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## Note

### **Solving the Problem of Problem-Solving Justice: Rebalancing Federal Court Investment in Reentry and Pretrial Diversion Programs**

*By Devin T. Driscoll\**

Rosemary has just been arrested near the campus of the University of Oregon, in Eugene.<sup>1</sup> Eugene Police Department officers, while conducting a routine traffic stop, discovered twenty-seven grams of powder cocaine on her person. Rosemary, a sophomore at the University, has never been arrested before. While this volume of cocaine is not enough to bump her into mandatory minimum territory,<sup>2</sup> which would *require* a judge to impose a particular sentence, federal prosecution still carries a possible

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\* J.D. Candidate 2018, University of Minnesota Law School; B.A. 2008, Providence College; M.P.P. 2011, University of Minnesota Hubert H. Humphrey School of Public Affairs. This Note would not exist without several incredible members of the federal and state bench: thank you to Judge Ann Aiken for inspiring me to learn more about criminal reentry through her innovation and service to the people of Oregon; to Judge Jack B. Weinstein for providing me with invaluable information about the antirecidivism work of the Eastern District of New York; to Judges Donovan Frank and Susan Richard Nelson for allowing me to observe their reentry court programs in the District of Minnesota; and to Judge Mark J. Kappelhoff for his encouragement and counsel during my early development of this project. Thank you to the talented editors and staff of *Minnesota Law Review* for your tireless efforts as Guardians of the Profession, and also for your friendship. I am particularly grateful to Frank Guenther, Taylor Mayhall, Caitlin Opperman, Emily Atmore, and Mitchell Ness for their assistance in making this Note worthy of inclusion in Volume 102. Finally, thank you to Katie Driscoll for your unwavering support, your wisdom, and your compassion. I love you. Copyright © 2018 by Devin T. Driscoll.

1. This fictionalized account offers a perspective of the critical impact prosecution under the state-based ex-ante approach can have, versus prosecution under the federal ex-post approach.

2. See, e.g., Families Against Mandatory Minimums, *Federal Mandatory Minimums*, FAMM.ORG, <http://www.famm.org/wp-content/uploads/2013/08/Chart-All-Fed-MMs-NW.pdf> (last visited Jan. 30, 2018) (listing five kilograms of cocaine as the amount necessary to trigger a mandatory minimum prison sentence under federal law).

sentence of *up to* twenty years in prison.<sup>3</sup> If, however, Rosemary is charged by the Lane County District Attorney for the Class C felony of unlawful possession of cocaine,<sup>4</sup> she could face up to five years of incarceration.<sup>5</sup> This disparity in sentences is not the only significant difference in potential outcome based on whether she is charged by federal or state authorities. Rosemary, if charged by Oregon, would be eligible for the state's drug court—a specialized docket “designed to rapidly place drug-affected defendants into appropriate treatment programs with close supervision by a single judge familiar with both treatment and the offenders.”<sup>6</sup> The state charges against Rosemary would be dropped if she completes the drug court program. No similar preconviction diversionary program exists in the federal system. After her release from prison, however, Rosemary could be eligible for the federal program *based* on drug courts: the District of Oregon's reentry court.

This Note explores the creation of so-called problem-solving courts, including state drug courts and federal reentry courts, as well as the future of this kind of reform within the federal criminal justice system. Part I traces the development of problem-solving courts, beginning first with state drug courts in the 1990s, then state-based reentry courts in the early 2000s, before reviewing reforms to the federal system in the same period and the creation of federal reentry courts in the late 2000s. This Part offers—for the first time anywhere—a synthesis of the development of both state and federal programs designed to address addiction-related recidivism,<sup>7</sup> and classifies these two major categories of intervention as either *ex ante* or *ex post*. Part II considers challenges attendant to placing an *ex-ante* policy intervention—drug courts—in the *ex-post* policy context of criminal reentry. Part III offers a solution, both for (1) the creation of federal drug courts, either under existing statutory authority or

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3. BRIAN T. YEH, CONG. RESEARCH SERV. RL30722, DRUG OFFENSES: MAXIMUM FINES AND TERMS OF IMPRISONMENT FOR VIOLATION OF THE FEDERAL CONTROLLED SUBSTANCES ACT AND RELATED LAWS 5 (2015).

4. OR. REV. STAT. § 475.884 (2017).

5. OR. REV. STAT. § 161.605 (2017).

6. *What Is a Drug Court*, LANE CTY. CIRCUIT COURT, <http://www.courts.oregon.gov/Lane/DrugCourt/pages/drugcourtpage.aspx#dcwhat> (last visited Jan. 30, 2018).

7. Recidivism is defined generally as “[t]he action of relapsing into crime, or reoffending, esp. habitually; the tendency to behave in this way.” *Recidivism*, OXFORD ENGLISH DICTIONARY, <http://www.oed.com/view/Entry/159514?redirectedFrom=recidivism>. For a more technical definition of the term in the problem-solving court context, see *infra* note 40.

the inherent power of courts to create necessary procedural tools to manage their dockets; and (2) for the further development of federal reentry courts, via (a) institutionalization of the program in the Federal Sentencing Guidelines; and (b) investment in further research and development.

### I. DEVELOPMENT OF STATE AND FEDERAL PROBLEM-SOLVING COURTS

Beginning in the late 1980s, largely as a response to the crack and methamphetamine epidemics,<sup>8</sup> states revolutionized their pre- and post-conviction adjudication models for drug offenders. The first innovation is what this Note will call “the ex ante response”: drug courts, which were designed (1) as a substitute for traditional adjudicatory proceedings failing to treat the underlying issue of offender addiction; and (2) to intervene *before* criminal conviction.<sup>9</sup> Through a program of “early, continuous, and intense judicially supervised treatment,” these programs offered substance-dependent defendants an alternative to incarceration.<sup>10</sup> The apparent success of drug courts paved the way for a host of other specialty courts: juvenile drug courts, DUI courts, veterans courts, domestic violence courts, and mental health courts.<sup>11</sup> These specialty courts have been generally labeled problem-solving courts.<sup>12</sup> According to the National Association of Drug Court Professionals (NADCP), there are now

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8. See, e.g., Noel Murray, “*Snowfall*”: Everything You Need to Know About FX’s *Origins-of-Crack Drama*, ROLLING STONE (June 30, 2017), <http://www.rollingstone.com/tv/news/snowfall-what-you-need-to-know-about-fxs-crack-epidemic-drama-w488146> (describing the new television program tracing the history of the crack cocaine epidemic in 1980s Los Angeles); *The Crack Epidemic*, U.S. DEA, <https://web.archive.org/web/20060823024931/http://www.usdoj.gov/dea/pubs/history/1985-1990.html>.

9. The National Association of Drug Court Professionals (NADCP) defines “adult drug court” as a “specially designed court calendar or docket, . . . [designed] to achieve a reduction in recidivism and substance abuse among . . . offenders and to increase the offender’s likelihood of successful habilitation.” *Types of Drug Courts*, NAT’L ASS’N OF DRUG COURT PROF’LS, <http://www.nadcp.org/learn/what-are-drug-courts/models> (last visited Jan. 30, 2018).

10. *Id.*

11. See, e.g., Mitchell B. Mackinem & Paul Higgins, *Introduction to PROBLEM-SOLVING COURTS: JUSTICE FOR THE TWENTY-FIRST CENTURY?*, at vii (Paul Higgins & Mitchell B. Mackinem eds., 2009).

12. *Id.* (“Problem-solving courts are local courts that seek to remedy detrimental community conditions through sustained attention and through possible therapeutic interventions with individual offenders who experience debilitating personal conditions.”).

more than 1200 non-drug-court problem-solving courts operating in all fifty states and the District of Columbia.<sup>13</sup>

The next innovation this Note will refer to as “the ex-post response”: reentry courts, which were designed to reduce recidivism *after* an offender is released from prison as part of a criminal conviction for drug crimes.<sup>14</sup> Following a generation of experimentation at the state level, Article III judges began to modify and adapt the reentry model for application to federal courts.<sup>15</sup>

To understand the development of federal reentry courts, one must first understand the development of their state court analogues. Section A reviews the history of state drug courts and their efforts to combat addiction-based recidivism. Section B discusses the genesis of post-incarceration reentry courts at the state level. Section C examines the application of these models to federal courts.

#### A. HISTORY OF STATE DRUG COURTS

The first drug court in the United States was established by Dade County, Florida<sup>16</sup> in 1989.<sup>17</sup> A response to the crack-cocaine epidemic,<sup>18</sup> it operated as an alternative to incarceration.<sup>19</sup> Participants had moderate-to-severe substance abuse issues and

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13. *Problem Solving Courts*, NAT'L ASS'N DRUG COURT PROF'LS, <http://www.nadcp.org/learn/what-are-drug-courts/types-drug-courts/problem-solving-courts> (last visited Jan. 30, 2018).

14. The NADCP defines “reentry drug court” as one which “utilize[s] the drug court model . . . to facilitate the reintegration of drug-involved offenders into communities upon their release from local or state correctional facilities.” NAT'L ASS'N DRUG COURT PROF'LS, *supra* note 9.

15. The National Drug Court Institute defines federal reentry courts as “post-incarceration, cooperative effort[s] of the U.S. District Courts, U.S. Probation Office, Federal Public Defender and U.S. Attorney’s Office . . . providing a blend of treatment and sanction alternatives to address re-integration into the community for nonviolent, substance-abusing offenders released from federal prison.” WEST HUDDLESTON & DOUGLAS B. MARLOWE, NAT'L DRUG COURT INST., *PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES* 44 (2011).

16. The name of the county was changed to Miami-Dade in 1997.

17. Greg Berman, *Problem-Solving Justice and the Moment of Truth*, in *PROBLEM-SOLVING COURTS: JUSTICE FOR THE TWENTY-FIRST CENTURY?*, *supra* note 11, at 1, 4; *see also* JEFFREY TAUBER & KATHLEEN R. SNAVELY, NAT'L DRUG COURT INST., *DRUG COURTS: A RESEARCH AGENDA* 1 (Apr. 1999).

18. DOUGLAS B. MARLOWE ET AL., NAT'L DRUG COURT INST., *PAINTING THE CURRENT PICTURE: NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES* 13 fig.1 (2016) [hereinafter *NDCI REPORT*].

