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Legislating Courts

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LEGISLATING COURTS

Michael C. Pollack*

I. INTRODUCTION

Judges are ordinarily thought of as deciders of a specific sort: people who apply the rule of law to resolve disagreements between the parties appearing before them. But in every state, judges do far more. They are charged by state statutory or constitutional law with a range of quasi-administrative, quasi-legislative, and quasi-executive law enforcement functions. These roles raise a number of theoretical and practical concerns, as I have explored at length elsewhere.[1] In many states, though, legislatures have gone even further. They have either wholly delegated significant policymaking power to state court judges or have sat idle while those judges have assumed the mantle of functions that no state law ever gave them. Specifically, judges in states across the country have been designing and establishing specialized alternative courts like drug treatment courts, domestic violence courts, veterans courts, girls courts, and the like, all with either the most general of legislative authorization or with no legislative authorization at all. In this sense, judges have become deciders of a different sort—determining their own power, which criminal defendants will receive "special(ized)" treatment and which will not, and how those efforts will be evaluated. Judges have become deciders of the very structure of a branch of state government.

I leave to other participants in this symposium the crucial questions of whether and how well these courts work, how we might measure success, what tradeoffs arise, whether the courts are worth the candle, and so on. But specialized courts do at least have the potential to improve the lives of many people caught in the web of the criminal legal system, to limit recidivism, to address some of the root causes of crime, and to protect communities.[2] Indeed, as many scholars, activists, judges, lawyers, and policymakers reexamine the racial and other biases inherent in so much of our criminal legal system, specialized courts are no doubt at least a necessary part of the conversation around how we can respond to crime in a more just, anti-racist, community-minded manner.

My focus is trained specifically on the interaction between these institutions and the rest of state government. If we are going to have specialized courts, who should make the decision to establish them? Who should design their structures, set their goals, and decide where they should operate? Who should

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* Professor of Law and Associate Dean for Faculty Development, Benjamin N. Cardozo School of Law. I am grateful to Judge Stephen Bough and Judge George Draper for their kind invitation to contribute to this important symposium, and to Isaac Strauss for superb research assistance, particularly with developing the legislative landscape of specialized courts around the country. I would also like to acknowledge the careful attention and assistance of the staff of the UMKC Law Review with this entire symposium. Many of the foundational ideas in this piece were first published in *Courts Beyond Judging*, 46 BYU L. REV. 719 (2021), and I would like to recognize the hard work of the staff of the BYU Law Review on that piece.

[1] *See generally* Michael C. Pollack, *Courts Beyond Judging*, 46 BYU L. REV. 719, 726 (2021).

[2] *See, e.g.*, Erin Collins, *Status Courts*, 105 GEO. L.J. 1481, 1482 (2017) [hereinafter Collins, *Status Courts*]; James L. Nolan, Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541, 1541 (2003).

oversee them? This essay argues that the answer to all of these questions is: state legislatures, at least in the first instance. Presently, as just noted, many states' specialized courts are shaped primarily by judges themselves, with little in the way of detailed guidance or sustained oversight from other branches of state government. Some states' specialized courts are even created by judges outright with no delegation of authority from the legislature. All of this raises serious concerns in terms of accountability, expertise, democratic legitimacy, and even institutional quality. Indeed, the fact that this has been happening for decades marks a striking and surprisingly unnoticed break with how policy is ordinarily made and with how we often tend to think policy *ought* to be made in a democracy.

While these judges ought to be applauded for their efforts and for devoting their energies to addressing an important social problem they encounter in their jobs every day, it is time for state legislatures to roll up their sleeves, to take a greater hand in designing these institutions with the help of subject-matter experts, to make them uniform, to oversee them, and to responsibly fund them. It is time for legislatures, rather than judges, to legislate.

