department of Justice examined re-arrest rates for drug court graduates and found that nationally, 84 percent of drug court graduates have not been re-arrested and charged with a serious crime in the first year after graduation, and 72.5 percent have no arrests at the two year mark. (Office of National Drug Control Policy, 2011)

Academics went so far as to cite drug courts as one of the greatest criminal justice advancements in a generation (Berman, 2010). The expansion of drug courts continued and now seems to have peaked, with an estimated 3,000 in operation across the

**TABLE 1.**  
**Therapeutic Jurisprudence/Problem-Solving Justice**

Traditional Process	Transformed Process
Dispute resolution	Problem-solving dispute avoidance
Legal outcome	Therapeutic outcome
Adversarial process	Collaborative process
Claim or case-oriented	People-oriented
Rights-based	Interest or needs-based
Emphasis placed on adjudication	Emphasis placed on post-adjudication & alternative dispute resolution
Interpretation and application of law	Interpretation & application of social science
Judge as arbiter	Judge as coach
Backward looking	Forward looking
Precedent-based	Planning-based
Few participants and stakeholders	Wide range of participants and stakeholders
Individualistic	Interdependent
Legalistic	Informal
Formal	Effective
Efficient	

Source: <https://criminaljusticecaucus.files.wordpress.com/2011/08/problem-solving-courts-steps-to-making-the-change.pdf>

country (National Association of Drug Court Professionals, 2016). The popularity of drug courts has prompted many jurisdictions to develop similar programs targeting other issues plaguing justice-involved persons. There are now programs focusing on defendants who are homeless, mentally ill, compulsive gamblers, and members of gangs. Others focus on defendants' status as juveniles, veterans of military service, and Native Americans. There are also programs organized around the nature of the charges against the justice-involved person, including domestic violence charges, driving while impaired, prostitution, truancy, public order, and weapons possession (National Drug Court Resource Center, 2012; NCSC, n.d.).

The tenets underlying all problem-solving courts are (1) specialization, (2) focusing on human outcomes as much as legal ones, and (3) adding teamwork to the traditional adversarial process. The specialization takes the form of a docket comprising certain types of case, justice-involved person, or criminogenic issue. By dealing with similar problems over time, the theory holds, the court becomes more proficient at resolving those problems. As to outcomes, courts eye objectives beyond traditional caseload management and adjudication of the law. Through incentives and direction, courts strive to help program participants become better people and better citizens, thereby reducing the threat of recidivism. When participants are unwilling

or unable to benefit from the program, the courts retain discretion to impose sanctions to protect the community and incentivize positive behavior moving forward (See Table 2). The teamwork concept includes involvement of the prosecutor and defense attorney, who are otherwise situated to be adversarial.

Those unifying principles aside, there are also variations between different problem-solving court types and even within programs bearing the same name (Bureau of Justice Assistance, 2006). Problem-solving courts are subject to normal team dynamics, including differences in personalities, varying commitments to the model, and differing skill sets. There is also variation in the type, quality, and cost of rehabilitative services available locally (Harrell, 2003). In addition, justice-involved persons enrolled in problem-solving courts are all unique, requiring courts to frequently adjust their approach. That flexibility, however, can lead to problematic inconsistency (National Association of Drug Court Professionals, n.d.). It can also fan concerns among policy makers and pundits:

Problem-solving courts have raised hackles among both liberal and conservative commentators. On the right, problem-solving conjures images of a fuzzy-minded judiciary hell-bent on rehabilitation at the expense of accountability and individual responsibility.

On the left, it raises the specter of a misguided judiciary unfettered by the restraints of the adversarial system, eager to send poor and defenseless defendants into lengthy social interventions for their own good, proportionality be damned. (Berman & Feinblatt, 2002)

Problem-solving courts draw considerable attention from the media and public.<sup>11</sup> It could be because the programs substantially change how judges and attorneys operate in the courtroom (Stetzer, 2016; Dukmasova, 2016). Countless books and movies portray the courts as home to solemn and detached judges, driven and cunning attorneys, and dramatic cross-examination. Visitors to problem-solving courts now are often surprised to see judges and lawyers making benevolent inquiries together and focusing on preventing tears on the stand, not creating them (Fishman, 2014).

The change in roles has generated ethical and practical concerns (Freeman-Wilson, Tuttle, & Weinstein). The legal professionals' increased involvement in the personal lives of program participants can make it more difficult to arrive at objective legal determinations in the case. Being human, judges and attorneys are subject to emotions when dealing with the often troubled justice-involved people referred to problem-solving courts. The joy of helping program participants make progress can easily be offset by failures and associated harm to the community. Negative emotions can sap legal teams' physical and psychological wellbeing and be particularly dangerous if left unmanaged (Norton, Jennifer Johnson, & Woods, 2016).

The problem-solving paradigm creates pressures on all those who operate the program, but the pressure seems particularly intense for defense attorneys.