19. *Id.* at 11.

were charged with a drug-related offense.<sup>20</sup> “[C]areer criminals [or] violent offenders,” however, were not allowed into the program.<sup>21</sup> Participants were required to complete a treatment program, refrain from drug or alcohol use for a significant period of time (enforced through frequent random urinalysis tests), remain arrest free, follow supervision conditions, and pursue education or employment.<sup>22</sup>

The Dade County drug court differed from a typical adversarial proceeding. Instead of acting as a disinterested neutral, the judge was “the leader of a multidisciplinary team of professionals” composed of the prosecutor, defense attorney, probation officer, and representatives from treatment and service organizations.<sup>23</sup> As one prosecutor who participated in the program noted, “In this court all of us are public defenders, really.”<sup>24</sup> The team met before each bimonthly or monthly session to confer about participant progress, and to recommend either rewards or consequences to be handed down by the judge during the session.<sup>25</sup> These “incentives and sanctions [we]re moderate in magnitude and delivered with certainty.”<sup>26</sup> Once a participant successfully completed the program, they were diverted out of the criminal justice system without a conviction on their record<sup>27</sup>—avoiding both the high costs of incarceration<sup>28</sup> and the collateral consequences that follow conviction.<sup>29</sup> These twin benefits to

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20. *Id.*

21. Ronald Smothers, *Miami Tries Treatment, Not Jail, in Drug Cases*, N.Y. TIMES, Feb. 19, 1993, at A10.

22. NDCI REPORT, *supra* note 18, at 11.

23. *Id.*

24. Smothers, *supra* note 21.

25. NDCI REPORT, *supra* note 18, at 11.

26. *Id.* at 17.

27. *Id.* at 11 (noting the varying methods of post-completion impacts on criminal records).

28. See Annual Determination of Average Cost of Incarceration, 80 Fed. Reg. 12523 (Mar. 09, 2015) (finding the “average cost of incarceration for Federal inmates in Fiscal Year 2014 was \$30,619.85 (\$83.89 per day)”; see also Marc Santora, *City’s Annual Cost Per Inmate Is \$168,000, Study Finds*, N.Y. TIMES, Aug. 24, 2013, at A16 (noting the “annual average taxpayer cost in [forty participating] states was \$31,286 per inmate”).

29. See, e.g., MARGARET COLGATE LOVE ET AL., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE § 2.1 (2016) (listing specific categories of collateral consequences). “Persons convicted of crimes are subject to a wide variety of sanctions and restrictions in addition to the sentence imposed by the court. These so-called ‘collateral consequences’ of conviction are frequently more punitive and long-lasting than court-imposed sanctions like a prison term or fine.” *Id.* at § 1.2.

both offender and society have been a selling point of drug courts since their inception in Miami,<sup>30</sup> and are a hallmark of the ex-ante approach to combating addiction-related recidivism.

This model was based largely on a recognition that “traditional threats of punishment and probation do not deter drug use by the majority of individuals struggling with addiction.”<sup>31</sup> Drug courts “obtain [their] results by integrating treatment, close supervision, frequent drug testing, sanctions for court violations, and incentives for compliant behavior.”<sup>32</sup> Then-Dade County State Attorney Janet Reno was instrumental in creating the first drug court,<sup>33</sup> and, after becoming Attorney General of the United States in 1993,<sup>34</sup> she instituted a series of grants to incentivize state and local governments to replicate the model around the country.<sup>35</sup> After Reno’s first year at the Department of Justice,

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30. See Smothers, *supra* note 21 (noting that the “program costs about \$1.2 million [which] translated into about \$500 to \$700 a person a year, roughly the cost of jailing an offender for nine days”).

31. Caitlinrose Fisher, *Treating the Disease or Punishing the Criminal?: Effectively Using Drug Court Sanctions to Treat Substance Use Disorder and Decrease Criminal Conduct*, 99 MINN. L. REV. 747, 747–48 (2014); see also Richard L. Wiener & Leah Georges, *Social Psychology and Problem-Solving Courts: Judicial Roles and Decision Making*, in PROBLEM SOLVING COURTS: SOCIAL SCIENCE AND LEGAL PERSPECTIVES 1, 4 (Richard L. Wiener & Eve M. Brank eds., 2013) (noting that “traditional tools of the criminal justice system . . . [such as] deterrence [and] incapacitation . . . are ill suited to address the personal and psychological failings of lawbreakers who suffer from underlying social and psychological dysfunction[s]” such as addiction).

32. Fisher, *supra* note 31, at 748 (citation omitted).

33. See Smothers, *supra* note 21 (noting that according to participating judges, the program “could not [have] operate[d]” without Reno’s support).

34. Reno’s nomination may have been due, at least in part, to the Dade County Drug Court. At the Rose Garden press conference where he announced Reno as his nominee to lead the Justice Department, President Clinton listed among his reasons for selecting her, “[s]he launched a drug court program that has become nationally acclaimed that gets young first-time offenders back on track.” *Attorney General Nomination*, C-SPAN, <https://www.c-span.org/video/?37897-1/attorney-general-nomination> (Feb. 11, 1993). He then added, “[I]f I might be permitted a little personal moment, I’ve had a high regard for Janet Reno for some time because my brother-in-law [Hugh Rodham] is the defense attorney in the drug court . . . so I’ve known about her exploits for some time.” *Id.*

35. See, e.g., Randy Kennedy, *Drug Court Seeks End to Revolving-Door Justice*, N.Y. TIMES, May 22, 1996, at B3 (“The court is modeled after the first such court, started in Miami in 1990 with the help of Janet Reno, then the prosecutor in drug-plagued Dade County, Fla. As United States Attorney General, Ms. Reno is now championing the creation of drug courts around the country. She presented grants for nine new courts on May 9.”); Mireya Navarro, *Experimental Courts Are Using New Strategies to Blunt the Lure of Drugs*, N.Y. TIMES,

there were nineteen drug courts in the United States.<sup>36</sup> At the end of her tenure,<sup>37</sup> in 2000, there were 665.<sup>38</sup> Today, there are more than 3000 drug courts, located in all fifty states and the District of Columbia.<sup>39</sup>

While federal funding and support were key to the rapid adoption of drug courts by the states, so too was their strong track record of success; studies found that the average drug court reduced recidivism by eight to fourteen percent,<sup>40</sup> and the best-performing drug courts reduced recidivism by between thirty-five to eighty percent.<sup>41</sup> Additionally, studies found the programs to be “highly cost-effective . . . produc[ing] an average return on investment of approximately \$2 to \$4 for every \$1 invested.”<sup>42</sup> Even researchers critical of problem-solving courts acknowledge they “generat[e] actual and potential cost savings and substantially reduc[e] drug use and recidivism while offenders are in the program . . . and to a lesser but still significant extent . . . after they leave the program.”<sup>43</sup>

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Oct. 17, 1996, at A25 (“Attorney General Janet Reno, who was the chief prosecutor in Dade County when the first drug court was established in Miami in 1989, has pushed to expand the program nationwide and doubled spending on it this year, to \$30 million.”).

36. NDCI REPORT, *supra* note 18, at 34 tbl.3.

37. Reno served as Attorney General of the United States from March 11, 1993 to January 20, 2001, the second-longest term in the history of the republic. See Jane Onyanga-Omara & Kevin Johnson, *Janet Reno, First Female U.S. Attorney General, Dies at 78*, USA TODAY (Nov. 7, 2016), <https://www.usatoday.com/story/news/nation/2016/11/07/reports-janet-reno-first-female-us-attorney-general-dies/93412386>.

38. NDCI REPORT, *supra* note 18, at 34 tbl.3.

39. *Id.* The NDCI Report indicates there were 3057 drug courts as of December 31, 2014. *Id.* The National Institute of Justice (NIJ) website has an updated figure of 3142 as of June, 2015. *Drug Courts*, NAT'L INSTITUTE JUST., <https://www.nij.gov/topics/courts/drug-courts/Pages/welcome.aspx> (last updated Jan. 10, 2017).

40. NDCI REPORT, *supra* note 18, at 15 (citation omitted). Recidivism is defined as “rearrest rates over at least two years.” *Id.* (citation omitted).

41. *Id.* (citation omitted).

42. *Id.* (citation omitted). Wide adoption of problem-solving courts “may also reflect a broader [societal] transition from punitive and retributive punishment to therapeutic and restorative justice.” Fisher, *supra* note 31, at 755 (citation omitted). For a seminal discussion of the concept of therapeutic justice, see David B. Wexler, *Therapeutic Justice*, 57 MINN. L. REV. 289 (1972).

43. Steven Belenko, *Research on Drug Courts: A Critical Review*, 1 DRUG CT. REV. 10, 29 (1998).

## B. DEVELOPMENT OF STATE REENTRY COURTS

## 1. Growth of Prison Population

Despite the demonstrated impact of problem-solving courts, participation was limited to a narrow subset of offenders: those with eligible charges like “nonviolent drug offenses, theft, or other crimes stemming from the participant’s underlying addiction.”<sup>44</sup> Such programs, in particular, did not reach already incarcerated persons—whose numbers were rapidly growing. The number of adults incarcerated at the state and local level grew seventy-eight percent—from 1,048,800 to 1,834,300—in the decade following the 1989 founding of the Dade County drug court.<sup>45</sup> Over that same period of time, there was a significant shift from indeterminate to determinate sentencing at both the state and federal levels.<sup>46</sup> Under an indeterminate model, judges hand down sentences with a range of time to serve, such as ten to twenty-five years.<sup>47</sup> The lower end of the range was believed to be the minimum sentence necessary to serve as a punitive response to the crime; the remainder could be served on parole, so long as the offender demonstrated to a parole board that he or she was sufficiently rehabilitated.<sup>48</sup> With the advent of determinate sentencing, states created commissions to set guidelines designed to limit judicial discretion in sentencing and ensure offenders served the full term of their sentence.<sup>49</sup> The degree to which determinate sentencing led to increased incarceration rates in the states is contested, with data showing those states

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44. Fisher, *supra* note 31, at 754 n.32 (citation omitted); *see also supra* note 21 and accompanying text.

45. *See Total Adult Correctional Population, 1980–2015*, BUREAU OF JUSTICE STATISTICS, <https://www.bjs.gov/index.cfm?ty=kfdetail&iid=487#> (last visited Jan. 30, 2018).

46. *See* Beth Schwartzapfel, *The Power and Politics of Our Parole Boards*, WASH. POST, July 12, 2015, at A1 (noting that “[f]ourteen states and the federal government eliminated or severely restricted parole” and turned to determinate sentencing schemes).