This essay proceeds in three parts. Part II explores the ways in which specialized courts have been established. It shows that many of them were and remain creatures of judicial policymaking rather than of engaged legislative design. That is, even where legislatures authorized the creation of these courts, many of those delegations were so broad that they essentially operate as blank checks. Notably, however, Part II also points out that some state legislatures have indeed crafted these institutions in more detailed manners, which is a welcome development. Even most of these states, however, still leave the bulk of the oversight to the courts themselves. Part III argues that the latter group of states are on the right track and that others should emulate them, but it emphasizes that even these states would benefit from more legislative primacy and ownership. Drawing on theories of democratic participation and institutional design I have previously articulated elsewhere,[3] this Part makes the normative and practical case for legislative creation, design, and oversight (and *against* judicial creation, design, and oversight) of specialized courts. Part IV concludes by setting out an agenda for state legislators and judges interested in working together to establish and maintain specialized courts that are and are perceived to be durable, legitimate, and successful.

II. THE CREATION OF SPECIALIZED COURTS

Specialized courts generally consist of two groups. First, there are the "problem-solving courts" like drug treatment courts. The premise of these sorts of courts is that they focus less on incarceration and punishment and more on treatment plans, education, supportive social services, and community peace and

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[3] *See* Pollack, *supra* note 1, at 758-59, 763-70.

safety.[4] The second, closely related and growing from the same roots, are what Professor Erin Collins calls "status courts" like veterans courts and girls courts. The idea behind these courts is that the judges who preside over them are often members of the same group and may therefore be better able to mentor and assist the offenders who appear before them.[5] There is also often a sense, particularly in the context of veterans courts, that this sort of approach is the "right thing to do" in light of both the service those veterans have rendered and the trauma they have experienced.[6]

There is little in the way of a complete history of the establishment of these specialized courts. Many scholars and observers—myself included—have instead noted in general terms that, most of the time, these courts have been created primarily by judges themselves in a roughly ad hoc fashion.[7] A few noteworthy events stand out in the common retelling of the story. The first drug court in the United States was created in Dade County, Florida in 1989 "by administrative order of the chief judge of Florida's 11th Judicial Circuit."[8] Similarly, the first veterans court was opened in 2008 by Robert Russell, a judge on the City Court in Buffalo, New York.[9] A few years later, Judge Jo Ann Ferdinand chose to create New York City's first veterans court after an interaction with a Vietnam War veteran defendant in her courtroom.[10] Similarly, the first girls court in the country was established in 2004 in Hawaii by the judges on the Family Court of the First Judicial Circuit in that state.[11]

This Article revisits this story and offers a new, more comprehensive survey of the landscape as it appears today. In a dozen or so states, that traditional story remains accurate: legislatures are entirely absent from the scene.[12] For

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[4] *See Problem Solving Courts: Addressing a Spectrum of Issues,* NAT'L ASS'N OF DRUG CT. PROFS., https://www.ncsc.org/topics/alternative-dockets/problem-solving-courts/home (last visited Nov. 9, 2023); *Collaborative Courts*, SUPERIOR CT. OF CAL., CTY. OF ORANGE, https://www.occourts.org/directory/collaborative-courts/ (last visited Nov. 9, 2023); Collins, *Status Courts*, *supra* note 2, at 1483, 1488-89.

[5] Collins, *Status Courts*, *supra* note 2, at 1484, 1498, 1522.

[6] *Id.* at 1509-10.

[7] *See* Pollack, *supra* note 2, at 755-57; Sohil Shah, *Authorization Required: Veterans Treatment Courts, the Need for Democratic Legitimacy, and the Separation of Powers Doctrine*, 23 S. CAL. INTERDISC. L.J. 67, 67, 91-96 (2014); Ethan Leib, *Local Judges and Local Government*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 707, 723 (2015).

[8] *See Drug Court's Holistic Approach*, MIAMI DADE CNTY. https://www.miamidrugcourt.com/index.php?option=com_content&view=article&id=44&Itemid=54 (last visited Oct. 7, 2020).

[9] *See* Collins, *Status Courts*, *supra* note 2, at 1492; Robert T. Russell, Veterans Treatment Court: A Proactive Approach, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 357, 357 n.† (2009).

[10] Kristen Meriwether, *Veterans Treatment Courts Offer Hope, but Only in Three Boroughs*, GOTHAM GAZETTE, https://www.gothamgazette.com/index.%20php%20government/5279-veterans-treatment-courts-offer-hope-but-only-in-three-boroughs (last visited Nov. 9, 2023).

[11] *Hawaii Girls Court*, HAW. ST. JUDICIARY, https://www.girlscourthawaii.org/ (last visited Nov. 9, 2023).