Since the inception of the drug court movement in America, arguably no player on the drug court team—be it judge, prosecuting attorney, probation officer or treatment provider—has struggled more with his or her own identity and often conflicted role than the defense attorney. The desires of the treatment team and the drug court client are, at times, conflicting and can

<sup>11</sup> A Google internet inquiry conducted on November 11, 2016, using the terms "drug courts" and "reentry courts," returned 2.4 million and 520,000 matches, respectively.

seemingly put the defense attorney in a box with no way out. (National Drug Court Institute, 2013).

Judges and lawyers not only have to meet the ethical and practical challenges but do so in a transparent way. Otherwise, justice-involved persons and crime victims may think their legal rights have been unfairly subjugated to the broader interests of the problem-solving program. The interpretation would be reasonable to a lay person who once saw his or her defense attorney, in the case of the person charged, or prosecutor, in the case of the victim, zealously advocating for their Constitutional and statutory rights. Similarly, they saw the judge at arm's length from the litigants. In the problem-solving context, however, they see all the legal professionals acting in concert to pursue a global objective that they, personally, may not share (Feinblatt & Denckla, 2001). To mitigate such concern, some states require defense attorneys to explain to their clients how problem-solving courts may impact traditional advocacy rules and define when the client's wishes are not binding on the attorney (Meekins, 2007).

In addition to the ethical challenges, the problem-solving model produces additional training requirements for judges and attorneys. In order to influence the behavior of program participants, the legal team needs familiarity with forensic psychology, neurobiology, and pharmacology, among other fields. It is difficult for legal practitioners to develop that kind of knowledge base while maintaining their legal expertise (Bozza, 2008). One attorney noted that it takes "long-term training to figure out what kinds of treatment programs actually work, what are an individual's problems, and how to match that individual's problem to a particular program. Defense lawyers, prosecutors, and judges are [normally] not trained to do this" (Feinblatt & Denckla, 2001). Judges and attorneys can and do rely on the expertise of probation officers and treatment providers to assist with the necessary social science (Rudes & Portillo, 2012). A complete delegation by the court, however, would be contrary to the problem-solving model and possibly violate statutory rules (Adair, 2004).

The more judges and the attorneys are expected to assist in treatment decisions, ironically, the more susceptible they are to criticism. Judges have already been accused of exceeding their area of expertise, practicing medicine without a license and acting like amateur therapists (Szalavavitz, 2015;

**TABLE 2.**  
**Examples of Problem-Solving Courts Rewards and Sanctions**

	Modest	Moderate	High
<b>Rewards</b>	Verbal praise from the court	Reducing reporting requirements	Savings bond
	Applause during a hearing	Relaxed curfew rules	Concert tickets
	Free sundries and token gifts	Appoint as peer mentor	Health club membership
<b>Sanctions</b>	Verbal admonishment	Increased reporting requirements	Home confinement
	Essay assignment	Community service	Short jail term
	Maintain a journal	Financial sanction	Termination from program

Source: <http://www.ndcrc.org/content/list-incentives-and-sanctions>

Galloway; Berman & Feinblatt, 2002; Eaton, 2005). See Table 2.

As part of their problem-solving activities, the legal team reviews progress reports of program participants from probation officers and treatment providers; they discuss appropriate incentives and sanctions in light of the reported progress and interact with program participants at status hearings. Maybe more significantly, many judges and attorneys provide unique services directly to, and secure resources on behalf of, program participants. These services are often beyond that which can be offered by traditional probation and pretrial supervision. For example, by virtue of their status, judges are often able to recruit high-status and prosocial mentors for program participants (Castellano, 2016).<sup>12</sup> They also can garner support from civic leaders and potential employers (McAvoy, 2016). Moreover, they can secure cooperation from

<sup>12</sup> Programs involving attorneys serving as mentors and providing assistance to justice-involved persons on matters of collateral consequences are not new. See, Burger, W. [Chief Justice of the United States], *Our Opinions Are Limited*, Villanova Law Review (December 1972), 165-172, 171 ("The ABA Commission on Correctional Facilities and Services has developed an active program aimed at modifying laws that foreclose large areas of employment for persons with criminal records. . . Another Commission program has already supplied 1,000 young lawyers as volunteers in twelve states to give counselling guidance and assistance to convicted persons released on probation or parole. This is a device used for more than 200 years in the countries of Northern Europe to supplement official governmental agencies").

key government officials. For example, one court has a representative from the Veterans Administration at status hearings to help qualified program participants cut through red tape and secure benefits (Burris, 2016). Prosecutors and defense attorneys, directly or through referrals, assist program participants with ancillary civil matters (Maloney, 2016; Torres, 2016). It is not uncommon for justice-involved people, particularly those who have been incarcerated, have neglected their personal finances and avoided other responsibilities. Consequently, justice-involved persons frequently are subject to punitive financial liens, are in trouble with the Internal Revenue Service, and have lost their driver's license. An attorney's assistance in addressing those and related problems can protect program participants from being overwhelmed and losing motivation to stay law abiding. Moreover, by guiding program participants through the process of prioritizing their problems, developing coping strategies, and helping them negotiate effectively, the attorneys are teaching program participants life-skills that go beyond the legal realm (SanGiacomo, 2016). There are obviously concerns that prosecutors' and defense attorneys' help in providing legal advice in civil matters may create conflicts of interest and dilution of duties, so applicable ethical rules and considerations have to be taken into account (Freeman-Wilson, Tuttle, & Weinstein).