47. *Id.*

48. *Id.*

49. *Id.*; *see also* JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 12–13 (2003). In 1977, discretionary release, which had to be “earned” by offenders, accounted for eighty-eight percent of state prison releases. *Id.* In 2000, it had fallen to twenty-four percent, with mandatory released increasing to forty-one percent. *Id.* at 13. Minnesota became the first state to create such a system in 1978, with its guidelines coming into operation in 1981. *About MSCG*, MINN. SENTENCING GUIDELINES COMM’N., <https://mn.gov/sentencing-guidelines/about> (last visited Jan. 30, 2018).



using sentencing guidelines “experienced below-average increments of prison growth, compared to a national baseline, in the time period following their implementation of guidelines.”<sup>50</sup> At the same time, states also adopted “mandatory minimums and ‘three strikes’ laws . . . ratchet[ing] up criminal sentences [and] result[ing] in dramatically longer terms of imprisonment than had previously been the norm.”<sup>51</sup> The total state prison population peaked at 1,407,400 in 2009;<sup>52</sup> the federal prison population peaked at 217,800 in 2012.<sup>53</sup> As of 2015, there were 1,526,800 incarcerated persons at the state and federal level.<sup>54</sup>

## 2. Growth of reentry population

While the causes of mass incarceration phenomenon are widely debated today,<sup>55</sup> one critical facet of this phenomenon involves the growing number of previously incarcerated persons returning to their communities. This reintegration of offenders is called prisoner reentry.<sup>56</sup> Reentry is a reality for ninety-three percent of all incarcerated persons.<sup>57</sup> Combined state and federal annual prisoner releases first crossed the half-million mark in 1997, and peaked at 734,144 in 2008.<sup>58</sup> There were 580,871 state offenders and 60,156 federal offenders released in 2015.<sup>59</sup>

For reentering persons, the period after release is fraught with temptation and danger. A 2005 Department of Justice

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50. Kevin R. Reitz, *Don't Blame Determinacy: U.S. Incarceration Growth Has Been Driven by Other Forces*, 84 TEX. L. REV. 1787, 1799 (2006).

51. Kelsey McCowan Heilman, *Why Vague Sentencing Guidelines Violate the Due Process Clause*, 95 OR. L. REV. 53, 63 n.58 (citing Peter W. Low, *Marvin E. Frankel's Criminal Sentences: Law Without Order*, 87 HARV. L. REV. 687 (1974) (book review) (predicting the result)).

52. BUREAU OF JUSTICE STATISTICS, *supra* note 45.

53. *Id.*

54. *Id.*

55. For an excellent discussion of the racial and socioeconomic implications of mass incarceration, see generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010).

56. PETERSILIA, *supra* note 49, at 3 (defining prisoner reentry as “all activities and programming conducted to prepare ex-convicts to return safely to the community and to live as law-abiding citizens”).

57. *Id.* Prisoners with life or capital sentences—and those who unexpectedly die while incarcerated—are the only offenders who would not need to eventually reenter society. *Id.*

58. E. ANN CARSON & DANIELA GOLINELLI, BUREAU OF JUSTICE STATISTICS, *PRISONERS IN 2012: TRENDS IN ADMISSIONS AND RELEASES 1991–2012*, at 4 tbl.2 (2014).

59. E. ANN CARSON & ELIZABETH ANDERSON, BUREAU OF JUSTICE STATISTICS, *PRISONERS IN 2015*, at 11 tbl.7 (2016).

(DOJ) study of prisoners released in thirty states found that (a) more than a quarter were rearrested within six months of release; (b) two-thirds were rearrested within three years; and (c) three-quarters were rearrested within five years.<sup>60</sup> The two-thirds rearrest rate has been documented for nearly a half-century, having first appeared in 1969,<sup>61</sup> and appearing in two DOJ cohort studies (similar to the one mentioned above) undertaken in 1983 and 1994.<sup>62</sup> Of those rearrested within five years of release, fifty-seven percent are arrested within the first year.<sup>63</sup> Given these remarkably stable statistics, it appears there is a strong need for interventions designed to keep reentering offenders from reoffending, and that “the most intensive services and surveillance should begin immediately upon release and be front-loaded in the first . . . year.”<sup>64</sup>

What form that intervention should take was under debate in the waning years of Reno’s tenure as Attorney General. In the spring of 2000, Jeremy Travis was finishing his six years as director of the National Institute of Justice (NIJ) at DOJ.<sup>65</sup> As he prepared to leave, he wrote what he called a “provocative proposal” regarding reentry.<sup>66</sup> He suggested the reentry process “should *begin at sentencing* and continue throughout the period of release,”<sup>67</sup> and noted that the “traditional function of parole boards—deciding release dates for prisoners—has been severely diminished, if not eliminated” by the move to determinate sentencing regimes.<sup>68</sup> Travis wondered, in the absence of parole board oversight, what institution could best serve as the “manager” of the reentry process.<sup>69</sup> After considering probation/parole supervision agencies and correctional institutions and finding both insufficient,<sup>70</sup> he turned to the example of problem-solving courts.<sup>71</sup> He admired very much their “finely calibrated use of

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60. MATTHEW R. DUROSE ET AL., *RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005: PATTERNS FROM 2005 TO 2010*, at 8 tbl.8 (2014).

61. PETERSILIA, *supra* note 49, at 141.

62. *Id.* at 141–42.

63. DUROSE ET AL., *supra* note 60, at 7.

64. PETERSILIA, *supra* note 49, at 153.

65. *Jeremy Travis*, JOHN JAY COLL. OF CRIMINAL JUSTICE, [www.jjay.cuny.edu/faculty/jeremy-travis](http://www.jjay.cuny.edu/faculty/jeremy-travis) (last visited Jan. 30, 2018).

66. Jeremy Travis, *But They All Come Back: Rethinking Prisoner Reentry*, 7 SENT’G & CORRECTIONS, May 2000, at 1, 8.

67. *Id.* at 2 (emphasis added).

68. *Id.* at 3.

69. *Id.* at 2.

70. *Id.*

71. *Id.* at 4.

the scarce resources of judicial authority and prison capacity to achieve demonstrable changes in behavior.”<sup>72</sup> Travis argued that a system (1) where the “success and failure at meeting the conditions of post conviction release are . . . carefully monitored by a figure having the moral authority of a drug court judge,” (2) with “clearly delineated consequences for failure;” and (3) which made “sparing use of prison,” could achieve results similar to those of drug courts.<sup>73</sup>

Travis ultimately suggested such a system, and gave it a name: reentry court.<sup>74</sup> In his model, Travis envisioned that the sentencing judge would preside over the whole reentry process, since “creating a supervisory role for judges . . . gives them far greater capacity to achieve the purposes of sentencing.”<sup>75</sup> A “significant purpose of [one’s] activities behind bars would be preparation for reentry” and offenders would begin treatment and training programs linked to those they would undertake after release.<sup>76</sup> Similarly to those in drug court programs, participants would, once back in their community, have to meet a series of conditions pertaining to treatment, employment, and reintegration into society.<sup>77</sup> If they failed to meet those obligations, they would be punished “in amounts proportionate to [their] failure.”<sup>78</sup> If they achieved their goals, the judge could “accelerate the completion of [their] sentence,” “return privileges that might be lost,” and “welcome [them] back to the community.”<sup>79</sup> Travis, in sum, envisioned applying the ex-ante drug court model to the ex-post context of reentry—and extending the sentencing judge’s responsibility to the life of that process.

Attorney General Reno was strongly supportive of Travis’s proposal, and in 2000 she directed the Office of Justice Programs (OJP) to create a series of reentry-related programs, including the Reentry Court Initiative (RCI).<sup>80</sup> As part of RCI, OJP “selected and provided technical support to nine states to implement pilot reentry courts.”<sup>81</sup> The pilot courts were located in:

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72. *Id.* at 5.

73. *Id.*

74. *Id.* at 8.

75. *Id.* at 8.

76. *Id.*

77. *Id.* at 9.

78. *Id.* at 8.

79. *Id.*

80. Stephen E. Vance, *Federal Reentry Court Programs: A Summary of Recent Evaluations*, 75 *FED. PROB.* 64, 65 (2011).

81. *Id.*

California (San Francisco)  
Colorado (El Paso County)  
Delaware (two distinct programs: New Castle County and  
Sussex County)  
Florida (Broward County)  
Iowa (Cedar Rapids)  
Kentucky (two distinct programs: Fayette County and  
Campbell and Kenton counties)  
New York (the Harlem area)  
Ohio (Richland County)  
West Virginia (Mineral, Tucker, and Grant counties)<sup>82</sup>

A 2003 evaluation of the pilot courts found that “it is essential [for reentry courts] to agree on the target population” eligible to participate, since, “unlike drug courts, . . . ‘reentry courts that target the general population of returning offenders have to meet a diverse set of needs extending far beyond substance abuse treatment.’”<sup>83</sup>

Subsequent evaluations of state reentry courts<sup>84</sup> have found that successful programs require even greater flexibility than exists in the drug court context, with judges needing “a higher level of tolerance for technical violations, such as ‘dirty [drug] tests’” in order to “dole out [the] graduated punishments” necessary to “get the offender back on track and improve the odds of successful graduation.”<sup>85</sup> A recent evaluation of the Harlem court, created under the Reno-era RCI program, found participants were less likely to be rearrested, and less likely to be reconvicted,

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82. CHRISTINE LINDQUIST ET AL., REENTRY COURTS PROCESS EVALUATION (PHASE 1), FINAL REPORT 5 (2003).

83. Vance, *supra* note 80, at 65 (quoting LINDQUIST ET AL., *supra* note 82, at 52–53).

84. Hawaii, in 2004, became the first state to implement a state-wide probation reform initiative, called Project HOPE (Hawaii’s Opportunity Probation with Enforcement). While not a reentry court, its procedures are designed to achieve the same ends, with the state’s entire probation population as the target population. Fisher, *supra* note 31, at 758–59 (citing *HOPE Probation*, HAW. STATE JUDICIARY, [http://www.courts.state.hi.us/special\\_projects/hope/about\\_hope\\_probation](http://www.courts.state.hi.us/special_projects/hope/about_hope_probation) (last visited Jan. 30, 2018)); see also Steven S. Alm, *A New Continuum for Court Supervision*, 91 OR. L. REV. 1181, 1184 (2013). Several states, including those with reentry courts, have adopted the HOPE probation model. See, e.g., H.B. 1052, 2016 Reg. Sess. (La. 2016) (establishing the Swift and Certain Probation Pilot Program); Paul Suarez, *New Approach to Probation*, COLUMBIAN (Vancouver, Wash.), May 23, 2012, at A1.