[12] It is, of course, difficult to demonstrate a negative, but the states discussed here are states without obvious statutes on the books authorizing or setting standards for specialized courts. *See also* Okla. Cty. Treatment Cts., About Us, https://www.okcountytc.org/about-us (last visited Nov. 9, 2023)

example, Iowa's specialized courts are "a partnership between courts and communities" that does not appear to involve the legislature at all.[13] Montana's specialty courts were created by judges and rely largely on federal funding,[14] and the same is true in Massachusetts, where specialty courts are expanding "by the leadership of the Judicial Branch."[15] Alabama's veterans courts remain "judicially created,"[16] as are all of Ohio's treatment courts.[17]

Some of these judiciary-centered efforts are quite thickly developed. For example, in Colorado, Chief Justice Mary Mullarkey observed in 2008 that specialized courts "have been created at the local level with little coordination with other judicial districts regarding staffing models, funding models, treatment, case management, and other policy and practice issues that impact the sustainability and effectiveness of these courts."[18] She therefore ordered the establishment of a statewide Problem Solving Court Advisory Committee that would develop best practices, funding models, and "promote and coordinate the development and implementation" of specialized courts.[19] Similarly, Maryland's high court established a statewide Office of Problem-Solving Courts; that office then created a uniform "formal process" under which judges can apply to establish specialized courts.[20] The court then required that each specialized court "shall provide the Office of Problem-Solving Courts . . . the information requested by that Office regarding the program" and that the Office "shall submit to the Chief Judge of the [Supreme Court] . . . annual reports and recommendations as to the status and operations of the various problem-solving court programs."[21]

(describing program as "a combined effort of the District Court, District Attorney's office, Public Defender's office," and other state and local agencies); VT. JUDICIARY DIV. OF PLANNING & CT. SERVS., ESTABLISHING A TREATMENT DOCKET OR PROBLEM-SOLVING DOCKET, https://legislature.vermont.gov/Documents/2018/WorkGroups/House%20Judiciary/Bills/H.213/W~Robert%20Sand~Establishing%20a%20Treatment%20Docket%20or%20Problem%20Solving%20Docket~1-27-2017.pdf ("The Supreme Court has established a protocol for approval of specialty, problem-solving, and treatment dockets.").

[13] *See* IOWA JUDICIAL BRANCH, IOWA SPECIALTY COURTS, https://www.iowacourts.gov/static/media/cms/Iowa_Specialty_Courts_543BA08E1647D.pdf.

[14] *See* Jonathon Ambarian, *Montana Leaders Look at Future of Drug Treatment Courts*, KTVH (Jan. 20, 2023), https://www.ktvh.com/news/68th-session/montana-leaders-look-at-future-of-drug-treatment-courts. The Montana legislature has recently directed its attention to establishing more sustainable state funding of treatment courts, but it appears that legislative involvement will remain limited to appropriations. *Id.*

[15] Mary Hogan Sullivan, *The Development and Implementation of Specialty Courts in Massachusetts*, 59 BOSTON BAR J. (2015), https://bostonbar.org/journal/the-development-and-implementation-of-specialty-courts-in-massachusetts/.

[16] Jeremy Glassford, Note, *"In War, There Are No Unwounded Soldiers": The Emergence of Veterans Treatment Courts in Alabama*, 65 ALA. L. REV. 239, 254 (2013).

[17] *See* OHIO SUP. R. 36.20 *et seq.* (rules adopted by Supreme Court for establishing treatment courts).

[18] Letter from Mary J. Mullarkey, Chief Justice of Colorado (Apr. 9, 2008), https://www.courts.state.co.us/userfiles/File/Court_Probation/Supreme_Court/Committees/Problem_Solving_Court_Advisory_Committee/letter_20to_20members_20and_20order.pdf.

[19] *Id.*

[20] *See* MD. RULE § 16-207; Maryland Courts, Problem-Solving Courts: Plan for a Proposed Problem-Solving Court, https://www.mdcourts.gov/opsc/programapplicationdocuments (last visited Nov. 9, 2023).

[21] MD. RULE § 16-207(h).