## Emergence in Federal Courts

The popularity of problem-solving courts in

state and local jurisdictions led to experimentation in the federal courts. The Department of Justice initially argued against adoption of federal drug courts<sup>13</sup> in a report to Congress:

Using the existing data, approximately 2.0% of federal drug offenders between 2004 and 2005 were sentenced for simple possession offenses. Thus, putting aside unknown factors such as violent criminal history, and assuming that all offenders sentenced for simple possession offenses are non-violent, substance abusers, at the most only a very small number of federal drug offenders—412 out of 24,561 in FY 2005—would even be eligible for a traditional drug-court type program. Plainly, this small and uncertain number of offenders does not warrant the creation of a new federal drug court program, particularly when there are existing drug treatment programs available in the federal system. (Department of Justice, June 2006)(cites removed)

Nonetheless, by the end of 2010, nearly half of federal districts had problem-solving courts, drug courts among them. Although there was considerable variation among the court programs, they reported consistency in targeting higher-risk persons under supervision who were motivated to change (Meierhoefer, 2011). Of the various types of problem-solving courts, reentry courts seemed to take the greatest hold in the federal system, and that trend was consistent with what was happening more globally in criminal justice (Marlowe, Hardin, & Fox, 2016). The Department of Justice, its position against drug courts aside, specifically encouraged its prosecutors to actively participate in reentry courts.<sup>14</sup> Reentry courts focus on persons returning to society after a prison term, but otherwise had the hallmarks of a drug court:

In the reentry court, the presiding judge—with the aid of an Assistant Federal Public Defender and an

Assistant United States Attorney—assists United States Probation with the supervision of participants by conducting regular court sessions attended by all participants in the program. At the court session, the judge reviews and responds to the achievements and failures of each participant. The conduct and activities supervised by the program are those typically handled by United States Probation without judicial support. The program adds the regular oversight of a defendant by a judge with a blend of treatment, education and job skills training, and sanctions alternatives to address participant behavior, rehabilitation, and the safety of our communities. Additional details on the program are included in the attached Interagency Agreement for the creation of a reentry court. (Reentry Court)

### Federal Problem-Solving Court Studies

While there have been positive anecdotal assessments of federal problem-solving courts (Beeler, 2013), empirical studies have been inconclusive. Two studies commissioned by districts found their program participants had either the same or higher recidivism rates than those in comparison groups.<sup>15</sup> Yet two other studies found at least marginal reductions in recidivism, although those studies involved small study cohorts.<sup>16</sup> In fact, all the federal studies to date, according to the researchers who conducted them, have had significant

methodological limitations.<sup>17</sup> Those limitations include those that often plague criminal justice research generally: selection bias, poor comparison group development, incongruent follow-up periods, failure to account for confounding factors, and lack of statistical controls for small population sizes and other factors (Burkhead, 2006).

The lack of clarity from the initial federal evaluations demonstrated the need for a larger, more comprehensive study. The Judicial Conference's Committee on Criminal Law requested the Federal Judicial Center (FJC) to undertake the effort, asking them to study both the effectiveness and cost efficiency of reentry courts relative to other ways of providing similar services. The FJC accepted the commission pursuant to its statutory mission to study judiciary operations (The Federal Judicial Center Offers Training and Research, 2009). Going into the study, the FJC had the advantage of pre-existing familiarity with the federal judiciary and having already provided training to problem-solving courts.

The FJC fashioned an "experimental design" for its study, with random-assignment of hundreds of justice-involved persons from multiple districts, tracking cost and outcomes for more than two years. With participation in the study voluntary, the FJC identified five geographically diverse districts willing to be part of the study.<sup>18</sup> The FJC then set study and control groups to be populated by volunteer justice-involved persons, randomly assigned to the group by the FJC. Last, the FJC put in place the mechanisms to track recidivism, in its varied forms, and cost.

Judges, litigants, and probation officers participating in the study received training in research-proven, "evidence-based" behavioral change techniques set out in the *Integrated Model for Implementing Effective Correctional Management of Offenders in the Community*, a program developed with support from the National Institute of Corrections (Crime and Justice Institute, 2014). The court teams also participated in training sessions led by the National Association of Drug

<sup>13</sup> The Department of Justice used the term "drug courts," at the time, to refer to all specialized courts programs, whether they were pretrial or post-conviction.