85. Rodney Villazor, *Reentry Courts: An Examination of the “Provocative Proposal” in Practice*, 28 FED. SENT’G REP. 253, 254 n.35 (2016) (quoting ROBERT V. WOLF, CTR. FOR COURT INNOVATION, REENTRY COURTS: LOOKING AHEAD 9 (2011)).

though they were more likely to have their parole revoked.<sup>86</sup> Researchers were unsure what to make of the data indicating increased levels of revocation, but suspect that the intensified supervision of reentry court could be responsible.<sup>87</sup>

Support for reentry programs, including reentry courts, has been strongly bipartisan. President George W. Bush signed the Second Chance Act of 2007 into law on April 9, 2008.<sup>88</sup> The law “reauthorize[d] and expand[ed] state and local re-entry demonstration projects that provide family reunification, job training, education, housing, substance abuse treatment and mental health services to adult and juvenile offenders and their families.”<sup>89</sup> It also created the National Reentry Resource Center, which “provides education, training, and technical assistance to states, tribes, territories, local governments, service providers, non-profit organizations, and corrections institutions working on prisoner reentry.”<sup>90</sup> In 2011, Attorney General Eric Holder “established a Cabinet-level federal interagency Reentry Council, representing a significant executive branch commitment to coordinating re-entry efforts and advancing effective re-entry policies.”<sup>91</sup>

President Obama officially chartered the Federal Interagency Reentry Council in April of 2016.<sup>92</sup> Today, there are forty-

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86. WOLF, *supra* note 85, at 4.

87. *Id.*

88. Pub. L. No. 110-199, 122 Stat. 657 (2008).

89. Rhonda McMillion, *Getting Out—and Staying Out*, A.B.A. J., Dec. 2007, at 64, 64; see also Michael M. O’Hear, *The Second Chance Act and the Future of Reentry Reform*, 20 FED. SENT’G REP. 75, 75 (2007) (predicting that “Passage of the [Second Chance Act will] galvanize an emerging reentry reform movement and highlight the increasing importance of reentry in the national dialogue on crime and punishment”); Erik Eckholm, *U.S. Shifting Prison Focus to Re-Entry into Society*, N.Y. TIMES, Apr. 8, 2008, at A23; Editorial, *A Second Chance*, N.Y. TIMES, May 20, 2008, at A22 (calling on Congress to appropriate \$330 million to fully fund the Second Chance Act). *But see* Editorial, *The Second Chance Act Proves Its Worth*, N.Y. TIMES, June 28, 2014, at A20 (noting that while the Act is proving successful, Congress appropriated only \$67.7 million in fiscal year 2014 to support its programs).

90. BUREAU OF JUSTICE ASSISTANCE, DEP’T OF JUSTICE, ABOUT THE NATIONAL REENTRY RESOURCE CENTER, <https://www.bja.gov/publications/nationalreentryresourcecenter.pdf> (last visited Jan. 30, 2018).

91. *The Attorney General’s Reentry Council*, NAT’L INST. OF JUSTICE, DEP’T OF JUSTICE, <https://www.nij.gov/journals/270/pages/criminal-records-council.aspx> (last visited Jan. 30, 2018).

92. Barack Obama, *The President’s Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 833 (2017); see also Press Release, Office of the Press Sec’y, Presidential Memorandum—Promoting Rehabilitation and Reintegration of Formerly Incarcerated Individuals (Apr. 29, 2016), <https://>

three state reentry courts.<sup>93</sup> While they represent only a fraction of the more than 1200 state problem-solving courts operating today,<sup>94</sup> they represent a critical development in the experiment begun in Miami almost three decades ago: they apply the ex-ante approach of drug courts to the ex-post context of reentry.

### C. PROBLEM-SOLVING COURTS AND THE FEDERAL JUDICIARY

During the period where states responded to rising drug crime by both passing harsher laws<sup>95</sup> and creating innovative programs like the Dade County drug court, the federal government pursued an *exclusively* “tough-on-crime” approach. This led the federal and state justice systems to become increasingly divergent in their approaches to drug crime. President Reagan first sought and won passage of the Comprehensive Crime Control Act of 1984<sup>96</sup>—described by then-Associate Attorney General D. Lowell Jensen “the most significant change in the Federal system of criminal law”<sup>97</sup>—which (1) abolished parole for federal crimes; (2) established the U.S. Sentencing Commission (USSC) to promulgate determinate sentencing guidelines; (3) allowed for preventative detention of persons accused of crimes; (4) narrowed the federal insanity defense; and (5) increased civil forfeiture powers of federal law enforcement in drug cases.<sup>98</sup> According to then-Attorney General William French Smith, the law was designed to “restore the proper balance between the forces of law and the forces of lawlessness.”<sup>99</sup> President Reagan later signed both the Anti-Drug Abuse Act of 1986<sup>100</sup> and the Anti-Drug Abuse Act of 1988.<sup>101</sup> These laws significantly increased, through the use of mandatory minimum sentences, the penalties for drug crimes—especially crack-cocaine, which had been the

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obamawhitehouse.archives.gov/the-press-office/2016/04/29/presidential-memorandum-promoting-rehabilitation-and-reintegration (last visited Jan. 30, 2018).

93. See *Find a Drug Court*, NAT’L DRUG COURT RES. CTR., <http://www.ndcrc.org/map> (last visited Jan. 30, 2018).

94. NAT’L ASS’N DRUG COURT PROF’LS, *supra* note 9 (“As of June 30, 2012, there were 1,122 problem-solving courts in the U.S.”).

95. See Heilman, *supra* note 51 and accompanying text.

96. Pub. L. No. 98-473, 98 Stat. 1976 (1984).

97. Leslie Maitland Werner, *Getting Out the Word on the New Crime Act*, N.Y. TIMES, Nov. 15, 1984, at A24.

98. Loretta Tofani, *The Harder Line on Federal Crime*, WASH. POST, Dec. 28, 1984, at A1.

99. Werner, *supra* note 97.

100. Pub. L. No. 99-570, 100 Stat. 3207 (1986).

101. Pub. L. No. 100-690, 102 Stat. 4181 (1988).

genesis of the first problem-solving courts.<sup>102</sup> The results were explosive, and “ushered in a period of remarkable prison growth in the federal system.”<sup>103</sup> The federal prison population grew 143% from 1980 to 1989,<sup>104</sup> and 267% from 1980 to 1993.<sup>105</sup> State and local prison populations increased 114% and 174% over the same periods.<sup>106</sup>

As part of the legislation creating the federal determinative sentencing scheme and the USSC, Congress abolished parole in the federal system and established in its place supervised release, “a ‘unique’ type of post-confinement monitoring . . . overseen by federal district courts with the assistance of federal probation officers.”<sup>107</sup> With the abolition of federal parole, “Congress intended supervised release to assist individuals in their transition [back] to community life . . . fulfill[ing] rehabilitative ends, distinct from those served by incarceration.”<sup>108</sup>

A term of supervised release may be imposed at the time of an offender’s sentencing, though only a few crimes *require* imposition of supervised release.<sup>109</sup> If not mandated by the statute under which the offender was convicted, the sentencing judge has broad discretion in setting the term and conditions of supervised release.<sup>110</sup> While sentencing judges are not generally required to impose a term of supervised release, they do in an estimated ninety-five<sup>111</sup> to ninety-nine<sup>112</sup> percent of federal

102. Tracy Thompson, *Cracking Down, Reluctantly, On Low-Level Drug Offenders*, WASH. POST, Aug. 28, 1989, at A1.

103. Reitz, *supra* note 50, at 1799.

104. See BUREAU OF JUSTICE STATISTICS, *supra* note 45.

105. *Id.*

106. *Id.*

107. U.S. SENTENCING COMM’N, FEDERAL OFFENDERS SENTENCED TO SUPERVISED RELEASE 1 (2010) [hereinafter USSC REPORT].

108. *United States v. Johnson*, 529 U.S. 53, 59 (2000).

109. 18 U.S.C. § 3583(a) (2012) (noting supervised release is required for those convicted of “domestic violence crime[s]” and others “required by statute”).

110. *Id.* § 3583(d). The only limits are that any condition must “comport with the purposes of sentencing; involve ‘no greater deprivation of liberty than is reasonably necessary’ to accomplish those purposes, and be consistent with USSC policy. See Lisa A. Rich, *A Federal Certificate of Rehabilitation Program: Providing Federal Ex-Offenders More Opportunity for Successful Reentry*, 7 ALA. C.R. & C.L. L. REV. 249, 279 (2016).

111. Christine S. Scott-Hayward, *Shadow Sentencing: The Imposition of Federal Supervised Release*, 18 BERKELEY J. CRIM. L. 180, 182 (2013) (“Between 2005 and 2009, more than 95 percent of people in the federal system . . . [were] sentenced to a term of supervised release.”).

112. Villazor, *supra* note 85, at 254 (noting 99.1 percent of nonmandated offenders still received a term of supervised release at sentencing).

sentencings. From 2005 to 2009, the average supervised release term was forty-one months.<sup>113</sup> The supervising judge may, after one year, terminate a term of supervised release.<sup>114</sup> However, in recent years, only twelve percent of offenders on supervised release received early termination.<sup>115</sup> On average, two-thirds of offenders successfully complete their term of supervised release,<sup>116</sup> and one-third have their supervised release status revoked “as a result of commission of new offenses or other violations of the[ir] conditions.”<sup>117</sup>

Over the years that followed, the divergence of state and federal responses to drug crime was becoming clear, but Congress failed to act and address the disparity. On October 12, 2000, Senator Robert Torricelli (D-NJ) introduced the Drug Court Act of 2000.<sup>118</sup> The bill authorized DOJ to establish federal drug courts in ten high-crime districts<sup>119</sup> by partnering with local state-run drug court programs.<sup>120</sup> The bill was referred to the Senate Judiciary Committee, but never received a hearing or vote. Similar legislation does not appear to have been introduced in the years following. In November of 2004, Judge Donald P. Lay<sup>121</sup> of the Eighth Circuit published an op-ed in the *New York Times* titled “Rehab Justice.”<sup>122</sup> He argued that “[m]andatory minimum sentences, enacted by Congress, have contributed to the rising costs of imprisonment and crowding in federal prisons,” noted that “[u]nlike the states, the federal criminal justice system offers no alternatives for nonviolent offenders charged with drug-related crimes,” and called on Congress to “pass[] legislation to carry out a program for federal drug courts.”<sup>123</sup> The financial and human

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113. USSC REPORT, *supra* note 107, at 55 tbl.1.