Notwithstanding these examples, the traditional judiciary-centric story is a bit misleading. As the following discussion demonstrates, a clear majority of states today do have at least *some* legislation authorizing specialized courts or delegating to the judiciary the power to establish them. To be fair to the dominant narrative, this legislation is not always consistent even within a given state: Some states have authorizing legislation for drug courts, for example, but not for other specialized courts, which accordingly remain more ad hoc.[22] Moreover, many of these state legislatures (and the federal government) have tended to follow the judges' leads, so the story of judicial primacy remains accurate in that sense. For example, building on the 1989 Dade County experiment, the 1994 federal Crime Act authorized the U.S. Department of Justice to make grants to fund such courts throughout the country.[23] More recently, veterans courts got the attention and encouragement of the Obama Administration after a few judges had already begun establishing them.[24] These state legislatures then followed the judges—and the federal money.[25]

Another facet of the common story is that, even where legislation exists, it is drawn so broadly and without guidelines, or it simply duplicates the judges' preexisting efforts, such that "with or without such statutes, the decision of whether to open a specialty court is within the discretion of the judiciary."[26] Moreover, this story goes, state legislation rarely requires the sort of robust data collection and reporting that would enable observers—or even the judges themselves—to rigorously evaluate how the programs are working.[27]

There are about a dozen states in exactly this position. For example, Arizona's legislature authorized (but did not require) judges to establish drug courts, veterans courts, mental health courts, and so on, and that is essentially all the legislature has had to say.[28] Connecticut's legislature authorized (but did not require) the state's court administrator to establish drug courts.[29] Nevada's legislature authorized local courts to create treatment and veterans courts;[30] Pennsylvania's legislature did the same and also authorized the state supreme court

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[22] Erin R. Collins, *The Problem of Problem-Solving Courts*, 54 U.C. DAVIS L. REV. 1573, 1605 (2021) [hereinafter Collins, *The Problem*].

[23] Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 LAW & POL'Y 125, 127 (2001).

[24] *See* EXEC. OFF. OF THE PRESIDENT, STRENGTHENING OUR MILITARY FAMILIES: MEETING AMERICA'S COMMITMENT 12 (2011), https://apps.dtic.mil/sti/tr/pdf/ADA550567.pdf (announcing a commitment to provide federal support for further development of the "Veterans Treatment Court concept").

[25] Berman & Feinblatt, *supra* note 23, at 126-27; Collins, *The Problem*, *supra* note 22, at 1604 ("These authorization statutes largely codify existing practices; they simply specify that the judiciary *may* open a specialty court.").

[26] Collins, *The Problem*, *supra* note 22, at 1605.

[27] *Id.* at 1607-08.

[28] *See* ARIZ. REV. STAT. §§ 12-132, 13-3422, 22-601. The only other guidance the legislature offers is excluding certain defendants from eligibility for drug court and listing which defendants would be eligible to have their charges dismissed upon completion of a drug court program. *Id.* § 13-3422(D), (I).

[29] CONN. REV. STAT. § 51-181b.

[30] NEV. REV. STAT. §§ 174.032, 176A.230, 176A.240, 176A.260, 176A.280.

to coordinate statewide efforts.[31] Nebraska's legislature simply declared that specialized courts are effective before delegating every other choice to the state's supreme court.[32] Hawaii, as noted above, has a girls court because of the initiative of the state's family court judges,[33] but that court acted under a broad directive from the legislature to "implement alternative programs that place, control, supervise, and treat selected defendants in lieu of a sentence of incarceration."[34] Some states have something of a mix of origin stories: In Delaware, for example, the judicial branch created drug and mental health courts on its own, but the legislature later authorized a DUI treatment court program.[35] In Washington, the legislature acknowledged the judiciary's "inherent authority" to establish treatment courts but went on to authorize the judiciary to create them too.[36] In states like these, the legislature's role has been minimal at best—a wholesale delegation of authority to the courts.