<sup>14</sup> U.S. Department of Justice, Office of the Deputy Attorney General, Memorandum for All United States Attorneys, Guidelines for Participation by United States Attorneys' Offices in Post-Incarceration Reentry Programs, Jan. 19, 2011.

<sup>15</sup> Taylor, C., *Tolerance of Minor Setbacks in a Challenging Reentry Experience: An Evaluation of a Federal Reentry Court*, 24 Criminal Justice Policy Review 49, 64 (2013) ("Nearly one-third of both [program] participants and comparison group individuals were arrested for a new offense during the study period. Eight percent of [program] participants and 6% of the comparison group were arrested for a new violent offense"; Close, D., Aubin, M., Alltucker, K., *The District of Oregon Reentry Court: Evaluation, Policy Recommendations, and Replication Strategies*, available at: <http://www.orp.uscourts.gov/documents/ReentryCourtDoc.pdf>. ("it appears that the comparison group outperformed the treatment groups on multiple, important dimensions. For example, the comparison group underwent less monitoring and supervision and had fewer drug and mental health services and yet had more employment and fewer sanctions.")

<sup>16</sup> For a summary of the studied programs and their results, see Vance, S., *Federal Reentry Court Programs: A Summary of Recent Evaluations*, Federal Probation (Sept. 2011)

<sup>17</sup> Id.

<sup>18</sup> These districts were the Central District of California, the Middle District of Florida, the Southern District of Iowa, the Southern District of New York, and the Eastern District of Wisconsin.

Court Professionals (NADCP)<sup>19</sup> and the Administrative Office (AO) of the United States Courts. In addition, the group observed a case conference and other activities held, in simulated fashion, by operators of the federal drug court in the District of Massachusetts.

The court teams received instructions and written guidance on how they were to operate their respective groups. The guidance covered issues such as behavior management techniques, nature of rehabilitative interventions, and changes in program intensity based on progress and relapses. The guidance was based on the work of the NADCP, contextualized by the AO (OPPS Model Policy for Experimental Reentry Programs, 2010; The Federal Judicial Center, 2010).

In all, the FJC approached more than 500 justice-involved persons in volunteer districts to participate in the study. More than 42 percent declined, leaving 289 justice-involved persons for random assignment. The FJC placed volunteers in either “Group A,” which had all the elements of a formal problem-solving court, including being led by a judge; “Group B,” which was the same but led by a probation officer rather than a judge, or “Group C,” which involved post-conviction supervision by a probation officer alone. Also, as a “Group D,” the FJC tracked outcomes of persons who declined to participate in the reentry court study, at least in instances where they were subject to ongoing probation and supervised release terms.

Among the outcomes monitored by the FJC were revocation rates at 24 months, rearrest at 30 months, and total cost of operation. In its review of operations, the FJC discovered that volunteer courts were finding it difficult to adhere to the defined reentry court model. Courts, to one degree or another, varied in terms of treatment intensity, phased movement of participants, level of participation by team members, and (in limited instances) the random case assignment methodology. The courts diverged from the prescribed model, presumably, to address the needs of individual cases or to respond to logistical realities or local priorities.

The variation from the model may reflect

the inherent challenges involved in trying to apply a single model of operation in an environment as large and diverse as the federal judiciary, and adds challenges to expanding the problem-solving model. The judiciary is required to deal with prosecutions based on more than 3,000 statutes investigated by 70 different law enforcement agencies. The charges cover everything from drug trafficking to fraud, terrorism, weapons offenses, immigration violations, environmental crimes, and espionage. There are 94 district court jurisdictions, each afforded autonomy to deal with their unique legal, socio-economic, and geographic environments. There are more than 200,000 justice-involved people a year subject to some form of federal court-imposed supervision.<sup>20</sup> That population, made up of individuals, presents a boundless array of criminogenic risks, rehabilitative needs, and responsivity issues. Not every supervisee requires the same type and intensity of monitoring and treatment services. Moreover, getting them the monitoring and services they

do need is a challenge, because they reside in an area covering 3.8 million square miles and in every type of living environment. Each locale has different treatment resources, law enforcement presence, job markets, and policies toward justice-involved persons.

As was the case with other studies of problem-solving court programs, the FJC study has been subject to criticism regarding its execution. The primary concern was the court’s failure to strictly adhere to the random case assignment protocol. There was also criticism regarding the lack of incentives to secure more interest in study and program involvement (Compton, 2016).<sup>21</sup> Nonetheless, the FJC concluded “there was sufficient fidelity to the [...] model to justify analyses of the combined sites. By combining the sites, we gain statistical power and increase our ability to detect differences in outcomes across the experimental groups” (Rauma, 2016). Chief among the observations made was that participants in judge-led problem-solving court programs had higher revocation and rearrest rates than those subject to traditional supervision by

<sup>20</sup> Persons are conditionally released to the community by courts, the U.S. Parole Commission and the Federal Bureau of Prisons. The types of release include pretrial, deferred prosecution, criminal incapacitation (person found unfit to stand trial or to be sentenced), probation, parole, special parole, military parole and conditionally released persons unfit to stand trial or to be sentenced, and conditionally released certified sexually dangerous persons. Pursuit to Title 18 of the United States Code, the United States Probation and Pretrial Services System supervises persons conditionally released to the community by the courts and Department of Justice. Probation and pretrial services officers are responsible for promote adherence to the conditions imposed by the court and paroling authority, and to detect and report violations.