114. 18 U.S.C. § 3583(e)(1).

115. USSC REPORT, *supra* note 107, at 62.

116. *Id.*

117. *Id.* at 63.

118. S. 3191, 106th Cong. (2000).

119. *Id.* § 3(a).

120. *Id.* § 3(b).

121. Judge Lay was appointed to the United States Court of Appeals for the Eighth Circuit by President Johnson in 1966. He served as chief judge from 1979–1992. He assumed senior status in 1992, and passed away in 2007. *Biographical Directory of Federal Judges*, FED. JUDICIAL CTR., <https://www.fjc.gov/history/judges/lay-donald-pomery> (last visited Jan. 30, 2018).

122. Donald P. Lay, Opinion, *Rehab Justice*, N.Y. TIMES, Nov. 18, 2004, at A31.

123. *Id.* But see U.S. PRETRIAL SERVS. AGENCY, U.S. DIST. COURT FOR THE DIST. OF E.N.Y., ALTERNATIVES TO INCARCERATION IN THE EASTERN DISTRICT OF NEW YORK 7–11, 35–47 (2015) [hereinafter EDNY ALTERNATIVES REPORT]



cost of the current regime, Judge Lay argued, was too great.<sup>124</sup> No action was taken in response to his suggestion.

While Congress failed to specifically authorize the creation of something resembling state drug courts,<sup>125</sup> it had given judges broad authority to structure the terms and conditions of federal supervised release.<sup>126</sup> Federal judges took advantage of this authority to create federal reentry courts. The first, called the Supervision Treatment and Re-entry (STAR) Program, was created in 2002 by Judge Charles Sifton of the United States District Court for the Eastern District of New York (EDNY).<sup>127</sup> The STAR program targets “persons with drug or alcohol problems” in order to provide “more assistance, stricter accountability[,] and greater rewards for completing their supervision successfully.”<sup>128</sup> Other pioneering federal reentry courts include the District of Oregon (2005), the Western District of Michigan (2005), the District of Massachusetts (2006), the Southern District of Mississippi (2006), the Southern District of Indiana (2007), the Eastern District of Pennsylvania (2007), the Eastern District of Utah (2008) and the Eastern District of Missouri (2008).<sup>129</sup> These courts are “designed to reward good behavior that is incompatible with drug use and crime,” using graduated sanctions

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(describing sixteen “drug court” programs in various federal districts). These federal “alternative to incarceration” (ATI) programs, unlike most state drug courts, still result in conviction and sentencing of participating offenders. *Id.* at 11.

124. Lay, *supra* note 122.

125. *Id. Contra* CHARLES P. SIFTON & JACK B. WEINSTEIN, REPORT ON A PROPOSED INTENSIVE POST-SENTENCE DRUG SUPERVISION PROGRAM FOR THE EASTERN DISTRICT OF NEW YORK 11 (2006) (on file with author) (arguing that *United States v. Booker*, 543 U.S. 220 (2005), and “the inherent power of . . . district court judges to fashion appropriate sentences under 18 U.S.C. § 3553” provide sufficient legal authority for federal judges to impose state drug court-like deferred or alternative sentences). *See also* EDNY ALTERNATIVES REPORT, *supra* note 123, at 63 (citing 18 U.S.C. § 3154 as legal authority for the EDNY Pretrial Opportunity Program, a pre-sentencing diversionary program based on state drug courts). This author is indebted to Judge Weinstein for his assistance in locating copies of these reports, and for additional materials on EDNY program innovation.

126. *See supra* note 110 and accompanying text.

127. *See* SIFTON & WEINSTEIN, *supra* note 125, at 1; *see also* DANIEL W. CLOSE ET AL., THE DISTRICT OF OREGON REENTRY COURT: EVALUATION, POLICY RECOMMENDATIONS, AND REPLICATION STRATEGIES 1 (2008); Andrew S. Harris, *The STAR Program in the Eastern District of New York*, FED. B. COUNCIL Q. (Aug. 21, 2014), <http://www.federalbarcouncilquarterly.org/?p=315>; EDNY ALTERNATIVES REPORT, *supra* note 123, at 48.

128. SIFTON & WEINSTEIN, *supra* note 125, at 1.

129. CLOSE ET AL., *supra* note 127, at 2.

to change behavior.<sup>130</sup> They generally feature a reentry team comprised of a federal district court judge or magistrate judge,<sup>131</sup> a federal public defender, an assistant U.S. attorney, an officer from the district's Office of Probation and Pretrial Services, and representatives of the treatment and service provider communities.<sup>132</sup> Fifteen years after Judge Sifton applied Travis's "provocative proposal" to the Article III context and created STAR in Brooklyn, the number of federal reentry courts has grown to at least forty-six.<sup>133</sup>

Ultimately, these two lines of innovation—ex-ante diversionary programs and ex-post recidivism reduction programs—seek to address the same issue, but in sometimes conflicting ways, and with very different results. This Part identified the history and markers of both sets of interventions; Part II will describe the tension in using one form (ex-post) to achieve the goals of the other (ex-ante).

## II. THE EX-ANTE/EX-POST PROBLEM

The federal reentry court was born of compromise. States, ever serving as laboratories of democracy,<sup>134</sup> sought to combat addiction-based recidivism through programs designed to both avoid incarceration and treat the underlying problem of substance abuse. After those programs proved successful, states expanded the model to other contexts, including reentry. When Congress failed to provide an ex-ante diversionary program at the federal level, judges made use of their supervised release powers to create the federal reentry model *sua sponte*.

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130. Laurel Beeler, *Federal Reentry Courts and Other New Models of Supervision*, 60 *FED. LAW.* 55, 56–57 (2013).

131. Magistrate judgeships are authorized under the Federal Magistrates Act of 1968, 28 U.S.C. §§ 631–639 (2012). Magistrates are appointed by the judges of a federal district court for renewable terms of eight years, rather than being confirmed by the U.S. Senate for life tenure. PETER G. MCCABE, *FED. BAR ASS'N, A GUIDE TO THE FEDERAL MAGISTRATE SYSTEM* 7 (2014). They are empowered to "hear and determine non-dispositive motions with finality," but can only "hear dispositive motions, . . . [and] present recommend[ed] findings and conclusions for decision by a District Judge." *Id.* at 46–47.

132. Beeler, *supra* note 130, at 57.

133. Villazor, *supra* note 85, at 255 (citing a Federal Judicial Center tabulation from March 2013).

134. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

Drug courts “emerged to address addiction and its correlation to criminal activity.”<sup>135</sup> Addicts often “commit crimes to finance their addiction” or “while under the influence of a substance,” making “high rates of recidivism the norm.”<sup>136</sup> The model pioneered in Dade County intervenes *before* incarceration, avoiding both the high costs of incarceration and the collateral consequences that follow conviction. This *ex-ante* approach recognizes that addiction is a disease, rather than the kind of anti-social behavior for which incarceration is the best response.<sup>137</sup> As the drug court model proved effective at combating this particularly pernicious form of recidivism, states continued to invest in these kinds of programs and provided their judicial system the authority and flexibility necessary to support their development.

The development of federal reentry programs is, in contrast, a judge-driven process.<sup>138</sup> Districts forming reentry courts have, almost universally, drawn upon the experience of the programs that came before.<sup>139</sup> The majority of programs focus on probationers with substance abuse issues, but there is wide variation regarding eligibility.<sup>140</sup> There is also significant variation in the risk level of participants.<sup>141</sup> All but two programs use the Risk Prediction Index (RPI),<sup>142</sup> a risk-assessment tool used in federal

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135. Fisher, *supra* note 31, at 750.

136. *Id.* at 753.

137. Critics of the disease theory of addiction suggest it “has its roots in eighteenth century liberal metaphysics, not in science.” Morris B. Hoffman, *The Drug Court Scandal*, 78 N.C. L. REV. 1437, 1469 (2000). However, both the American Society of Addiction Medicine and the American Psychiatric Association now describe addiction as a brain disease. Fisher, *supra* note 31, at 750–51.

138. Barbara Meierhoefer, *Judge-Involved Supervision Programs in the Federal Courts: Summary of Findings from the Survey of Chief United States Probation Officers*, FED. PROB., Sept. 2011, at 37 (noting that more than “three-quarters of the federal judge-involved supervision programs” studied had been developed “at the request of the court”).

139. *Id.* (“[T]eam members in all but two courts travelled during the planning stage to observe at least one other district’s program in action.”).

140. *Id.* at 38. Of the thirty-nine programs studied by Meierhoefer, thirty-four are “open only to offenders with a particular type of problem.” *Id.* Of those, twenty-three are targeted specifically to those with a “documented history of substance abuse.” *Id.* Only three reentry programs targeted specific problem populations *other* than substance abuse; one targeted gang members, one targeted prisoners with mental health issues, and one focused on “Native Americans who lack coping skills.” *Id.*

141. *Id.*

142. *Id.*

probation since 1997 to “determine the general risk level of offenders received for . . . supervised release . . . .”<sup>143</sup> Forty-four percent of programs targeted “high-risk” offenders, while twenty-five percent targeted only “moderate-risk” offenders.<sup>144</sup> Regardless of the risk level of the population, there is one unifying trait: all participants have just been released from prison. This is one of the fundamental challenges facing federal reentry programs. They are essentially ex-ante interventions applied to the ex-post context; the twin benefits of drug courts—avoiding both the high cost of incarceration and the collateral consequences of conviction—are abrogated when incarceration is a necessary antecedent to program participation.