Contrary to the old story, though, over twenty states *do* have statutes on the books that not only establish or authorize the establishment of specialized courts, but that also provide at least some standards under which those courts must operate. That is, these states' arrangements are born out of at least some actual *legislative* policymaking. For example, take the home of this symposium: the State of Missouri. The first treatment court in the state was started in 1993 just like in many other states: by judges.[37] Just five years later, though, the Missouri legislature enacted legislation to formalize and establish treatment courts in the state.[38] In 2013, the legislature went on to establish veterans courts.[39] And in 2018, the legislature refined these models and, crucially, promulgated standards to guide the implementation of the specialized court model.[40]

This legislative package directs circuit courts throughout Missouri to establish specialized courts by August 28, 2021 for "cases which stem from, or are otherwise impacted by, substance use."[41] It goes on to provide that the "treatment court" "shall combine judicial supervision, drug or alcohol testing, and treatment of participants," and that referrals for treatment can only be made by courts to programs certified by the state's department of mental health.[42] The statute also provides for the appointment of "treatment court commissioners" in each of the

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[31] 42 PA. CONS. STAT. § 916.

[32] NEB. REV. STAT. §§ 24-1301, 1302.

[33] *See Hawaii Girls Court*, *supra* note 11.

[34] HAW. REV. STAT. § 706-605.1(1). This provision was enacted in 1995, *see* 1995 HAW. SESS. LAWS 735 https://www.capitol.hawaii.gov/slh/AllIndex/All_Acts_SLH1995.pdf, nine years before the Oahu Family Court judges established the girls court, *see Hawaii Girls Court*, *supra* note 11.

[35] *See Specialty Courts DUI Treatment Court Program*, DEL. CT JUD. BRANCH, https://courts.delaware.gov/commonpleas/specialty.aspx (last visited Nov. 11, 2023); DEL. CODE ANN. tit. 21 § 4177C.

[36] WASH. REV. CODE §§ 2.30.010, 2.30.030.

[37] *See Treatment Court Fact Sheet*, MO. TREATMENT CT. COORDINATING COMM'N, https://www.courts.mo.gov/file.jsp?id=6148 (last modified Dec. 2019).

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] MO. REV. STAT. § 478.001(2) (providing that circuit courts "shall" establish such courts).

[42] *Id.*

state's circuits who "shall have all the powers and duties of a circuit judge, except that any order, judgment or decree of the commissioner shall be confirmed or rejected by an associate circuit or circuit judge by order of record."[43] And it sets up a basic structure by which the treatment court "shall" evaluate the progress of participants and provide "appropriate incentive or sanction" for participants to complete their programs.[44] Finally, the statute establishes a Treatment Courts Coordinating Commission to "evaluate resources available for assessment and treatment of persons assigned to treatment courts or for the operation of treatment courts," "secure [and disburse] grants, funds and other property and services necessary or desirable to facilitate treatment court operation," "establish standards and practices . . . taking into consideration guidelines and principles based on current research and findings relating to practices shown to reduce recidivism of offenders with a substance use disorder or co-occurring disorder," and undertake "administrative action" against any treatment courts that do not comply with the commission's standards or that fail to "enter data in the approved statewide case management system as specified by the commission."[45]

At the same time, this Missouri statute still leaves much to the courts. While requiring circuit courts to establish specialized courts related to "substance use," the statute leaves the subjects of those courts open to the courts' discretion, saying simply that the programs "may include, but not be limited to, cases assigned to an adult treatment court, DWI court, family treatment court, juvenile treatment court, veterans treatment court, or any combination thereof."[46] The statute also says that, upon completion of the treatment court program, "the charges, petition, or penalty against a treatment court participant *may* be dismissed, reduced, or modified," but it does not *require* as much.[47] And while the statute commands circuit courts to "establish conditions for referral of proceedings to the treatment court division," it does not dictate what those conditions are or require any uniformity throughout the state.[48] Finally, the Treatment Courts Coordinating Commission is located "in the judicial department."[49] The Commission must consist of members selected by the Missouri Supreme Court and by various state agencies like the Departments of Corrections, Social Services, Mental Health, and Public Safety,[50] but none are selected by or report to the legislature. Indeed, the statute is silent on whether the data that must be collected by the treatment courts will ever be released to or evaluated by the legislature or the public, and it is likewise silent on whether the legislature will engage in any routine oversight over the Commission or over the treatment courts themselves. The statute does not even say what, if anything, the Commission is supposed to do with that data, though the