<sup>21</sup> It is unclear, at this point, what incentives would be appropriate and sufficiently strong to address the concerns raised and their impact on any subsequent cost/benefit analysis. The use of incentives could also produce ethical and practical concerns of their own. See, *Ethics in Human Subjects Research: Do Incentives Matter?* Journal of Medicine and Philosophy, Grant R; Sugarman, J. (2004). Some of the existing incentives used by problem-solving courts are set out in Table 2 of this article and include early termination from supervision and case-specific rewards, such as issuance of a formal letter of rehabilitation. See, *Judge Gleeson Issues a “Federal Certificate of Rehabilitation,”* Collateral Consequences Resource Center, Love, M. (March 7, 2016).

**TABLE 3.**  
**Revocation and Rearrest Rates**

	Revoked at 24 Months	Rearrested at 30 Months
<b>Group A: Judge &amp; Team</b>	22%	45%
<b>Group B: Probation Officer &amp; Team</b>	33%	27%
<b>Group C: Supervision by Probation Officer Alone</b>	19%	31%
<b>Group D: Supervision by Probation Officer Alone of Persons Refusing Participation in Other Groups</b>	19%	35%
<b>Average</b>	23%	34%

<sup>19</sup> The NADCP is a non-profit organization that “champions proven strategies within the judicial system that empower drug-using people to change their lives.” Through its National Drug Court Institute, it provides comprehensive training and technical assistance to more than 3,000 drug court and problem-solving court professionals annually (About NADCP).

probation officers. In fact, at the 30-month mark, the rearrest rate for those in the judge-led program was 18 percentage points higher than those in the same program administered by a probation officer (See Table 3 and Chart 1). Those differences, however, were not deemed statistically significant due to the number of program participants involved. The only distinguishable factor found by researchers pertained to cost. The judge-led group (Group A) was the most expensive to operate. On average, Group A cost \$44,500, or 83 percent, more than Group B (the probation officer-led group) (Rauma, 2016). Groups C and D (traditional probation supervision) had the lowest per capita cost overall, as such supervision did not involve salary costs beyond that of the probation officer.

### The Implications

Staying with a program, even a promising one, can be costly if it comes at the expense of a more effective one (Duriez, Cullen, & Manchak, 2014). Our criminal justice system has a history of maintaining and expanding programs in the absence of strong empirical evidence. Although the programs were popular and seemingly effective from an intuitive perspective, they later proved to be ineffective and in some cases even damaging. The premature expansion of programs that later fail may feed public perception that nothing works in terms of rehabilitation. In addition, they exact a significant opportunity cost relative to other programs that are effective, although not as popular or high profile.

In March 1995, boot camps or “shock incarceration programs” were heralded as “one of the newest weapons in the war on crime.”

While not all boot camps were designed alike, at the federal level they involved military drill and access to educational and rehabilitative programming (Klein-Saffran, Chapman, & Jeffers, 1993). While there was reason to question boot camps’ ability to reduce recidivism from the very beginning (Burns & Vito, 1995), they proliferated nevertheless. By 1998, boot camps were operating throughout the country (Colledge & Gerber, 1998). Support for boot camps eventually faded in the face of mounting research demonstrating they were ineffective at reducing recidivism (Parent, 2003). Even boot camps with formal treatment components did not fare well from a statistical perspective (Wilson, MacKenzie, & Mitchell, 2008). The Federal Bureau of Prisons closed its boot camps in 2005 (Willing, 2005). Many state and local systems eventually terminated their programs as well (Bergin, 2016). Shock or “intensive” community supervision programs, with operating principles similar to boot camps, were also deemed ineffective and discontinued at about the same time (Sherman, Gottfredson, MacKenzie, Eck, Reuter, & Bushway, 1998).

A 1979 documentary skyrocketed “scared straight” programs into popularity. At least 30 jurisdictions adopted scared straight programs, and they received attention at the federal level as well (Petrosino & Buehler, 2003). Scared straight was designed to expose at-risk youth and first-time offenders to hardened criminals, with the hope that the interaction would literally scare the younger, less culpable offenders out of a life of crime. The popularity of scared straight declined when initial reports of its effectiveness were disputed, and concerns grew that the program