That is not to say reentry courts fail to provide independent benefits in their own right—but it is not yet definitively known what those benefits are. Despite operating for more than a decade, no longitudinal studies of the impact of federal reentry court participation on offender outcomes exist.<sup>145</sup> Where individual federal reentry courts have undergone evaluations, they have not been designed as long-term outcome studies.<sup>146</sup> That’s because “concrete data remains undeveloped because districts are still experimenting, and no reentry courts have identical programs, focuses, or eligibility requirements.”<sup>147</sup> In fact, according to a study conducted by the Federal Judicial Center (FJC), “no two [federal reentry] programs are identical.”<sup>148</sup> The FJC found “a wide range of goals, philosophies, and design features” in the

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143. *Id.* at 38 n.8.

144. *Id.* at 38.

145. *See, e.g.*, Beeler, *supra* note 130, at 58 (noting that there is “little long-term empirical research” on reentry court effectiveness); Meierhoefer, *supra* note 138, at 46 (acknowledging the need to “examine the relationship between supervision outcomes . . . and information . . . about . . . program design features”); Vance, *supra* note 80, at 65 (noting that there is “limited research on whether these programs effectively reduce recidivism”).

146. *See* CAITLIN J. TAYLOR, PROGRAM EVALUATION OF THE FEDERAL REENTRY COURT IN THE EASTERN DISTRICT OF PENNSYLVANIA: REPORT ON THE EFFECTIVENESS FOR THE FIRST 164 REENTRY COURT PARTICIPANTS 14 (2014), [http://digitalcommons.lasalle.edu/cgi/viewcontent.cgi?article=1000&context=soc\\_crj\\_faculty](http://digitalcommons.lasalle.edu/cgi/viewcontent.cgi?article=1000&context=soc_crj_faculty) (observing the need to “consider the possibility that the Reentry Court program may influence recidivism . . . in a time period not sufficiently captured by this study”); *see also* CLOSE ET AL., *supra* note 127 (discussing the District of Oregon’s reentry court and replication strategies); Patricia A. Sullivan et al., *H.O.P.E. Court, Rhode Island’s Federal Reentry Court: The First Year*, 21 ROGER WILLIAMS U. L. REV. 521 (2016) (examining some of the challenges and lessons learned from the first year of the H.O.P.E. Court’s existence).

147. Villazor, *supra* note 85, at 255 (citation omitted).

148. Meierhoefer, *supra* note 138, at 38.

thirty-nine reentry courts included in the study, noting that “a better understanding of how various program features . . . relate[] to program success” would be necessary in order to evaluate their effectiveness.<sup>149</sup>

This difficulty is, in part, a by-product of the use of state drug courts as models.<sup>150</sup> They are appealing because their ability to achieve the goals<sup>151</sup> of federal reentry courts is extensively studied and well-established.<sup>152</sup> But these federal ex-post programs are applying the model to a post-incarceration population, without the benefit of the mountains of data produced by drug courts over nearly three decades.<sup>153</sup> As another FJC study noted, “focus[ing] on adhering to a . . . program model developed elsewhere can detract from the harder tasks of . . . identifying the core elements of other programs that have had success addressing the same problems, and adapting these elements to meet the new program’s purposes . . . .”<sup>154</sup>

State courts combatted this challenge during the infancy of drug courts. As interest began to grow, representatives from the first twelve programs came together in 1994 to form NADCP.<sup>155</sup> The NADCP drafted “model state legislation and provided early guidance to state legislatures,” to facilitate the creation of drug courts across the nation.<sup>156</sup> It also created a blue-ribbon commission to formulate core principles to serve as a blueprint for the

149. *Id.* at 46.

150. *See* Fisher, *supra* note 31, at 755.

151. *See* SIFTON & WEINSTEIN, *supra* note 125, at 3 (laying out three goals for the STAR program: (1) rehabilitating offenders “whose criminal violations are tied to drug addiction” and decreasing recidivism for those offenders; (2) increasing public safety by “reducing the number of crimes committed by those addicted”; and (3) reducing expenditures made for supervision).

152. *See, e.g.*, Fisher, *supra* note 31, at 754 (citation omitted) (“The proliferation of drug courts . . . is due in large part to reduced recidivism rates and net costs to the government . . . .”). *But see* Hoffman, *supra* note 137, at 1533 (“Drug courts themselves have become a kind of institutional narcotic upon which the entire criminal justice system is becoming increasingly dependent.”); *see also* Belenko, *supra* note 43, at 33–37 (outlining six areas requiring additional study to best evaluate drug courts).

153. *See, e.g.*, NDCI REPORT, *supra* note 18.

154. BARBARA S. MEIERHOEFER & PATRICIA D. BREEN, FED. JUDICIAL CTR., PROCESS-DESCRIPTIVE STUDY OF JUDGE-INVOLVED SUPERVISION PROGRAMS IN THE FEDERAL SYSTEM 30 (2013), <https://www.fjc.gov/sites/default/files/2014/JUDGE-INVOLVED-SUPERVISION-FJC-2013.pdf>.

155. *About NADCP*, NAT’L ASS’N DRUG COURT PROF’LS, <http://www.nadcp.org/learn/about-nadcp> (last visited Jan. 30, 2018).

156. *Id.* (quoted material is accessible by selecting “NADCP Early Victories”).

creation of additional drug courts.<sup>157</sup> In 1997, the commission released “the defining document of the [d]rug [c]ourt model,”<sup>158</sup> which has served as the foundation for every adult drug court created since its publication.<sup>159</sup> That same year, “in response to a great need for standardized, evidence-based training and technical assistance,” the NADCP also created the National Drug Court Institute (NDCI), which is now recognized as the “definitive authority on the latest research, best practices, and cutting-edge innovations to treat offenders facing substance use and mental health disorders.”<sup>160</sup>

Given the distance between the goals of federal ex-post programs and the successes of the state ex-ante interventions, it is necessary for the federal judiciary to (1) consider the adoption of its own ex-ante regime; and (2) further advance its ex-post programs, as well as invest in better institutionalizing and supporting of those programs through study and best-practice development.

### III. A NEW PATH FOR FEDERAL PROBLEM-SOLVING COURTS

#### A. CREATE EX-ANTE FEDERAL PROGRAMS

The failure of Congress to create a system of diversionary programs—that is, to learn from the states and create a federal

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157. *Id.* (cited material is accessible by selecting “NADCP Early Victories”).

158. *Id.* (quoted material is accessible by selecting “NADCP Early Victories”). The document detailed ten key components: (1) drug courts integrate alcohol and other drug treatment services with justice system case processing; (2) using a non-adversarial approach, prosecution and defense counsel promote public safety while protecting participants’ due process rights; (3) eligible participants are identified early and promptly placed in the drug court program; (4) drug courts provide access to a continuum of alcohol, drug, and other related treatment and rehabilitation services; (5) abstinence is monitored by frequent alcohol and other drug testing; (6) a coordinated strategy governs drug court responses to participants’ compliance; (7) ongoing judicial interaction with each drug court participant is essential; (8) monitoring and evaluation measure the achievement of program goals and gauge effectiveness; (9) continuing interdisciplinary education promotes effective drug court planning, implementation, and operations; and (10) forging partnerships among drug courts, public agencies, and community-based organizations generates local support and enhances drug court effectiveness. DRUG COURT STANDARDS COMM., THE NAT’L ASS’N OF DRUG COURT PROF’LS, DEFINING DRUG COURTS: THE KEY COMPONENTS, at iii–iv (1997), <http://www.nadcp.org/sites/default/files/nadcp/KeyComponents.pdf>.

159. See NAT’L ASS’N DRUG COURT PROF’LS, *supra* note 155 (cited material is accessible by selecting “NADCP Early Victories”).

160. *About NDCI*, NAT’L DRUG COURT INST., <http://www.ndci.org/about-ndci> (last visited Jan. 30, 2018).

drug court—led to the creation of the federal reentry court system. Unable to follow the experience of the states and adequately address addiction-driven recidivism in an ex-ante context, federal judges turned to an ex-post solution—a context in which they already possessed ample authority. Congress *could* address this problem by following Judge Lay’s 2004 request and pass comprehensive legislation authorizing federal judges, the U.S. Office of Probation and Pretrial Services, federal defenders, and U.S. attorneys to implement federal drug courts. Unfortunately, Congressional silence on this issue for nearly two decades signals that such action is unlikely. The 115th Congress began with discussions of bipartisan criminal justice reform legislation to “reduce mandatory minimum sentences, give judges more discretion to suit the punishment to the offense, invest more in alternatives such as drug and mental health treatment, and encourage programs that prepare the incarcerated for life after prison,” but the bill died in 2016.<sup>161</sup> Although Senate Judiciary Chair Chuck Grassley met with President Trump’s son-in-law and senior adviser Jared Kushner<sup>162</sup> to discuss potentially reviving the bill, Attorney General Jeff Sessions was a strong opponent of the legislation when he was a senator, and the President himself has not signaled any interest in the issue.<sup>163</sup>

In the face of this inaction, Article III judges must take matters in hand themselves, and create a federal ex-ante regime. They may do so under (1) statutory authority granted as part of the pretrial services statute; (2) statutory authority granted via the Rules Enabling Act; or (3) their inherent rulemaking powers. Federal authorities should, at the same time, further refine ex-post interventions like reentry courts by (1) institutionalizing reentry processes via the Federal Sentencing Guidelines; and (2) investing in research programs to determine best practices and create model ex-post programs.

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161. Bill Keller, Editorial, *2017: The Year for Justice Reform?*, N.Y. TIMES, Dec. 16, 2016, at A35.

162. Glenn Thrush & Maggie Haberman, *Jared Kushner Named Senior White House Adviser to Donald Trump*, N.Y. TIMES (Jan. 9, 2017), <https://www.nytimes.com/2017/01/09/us/jared-kushner-senior-adviser-white-house-trump.html>.

163. Mary Clare Jalonick, *White House Adviser Kushner, Senator Talk Criminal Justice*, ASSOCIATED PRESS (Mar. 30, 2017), <https://www.apnews.com/92a2535b853d4de9a62007eb5685c13c>.

### 1. Statutory Authority for Article III Judges to Create Federal Drug Courts at the District Court Level

While there has not been explicit congressional authorization of federal drug courts, Article III judges have sufficient statutory powers to create such programs. After creating the nation's first federal reentry program, STAR,<sup>164</sup> the judges of the Eastern District of New York "concluded that if the drug court model produces benefits in the reentry context, it has the potential to produce far greater benefits if it is moved up into the *presentence* phase."<sup>165</sup> In 2012, judges in EDNY launched the Pretrial Opportunity Program (POP).<sup>166</sup> While the POP program is not *explicitly* a diversion program—"most participants have entered pleas of guilty by the time they enter the program," though "a guilty plea is *not a prerequisite* to participation"<sup>167</sup>—the "program description explicitly contemplates the possibility that the rehabilitation of the participating defendant might be sufficiently extraordinary that outright dismissal of the charges on the motion of the United States Attorney would be appropriate."<sup>168</sup> The court has granted three such dismissals, and reduced felony charges to misdemeanors in two other cases.<sup>169</sup>

POP cites 18 U.S.C. § 3154, the statute outlining the functions and powers relating to pretrial services, as the legal authority for such programs.<sup>170</sup> While this authority may seem may seem murky, recall that the basis for federal reentry courts is the supervised release statute, 18 U.S.C. § 3583.<sup>171</sup> Both describe the outlines of pretrial services and supervised release regimes in broad terms, and both commit the regimes to the broad discretion of district courts. If § 3583 can contain problem-solving-justice multitudes, so too can § 3154.

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164. *See supra* note 127 and accompanying text.

165. EDNY ALTERNATIVES REPORT, *supra* note 123, at 8.

166. *Id.* at 4.

167. *Id.* at 9 (emphasis added).

168. *Id.* at 10.

169. *Id.*

170. *Id.* at 63 ("Section 3154 of Title 18, United States Code, gives pretrial services officers the authority to provide for the custody, care, counseling, treatment or other necessary social services to defendants released under pretrial supervision. The objective of support services for defendants on pretrial release is to ensure the safety of the community and to provide defendants with the structure and stability necessary to reasonably assure their appearance in court as required. Treatment and other support services provide the judge with alternatives to pre-sentence detention for those defendants who require close supervision and behavior monitoring.").

171. *Supra* notes 107–27 and accompanying text.



District courts—particularly those with long experience with reentry courts<sup>172</sup>—should follow the example of POP, but take it a step further and create a true diversionary program. Districts should look to NADCP for drug court best practices and defining characteristics,<sup>173</sup> and design ex-ante diversionary programs that best address the drug-crime issues facing their courts; NDCI should be invited to study the programs from their inception, and help to facilitate building data-driven programs best suited for adapting the ex-ante approach to the federal context. Just as most reentry courts are currently funded via allocation of existing judicial resources, these drug courts could be set up without additional funding; outside funding streams may also be available, given the interest of the nonprofit sector in criminal justice reform issues.

## 2. Statutory Authority for Article III Judges to Create a Nationwide Federal Drug Court Regime

While § 3154 would appear to allow district courts to create diversionary programs on an ad hoc basis—as was the case with the development of reentry programs—the whole of the Article III judiciary is also sufficiently empowered to create a nationwide federal drug court regime, via the Rules Enabling Act.<sup>174</sup> Passed in 1934, the Rules Enabling Act created a process for federal courts to “prescribe rules for the conduct of their business”<sup>175</sup> via the Judicial Conference of the United States, the policy making body of the federal court system.<sup>176</sup> The Judicial

172. Given the buy-in from U.S. attorneys and federal defenders necessary to run such a diversionary program, it seems wise to look to district courts where these relationships have already been forged via reentry courts.

173. *Supra* note 158 and accompanying text.

174. 28 U.S.C. §§ 2071–2077 (2012) (§ 2076 repealed 1988).

175. *Id.* § 2071(a). The choice of phrase “created a process,” rather than “allowed” is a deliberate one. It has long been argued that courts have inherent power to create rules of practice and procedure for themselves. *See, e.g.*, Charles W. Joiner & Oscar J. Miller, *Rules of Practice and Procedure: A Study of Judicial Rule Making*, 55 MICH. L. REV. 623, 624 (1957) (surveying and discussing “the sources and scope of the [judicial] rule-making power”); Roscoe Pound, *Procedure Under Rules of Court in New Jersey*, 66 HARV. L. REV. 28 (1952); Roscoe Pound, *Regulating Procedural Details by Rules of Court*, 13 A.B.A. J. 12, 13 (1927) (arguing for a restoration of “the rule-making power of the courts, a power which all common-law courts possessed and exercised when our constitutions were adopted”).

176. *See* 28 U.S.C. § 331 (2012) (“The Chief Justice of the United States shall summon annually the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district judge from each judicial circuit to a conference at such time and place in the United States as he may designate. He

Conference's Standing Committee on Rules of Practice and Procedure, aided by five subject-matter advisory committees,<sup>177</sup> evaluates operation of the federal rules and considers amendments via a public process strongly resembling notice-and-comment rulemaking in the administrative law context.<sup>178</sup> The Standing Committee may then recommend new or amended rules to the Judicial Conference, who may then pass them on to the Supreme Court.<sup>179</sup> If the Court agrees to the proposal, it forwards them on, by May 1 of a given year, to Congress, which then has until December 1 to override the proposal by passing a law disapproving the proposed Rule.<sup>180</sup> Thus, Congress and the President may overrule a proposed or amended rule—but only via the normal legislative process of bicameralism and presentment.<sup>181</sup>

The Judicial Conference should convene a select advisory committee to study state ex-ante drug court programs, and make recommendations for the creation of a small number of model ex-ante programs. As was suggested above in Part III.A.1, this select committee should pay particularly close attention to the work of the NADCP blue-ribbon commission and design programs based on their best practices, and should invite those districts with long experience in problem-solving justice to discuss their experiences with ex-post programs to better inform the development of model federal drug court programs. These models should then go through the rules vetting process, to ensure support from the Judicial Conference and the Supreme Court. While Congress has long slumbered on providing unambiguous authorization for federal ex-ante programs, the Rules Enabling Act pro-

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shall preside at such conference which shall be known as the Judicial Conference of the United States. Special sessions of the Conference may be called by the Chief Justice at such times and places as he may designate.”); *see also Governance and the Judicial Conference*, U.S. COURTS, [www.uscourts.gov/about-federal-courts/governance-judicial-conference](http://www.uscourts.gov/about-federal-courts/governance-judicial-conference) (last visited Jan. 30, 2018).

177. The five rule subject-matter areas are: appellate, bankruptcy, civil, criminal, and evidence. *How the Rulemaking Process Works*, U.S. COURTS, [www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works](http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works) (last visited Jan. 30, 2018).

178. *See id.*

179. *Id.*

180. *Id.*; *see also* 28 U.S.C. § 2074 (2012) (“The Supreme Court shall transmit to the Congress not later than May 1 of the year in which a rule prescribed under section 2072 is to become effective a copy of the proposed rule. Such rule shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law.”).

181. *See, e.g., INS v. Chadha*, 462 U.S. 919 (1983).

vides an opportunity to force the issue. Congress and the President would have to explicitly *reject* providing federal courts the opportunity to avail themselves of drug courts, and given the apparent inability of legislative leaders in Washington to achieve the policy goals of the current majority,<sup>182</sup> such action seems unlikely.

The Rules Enabling Act requires that federal practice and procedure rules “shall not abridge, enlarge or modify any substantive right.”<sup>183</sup> While some would argue diversionary programs like drug courts run afoul of this prohibition, similar programs at the state level have been found to be procedural rather than substantive. New Jersey, for example, created a program called pretrial intervention (PTI).<sup>184</sup> The program was created under the auspices of a state court rule, and the New Jersey Supreme Court found that “PTI [is] ‘a procedural alternative to the traditional system of prosecuting and incarcerating criminal suspects,’ and thus within the practice and procedure over which our rule-making power extends.”<sup>185</sup> This, the court said, was because “pretrial intervention provides one means of addressing the problems of congestion and backlog of cases which currently confront our prosecutors, public defenders, and courts. . . . [i]t also permits a more efficient use of the limited resources available to law enforcement authorities.”<sup>186</sup> The New Jersey Supreme Court went on to find no separation of powers violation in the creation of such a program via judicial rule, since the program was procedural rather than substantive.<sup>187</sup> It cited Justice Jackson’s concurrence from the *Steel Seizure* case—“[w]here [sic] the Constitution diffuses power the better to secure liberty, it also

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182. See, e.g., Thomas Kaplan & Robert Pear, *Senate Republicans Say They Will Not Vote on Health Bill*, N.Y. TIMES (Sept. 26, 2017), <https://www.nytimes.com/2017/09/26/us/politics/mcconnell-obamacare-repeal-graham-cassidy-trump.html>.

183. 28 U.S.C. § 2072(b) (2012).

184. The Garden State’s PTI program was created in the 1970s, as a sort of proto-drug court. See *State v. Leonardis*, 363 A.2d 321, 321–32 (1976) (describing the motivation for and process of creating the PTI program in New Jersey) [hereinafter *Leonardis I*]. It was one of several early diversionary programs, experimentation with which eventually led to the creation of problem-solving courts. For a discussion of these early PTI-type programs, see Note, *Criminal Practice—Pretrial Intervention Programs—An Innovative Reform of the Criminal Justice System*, 28 RUTGERS L. REV. 1203 (1975); Note, *Pretrial Diversion from the Criminal Process*, 83 YALE L.J. 827 (1974).

185. *State v. Leonardis*, 375 A.2d 607, 611 (1977) [hereinafter *Leonardis II*] (quoting *Leonardis I*, 363 A.2d at 324–25).

186. *Leonardis I*, 363 A.2d at 327.

187. *Leonardis II*, 375 A.2d at 611–14.

contemplates that practice will integrate the dispersed powers into a workable government”<sup>188</sup>—and the Rules Enabling Act.<sup>189</sup> The federal process suggested by this Note would suffer even less from separation of powers concerns, since Congress and the President would have the opportunity to override the rule, which was not the case with PTI.<sup>190</sup>

### 3. Inherent Authority for Article III Judges to Create Federal Drug Courts

For those seeking authority to create federal drug courts, the authority conferred by § 3154 may appear insufficient, and the Rules Enabling Act process may seem too lengthy and political a route to travel. In that case, Article III judges can (and should) use their inherent powers to create ex-ante programs. As recently as 2016, the Supreme Court acknowledged that “district court[s] possess[] inherent powers that are ‘governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.’”<sup>191</sup> While limited in some respects—they (1) “must be a ‘reasonable response to the problems and needs’ confronting the court’s fair administration of justice;”<sup>192</sup> and (2) “cannot be contrary to any express grant of or limitation on the district court’s power contained in a rule or statute”<sup>193</sup>—inherent powers exist broadly to allow district courts to “manage their dockets and courtrooms with a view toward the efficient and expedient resolution of cases.”<sup>194</sup>

Rulemaking, including the creation of procedural alternatives to trial such as drug courts, has long been viewed as part

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188. *Id.* at 613 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (Jackson, J., concurring)).