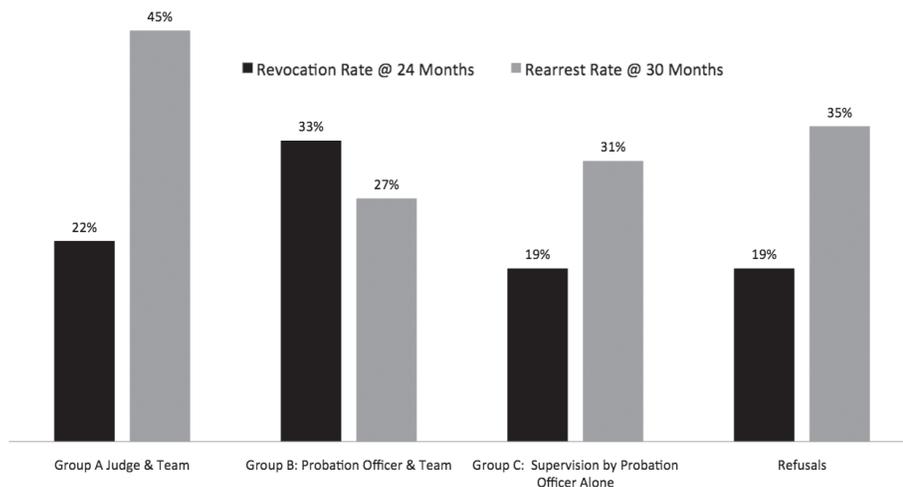
was actually having adverse effects on participants. The federal government, which once considered having scared straight programs, took the unusual step of outright discouraging their use (Department of Justice, 2011) and labeled them as having “no effect” in regard to recidivism (Department of Justice, 2016).

Drug Abuse Resistance Education, more commonly known as D.A.R.E., followed a similar life cycle. Initial popularity grew, with eventually 15,000 police officers assigned to schools, providing drug education and trying to enhance community relations. A line of studies finding that D.A.R.E. did not work, and in some instances increased drug use by students, checked the growth (Berman & Fox, 2010).

There are many, often conflicting, theories on the causes and solutions to crime (Regis University, 2016). The popularity of these theories seems to ebb and flow over time. The rehabilitative model of the 1960s and 1970s was replaced with the “just desserts” model of the 1980s and 1990s; now therapeutic jurisprudence is growing in popularity (International Therapeutic Jurisprudence in the Mainstream Project, 2016). The fact is that it is hard for any single theory to be effective all the time. Human behavior, and criminal offending in particular, is complex and does not lend itself to one type of intervention.

The federal probation and pretrial services system has geared itself less toward “programs” and more toward flexible principles and doctrines. Individualized case assessment and interventions tailored by trained professionals to specific risk presented have been mainstays for federal probation and pretrial services officers for decades (Administrative Office of the U.S. Courts, 1952). More recently, actuarial risk assessment tools been added to the arsenal of probation and pretrial services officers in identifying and addressing criminogenic issues in a case. In addition, cognitive-based interventions have emerged as one of the most versatile and promising means of producing positive behavior change. The theory underlying cognitive behavioral interventions is that thinking influences behavior. Consequently, officers assist supervisees with analysis of thought patterns, realistic goal setting, contingency planning, and progress assessment (Burkhead, 2006). One of the larger training efforts undertaken by the Administrative Office of the United States Courts for probation and pretrial services officers has been based on the cognitive behavioral model. Called “Staff Training Aimed at Reducing Rearrest” or STARR, its curriculum and

**CHART 1.**  
**Revocation and Rearrest Rates**





20 percent—44 studies—used sound social science principles. . . .

Many drug court evaluations have been criticized for having poorly defined or biased control groups, omitting data on people who fail to complete the treatment program, and over-reliance on self-reported data. A more trenchant critique in the U.S. case may be that a large majority of studies derive from government-funded evaluations of government-funded courts; there are too few independent evaluations. (Csete, 2015)

Conflicting research results and contrasting views on the effectiveness of drug courts are not new. The authors of a 2003 article in the *Federal Sentencing Reporter* began their discussion with these two quotes:

Drug courts don't work, and never have. They don't reduce recidivism or relapse . . . They have become . . . a form of glorified, and terribly expensive, probation . . . Their continued popularity is a testament to their political appeal, and to the irrational commitment of a handful of true believers.

Drug courts work—the research proves it and there are science-based reasons for the research findings . . . But just as compelling as the outcome research is the explanation of 'why' drug courts work. The answer to that question is also based on science and predicated upon enhanced training, and the informed use of sanctions and incentives to motivate change. (Marlowe, DeMatteo, & Festinger, 2003) (Cites omitted)

At times, the debate has moved beyond whether drug courts to why they expanded so quickly. One state judge stated:

Drug courts are sweeping the country, a contagion fueled by federal grants and sparked by well-intentioned state and local trial judges frustrated by the lost war on drugs . . . [W]e have rushed headlong into [drug courts], driven by politics, judicial pop-psychopharmacology, fuzzyheaded notions about "restorative justice" and "therapeutic jurisprudence," and by bureaucrats' universal fear of being the last on the block to have the latest administrative

gimmick. (Hoffman, 2000)<sup>24</sup>

Another judge expressed practical concerns that the involvement by judges in problem-solving courts may dissipate and dilute judicial authority and deplete resources:

Assuming drug and mental health courts provide a model for effective behavior modification, the same results can be accomplished without the need to fundamentally alter the judiciary's traditional role as an independent adjudicator and guardian of the rule of law.