189. *Id.* at 613–14.

190. *See Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) (noting that “congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent . . . responsibility”).

191. *Dietz v. Bouldin*, 136 S. Ct. 1885, 1891 (2016) (quoting *Link v. Wash R. Co.*, 370 U.S. 626, 630–31 (1962)).

192. *Id.* at 1892 (quoting *Degen v. United States*, 517 U.S. 820, 823–24 (1996)).

193. *Id.* (citing *Degen*, 517 U.S. at 823).

194. *Id.* (citing four Supreme Court cases that each upheld a district court’s use of its inherent powers).

of courts' inherent power.<sup>195</sup> The New Jersey Supreme Court noted, in upholding PTI, that although the Garden State's Constitution explicitly granted it rulemaking authority,<sup>196</sup> such power "has also been widely recognized as falling within courts' inherent powers."<sup>197</sup> While the federal Constitution does not include such an express grant of authority in Article III, cases such as *Dietz* indicate that the vesting of "the judicial [p]ower" in the Supreme Court *and* "in such inferior [c]ourts as the Congress may . . . establish" includes the inherent power to create local rules to govern their affairs.<sup>198</sup> The absence of any bar, in rule or statute, to the creation of ex-ante programs in the federal system is sufficient to allow Article III judges to create such programs as a means of controlling their own dockets. Whether under statutory or inherent authority, Article III judges must respond to the ongoing substance-abuse crisis confronting the justice system by profiting from the example of successful ex-ante interventions in the states, and create a federal drug court regime.

#### 4. Institutional Buy-In from Other Justice System Actors

Success of such judicially created ex-ante programs will require buy-in from the Justice Department and U.S. attorneys, as well as federal defenders. While DOJ "initially argued against adoption of federal drug courts" in 2006, it "specifically encouraged its prosecutors to actively participate in reentry courts" in 2011.<sup>199</sup> Many U.S. attorneys have chosen to join these ex-post programs; the 2011 FJC study found assistant U.S. attorneys

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195. See, e.g., Joiner & Miller, *supra* note 175, at 630 ("A shorthand statement might be that the courts may provide for the 'how' in the courts; the legislators, the 'what.' Thus when the purpose of the rule is to provide for the establishment and maintenance of the machinery essential for the efficient administration of judicial business, and it does only that, the scope of the inherent power vested in the courts is complete and supreme.").

196. "The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts." N.J. CONST., art. VI, § 2, para. 3 (1947).

197. *Leonardis II*, 375 A.2d 607, 611 (1977) (citations omitted).

198. U.S. CONST. art. III, § 1. While Article III contains no analogue to the Necessary and Proper Clause found in Article I, it is settled law of nearly two centuries that where power is granted in the constitution, there must be a means of carrying out that power. See *McCulloch v. Maryland*, 17 U.S. 316, 323–24 (1819) ("Even without the aid of the general clause in the constitution, empowering congress to pass all necessary and proper laws for carrying its powers into execution, the grant of powers itself necessarily implies the grant of all usual and suitable means for the execution of the powers granted.").

199. Matthew G. Rowland, *Assessing the Case for Formal Recognition and Expansion of Federal Problem-Solving Courts*, FED. PROB., Dec. 2016, at 3, 7.

were “full team partners playing [a] key role” in twenty-four of the thirty-nine reentry programs studied.<sup>200</sup> This partnership is even more critical in the ex-ante context, since U.S. attorneys must agree to forgo prosecution in the event that offenders complete the diversionary program.<sup>201</sup> The EDNY notes, for example, that before becoming Attorney General of the United States, then-U.S. Attorney Loretta Lynch provided initial support for POP.<sup>202</sup> The transition from the Obama to Trump Administration and Attorney General Sessions’s initial tough-on-crime actions<sup>203</sup>—particularly as they relate to drug crime<sup>204</sup>—at least create doubts about the future of federal participation in ex-ante efforts. However, weighing that possibility against the long-term benefit for federal problem-solving justice, such doubts should not per se stall taking this critical next step. Prosecutor cooperation should be judged *after* the creation of the programs, for, as was said to Ray Kinsella, “[i]f you build it, [they] will come.”<sup>205</sup>

#### B. FURTHER DEVELOP EX-POST FEDERAL PROGRAMS

While this Note argues that the federal system currently over relies on ex-post programs, it does not imply that it should stop investing in reentry courts altogether. The courts should institute an ex-ante diversionary program while, *at the same time*, further developing existing ex-post programs by: (1) instituting them through the Sentencing Guidelines; and (2) instituting a centralized research and data collection project through USSC. In the event political realities make that impossible, the FJC

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200. Meierhoefer, *supra* note 138, at 43.

201. The New Jersey Supreme Court found in *Leonardis I* that arbitrary prosecutorial discretion violated the rehabilitative aims of PTI, and ordered that (1) “Defendants who have been accused of Any [sic] crime shall be eligible for admission to” PTI; and (2) “Defendant[s] admission . . . should be measured according to [their] amenability to correction, responsiveness to rehabilitation and nature of the offense with which [they are] charged.” *Leonardis I*, 363 A.2d 321, 340 (1976) (emphasis added). Federal courts are, however, unlikely to so circumscribe the prosecutorial discretion of U.S. attorneys.

202. EDNY ALTERNATIVES REPORT, *supra* note 123, at 9.

203. See, e.g., Sheryl Gay Stolberg & Eric Lichtblau, *Justice Dept. to Re-Examine Police Accords*, N.Y. TIMES, Apr. 4, 2017, at A1.

204. See, e.g., *Remarks by Attorney General Sessions to Law Enforcement About the Opioid Epidemic*, DEP’T OF JUSTICE (Sept. 22, 2017), <https://www.justice.gov/opa/speech/remarks-attorney-general-sessions-law-enforcement-about-opioid-epidemic>.

205. FIELD OF DREAMS (Universal Pictures 1989). The quote is often erroneously rendered as quoted above; the correct quote is “[i]f you build it, he will come,” referring, specifically, to the spirit of Kinsella’s father.

could play a similar institutional role—though without the statutorily prescribed role in the sentencing process.

When Jeremy Travis first proposed reentry courts, he foresaw *sentencing* judges playing the reentry role, and managing the process before, during, and after incarceration.<sup>206</sup> To make this possible, the USSC should promulgate sentencing guidelines specifically geared towards reentry. This would fit squarely in its statutory mission to “[r]eflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process” and to “develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing.”<sup>207</sup> USSC reentry guidelines would provide the guidance, centralization, and incentives to create and evaluate a system that could be deployed across the whole of the federal criminal justice system. This would also truly be a *reentry* court—a process geared from the beginning towards an offender’s eventual return home, regardless of the nature of their offense—rather than the drug-court-by-another-name-and-at-another-time that make up most federal reentry courts today.

The FJC could also serve as the venue for such a program. Serving as the “research and education agency of the [federal judicial system],”<sup>208</sup> the FJC was created by Congress in 1967.<sup>209</sup> The FJC has already undertaken some limited studies of reentry programs, and in each case called for further research.<sup>210</sup> Additionally, the FJC in 2016 released the results of an experimental treatment of five reentry programs designed by the FJC and assigned randomly to five districts without reentry courts of their own.<sup>211</sup> This report called into question the validity of the reentry project.<sup>212</sup> It found that “participants in judge-led [reentry] court programs had higher revocation and rearrest rates than those subject to traditional supervision by probation

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206. See Travis, *supra* note 66, at 2.

207. 28 U.S.C. §§ 991(b)(1)(C), (b)(2) (2012).

208. *About the Federal Judicial Center*, FED. JUDICIAL CTR., <https://www.fjc.gov/about> (last visited Jan. 30, 2018).

209. See 28 U.S.C. §§ 620–629 (2012).

210. See MEIERHOEFER & BREEN, *supra* note 154, at vii–viii; Meierhoefer, *supra* note 138, at 46.

211. See Letter from Hon. Ann Aiken, Dist. Court Judge, U.S. Dist. Court for the Dist. of Or., to Hon. Jeremy Fogel, Dir., Fed. Judicial Ctr. (Oct. 27, 2016) (on file with author) (citing FED. JUDICIAL CTR., FJC EVALUATION OF A FEDERAL REENTRY PROGRAM MODEL (2016)).

212. *Id.*

officers.”<sup>213</sup> The results, however, were “not deemed statistically significant due to the number of program participants involved.”<sup>214</sup> The study’s design was also severely criticized by both reentry court judges<sup>215</sup> and addiction research professionals.<sup>216</sup> Given these challenges, the FJC would need to rebuild trust with the federal reentry community and provide support to a collaborative process, rather than undertaking a research program outside of existing reentry courts. But, its research expertise and strong connection to the federal judiciary would make it a strong potential institutional research and development partner. In either case, further refinement of data-driven ex-post programs must be the next step in the development of federal reentry efforts.

### CONCLUSION

Drug courts are among the few proven tools to reduce addiction-based recidivism. There is some debate on the *magnitude* of their success, yet the data tell a clear story of re-arrest reduction for both program graduates, and even those who participate without completion. Federal reentry programs have value as well, particularly when it comes to managing and minimizing the impact of collateral consequences on offenders. Striking the proper balance between an ex-ante and ex-post approach for federal courts may be difficult, but it would still be an improvement over the current all-or-nothing approach. Such a rebalancing is necessary for our country, through the federal courts, to take steps toward addressing addiction as a disease, rather than as a crime.

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213. Rowland, *supra* note 199, at 8–9.

214. *Id.* at 9.

215. *See, e.g.*, Letter from Hon. Ann Aiken to Hon. Jeremy Fogel, *supra* note 211 (expressing concern about project design and the absence of “a review of the ample literature on reentry courts”).

216. *See, e.g.*, Letter from Dr. Wilson Compton, Dep. Dir., Nat’l Inst. on Drug Abuse, to Hon. Ann Aiken, Dist. Court Judge, U.S. Dist. Court for the Dist. of Or. (Oct. 25, 2016) (on file with author) (noting “numerous methodological issues and variations in the way the program was implemented across the study sites” which would “make it difficult to draw any real conclusions” from the study); *see also* Rowland, *supra* note 199, at 8.