These courts do not provide individuals with access to any new or unusually effective form of treatment. Professionals can offer treatment only that our current scientific knowledge of human behavior supports. If the treatment doesn't work in the community, it won't work any better if carried out in the context of the court system.

Moreover—assuming that these initiatives offer some advantage in the management of criminal offenders—direct and ongoing judicial involvement is not required. The dissemination of rewards and punishments can be done by anyone who has the practical ability to do so. (Bozza, 2011)

The Open Societies Foundation made a similar point: "[d]rug treatment courts are not specified as the only or principal means of providing that alternative [to prosecution or incarceration]" (Csete, 2015). One of those options is to treat chemical addiction as a medical problem altogether and aim

<sup>24</sup> As to the expansion of drug courts, the NADCP advised it "launched a massive campaign to put a Drug Court within reach of every American in need. NADCP has aggressively pursued its vision and achieved a renewed commitment for Drug Courts among Congress and the general public alike. A national rally on Capitol Hill; 890 face-to-face Congressional visits; numerous press conferences; two major research announcements; Congressional testimony; and an ongoing media blitz that landed Drug Courts and NADCP on all major television networks and in *Newsweek*, *USA Today*, *The Washington Post*, *The New York Times*, and countless other newspapers, resulting in a staggering 50% increase in federal funding in 2007, and a historical 250% increase in federal funding for Drug Courts this year. Additionally, on July 1, 2009 NADCP launched its new public awareness campaign, ALL RISE, starring ten celebrities in a series of national public service announcements which introduces a broad group to NADCP's efforts to improve justice." (About NADCP)

preventative, treatment and research resources at all abusers, not just at those involved in the criminal justice system (Justice Policy Institute, 2011).

## Where Does this Leave Us in Understanding Studies of Federal Reentry Courts?

How can we reconcile the seemingly irreconcilable studies and interpretations of federal, state, and local programs? One of the findings from a Columbia University meta-data analysis may offer a solution. The study explained that one of the reasons drug courts are sometimes found effective is that they "provide more comprehensive and closer supervision of drug using offenders than other forms of [traditional] supervision" (Belenko, 1998). Put another way, the "quantitative drug court research focuses primarily on the issues of cost and recidivism vis-à-vis traditional dockets" (Werkmeister, 2015). Therefore, whether drug courts are considered effective or not often depends on the quality of the community corrections program they are measured against.

Drug courts were created when many probation and parole programs were struggling. Tight budgets and rapidly increasing caseloads left many departments unable to provide even the most basic supervision and rehabilitative services (Petersilia, 1998). As a result, recidivism climbed and so did the pressure to act.

Drug courts sprung out of necessity, not fashion or vogue. Just over twenty years ago when drug courts were born, the court system was in crisis. Dockets were overwhelmed with drug-related cases that rarely seemed to be resolved. Judges would sentence drug offenders to probation or incarceration, only to quickly see them back again on a revocation or new charge. The oft-cited statistics spoke loudly then and continue to speak deafeningly today: two out of three prison inmates arrested for a new offense; fifty to seventy percent of inmates reincarcerated for a new offense or parole revocation; forty to fifty percent of probationers revoked; ninety-five percent of drug offenders continuing to abuse alcohol, other drugs, or both with little pause. (Marlowe & Meyer, 2011, p. 1)

To the credit of Congress and leadership in the judiciary, the federal probation and pretrial

services system did not fall into the depths experienced by some state and local systems. Comparatively, caseloads remained reasonable, the federal probation and pretrial services system was able to recruit and retain quality staff, and there was support for training and research, and investment in other key areas.<sup>25</sup>

The outcomes associated with the federal, state, and local systems have been distinguishable as well. It is true that direct comparisons can be tricky because agencies define recidivism and client risk differently. But some generalizations can be made. For its part, the federal probation and pretrial services system defines and reports recidivism as arrest on any felony-level charge and termination of supervision upon revocation. At last measure, the rearrest rate of persons under federal supervision hovered at 20 percent after three years and they had a “total failure” rate, combining arrest and revocation, of 34 percent (Baber, 2015).

A Bureau of Justice Statistics (BJS) study placed the rearrest rate of federal supervisees much higher, at 35 percent (Markman, Durose, Rantala, & Tiedt, 2016). A more detailed explanation of the methodological differences underlying the variation is being drafted, but aside from different time-period, sampling and other factors, BJS took into account any arrest, for any reason. The probation and pretrial services system did not, looking only at felony-level charges. Consequently, the probation and pretrial services computations do not take into account arrests for scofflaw and administrative law violations, nor arrests related to revocation of supervision proceedings, as the latter were influenced in large part by the probation and pretrial services system itself.

The clear advantage of the BJS approach, however, is that it allows for better comparison of outcomes for people released from federal prison and those released from state prisons. Again, the BJS reported a three-year rearrest rate of 35 percent for persons released from federal prison to community supervision. For persons released from state prisons, the three-year rearrest rate has averaged 68 percent (Durose, Cooper, & Snyder, 2014). Consequently, the data indicates that the rearrest rate of persons released from federal prison is about half that of people released from state facilities. The difference is even

greater for federal probationers and those who were not required to serve prison terms as part of their sentence.

The lower recidivism baseline makes it difficult for federal problem-solving courts to produce significant reductions. While state and local problem-solving court programs have reported substantial recidivism reductions, they tended to be in jurisdictions with high preexisting failure rates. Consequently, the opportunity for reduction was larger in those jurisdictions. Although not a perfect analogy, it is as if the federal system is trying to facilitate weight loss among 200-pound individuals, while some of the state and local systems are dealing with people weighing much more.

The BJS study identified both demographic and criminogenic differences between state and federal justice-involved populations, which in part explains differences in expected recidivism rates and variation in programmatic need. The average person released from federal prison had 6 prior arrests on his or her record, while it was nearly double that for persons released from state prisons.<sup>26</sup> Although the racial makeup is similar in all jurisdictions, federal offenders tend to be a bit older and females constitute about seven percent more of the population. Even taking those differences into account, federal recidivism rates are still lower than the collective rate for states, according to the Bureau of Justice Statistics research.

## Summary and Conclusion

There are many problem-solving courts in state and local jurisdictions, and they have grown popular in the federal system as well. With their basis in drug courts, all problem-solving programs leverage specialized dockets and case assignment, judicial oversight of the rehabilitative process, and collaborative assistance from prosecutors and defense attorneys. There is ongoing debate about whether problem-solving courts achieve their goal of reducing recidivism and keeping communities safer. Studies of federal problem-solving courts have been mixed. Adding to the equation is that operation of problem-solving courts has generated some policy, ethical, and

even pragmatic questions.

At the same time, there is no disputing that problem-solving courts have created positive energy. The mixed study results aside, they retain considerable intuitive and emotional appeal. Maybe more importantly, observers are pointing to a potential niche service that problem-solving courts provide that may hold great potential. Specifically, many problem-solving courts help participants manage and overcome “collateral consequences” to their criminal activity, prosecution, and sentence. In doing so, the courts address “responsivity issues” that could interfere with a successful reintegration into society, and impart important life skills that assist program participants in moving forward. Fully addressing such issues has been outside the reach of traditional probation and pretrial services supervision.

The federal judiciary has a tradition of successfully reducing the criminogenic risk posed by persons conditionally released to the community. Historically, the courts have relied on the probation and pretrial services system to both monitor and improve the condition of justice-involved persons. The problem-solving court movement reflects the judiciary’s commitment to improvement and evolution. While persuasive empirical evidence that federal problem-solving courts reduce recidivism is at this point lacking, that should not dampen enthusiasm for improvement and securing better outcomes. Federal problem-solving courts have modeled themselves on state and local courts. Differences among jurisdictions may explain why positive results reported in some state and local courts have not been replicated federally. Consequently, maybe the question now should be what model makes the most sense in light of the peculiarities of the federal system.

Maybe the feature of problem-solving courts that is increasingly garnering accolades from community corrections professionals can serve as the basis for a more refined federal model moving forward. Assisting program participants with issues such as collateral consequences to a conviction can be invaluable and clearly leverages the professional skills and expertise of judges and attorneys. That in combination with greater division of duties with probation and pretrial services officers and treatment providers, and more direct behavior modification issues, may help reduce the cost of problem-solving courts, enhance outcomes, and even circumvent certain ethical issues.

Regardless of how the question of federal problem-solving courts is answered now,

<sup>25</sup> More than half of officers exceed the bachelor’s degree requirement with either a master’s degree or doctorate. In addition, officers average 10 years of relevant experience and are required to participate in at least 40 hours of training a year.

<sup>26</sup> Existing cross-jurisdictional comparisons take into account the number of arrests and the type of charge but not the severity of the offense (i.e., the amount of drugs or nature of victims’ injuries), perpetrators’ level of sophistication (e.g., use of special skills and efforts at concealment) or role in the offense (i.e., leader or organizer as compared to those who operate at the direction of others).

whether it be expansion, maintaining the status quo, or modification as suggested above, metrics and timelines need to be put in place for future decision making. No program should be allowed to go on endlessly without demonstrating its programmatic and cost efficacy. The criminal justice system in this country has repeatedly maintained and expanded crime reduction programs that sounded good but proved to be ineffective, exacting opportunity costs and endangering the community. While experimentation and piloting of new programs is absolutely necessary, it is unwise and maybe unethical to do so without a plan to assess their effectiveness and cost.

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