[43] *Id.* § 478.003(1).
[44] *Id.* § 478.004(1).
[45] *Id.* § 478.009(1), (2), (6), (8).
[46] *Id.* § 478.001(2).
[47] *Id.* (emphasis added).
[48] *See id.* at § 478.005(1).
[49] *Id.* § 478.009(1).
[50] *Id.*

Commission has wisely chosen to compile and produce public annual reports.[51]

Other states' specialized courts operate within similar statutory frameworks that reflect at least some degree of legislative attention on the front end but less going forward. For example, Indiana's legislature codified an entire chapter of statutory provisions having to do with specialized courts.[52] Though this statutory package still leaves the establishment of specialized courts to the initiation of individual city and county courts,[53] it sets out a slew of eligibility requirements for participants and for programs,[54] and it requires the state's office of court administration to monitor and certify specialized courts' compliance with the statute.[55] Moreover, judges who wish to establish specialized courts cannot do so on their own accord; rather, they must petition the state's office of court administration, which has the power to reject applications that do not comply with statutory requirements.[56] Note, however, that the judiciary, rather than the legislature, will still be the decider. Finally, the statute contemplates that the state's Judicial Conference, which consists of the Chief Justice and a number of judges from across the state,[57] will promulgate further rules and regulations.[58] Again, the judiciary, not the legislature. Texas's structure is similarly robust, including a range of criteria and requirements for drug courts, veterans courts, mental health courts, sexually exploited persons courts, public safety employees treatment courts, and juvenile family drug courts.[59] For many of these specialized courts, the legislature delegated to local courts the choice and authority to actually establish them,[60] but it also required some counties (including the most populous ones in the state) to establish specific ones.[61] Tennessee's structure is similar, featuring a list of ten principles for treatment courts and requiring the judiciary to develop an advisory committee to monitor those courts.[62] And yet, the Tennessee legislature did not fund these courts; rather, it authorized them to apply for state financial grants, "if funds are available."[63] Louisiana also has a fairly detailed statutory framework for its specialized courts which lists the programs' goals, procedures, and eligibility requirements,[64] but it likewise leaves the ultimate responsibility for establishing

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[51] *See, e.g.*, *Treatment Court Reports*, MO CT., https://www.courts.mo.gov/page.jsp?id=271 (last visited Nov. 10, 2023).
[52] *See* IND. CODE § 33-23-16-1 *et seq.*
[53] *Id.* § 33-23-16-11.
[54] *Id.* § 33-23-16-12 *et seq.*
[55] *Id.*§§ 33-23-16-17, -18.
[56] *Id.* § 33-23-16-19.
[57] *Id.*§ 33-38-9-4.
[58] *See, e.g.*, *id.* §§ 33-23-16-12(d), -13(1).
[59] *See* TEX. GOV'T CODE ANN. §§ 122.001, 123.001, 124.001, 125.001, 126.001, 129.002, 130.001.
[60] *See id.* § 121.002, 122.002, 123.002, 124.002, 125.002, 126.002, 129.003, 130.002.
[61] *See id.* §§ 123.006(a) (drug courts), 125.005(a) (mental health courts), 126.007 (sexually exploited persons courts).
[62] *See* TENN. CODE ANN. §§ 16-6-103, -104, 16-19-105, -107 (veterans and mental health courts).
[63] *Id.* § 16-6-105 (veterans courts), *see* 16-19-106 (mental health courts).
[64] *See* LA. STAT. ANN. § 13:5301 *et seq.* (drug courts); *id.* § 13:5353 *et seq.* (mental health courts); *id.* § 13:5361 *et seq.* (veterans courts).

these courts and for evaluating their effectiveness to the courts themselves.[65]

Some of these statutes even include some data-collection and analysis requirements. For example, Texas's legislature specifically requires the state Veterans Commission to report annually to the legislature and the governor the total number of veterans who participated in a veterans treatment court program, the numbers of veterans who did and did not successfully complete it, and the amount of funding received by each program.[66] Curiously, however, Texas law imposes no such requirement on the other specialized courts in the state. By contrast, Mississippi's legislature charged the state's Administrative Office of Courts with the "certification and monitoring of local drug courts according to standards promulgated by the State Drug Courts Advisory Committee,"[67] a committee that the legislature created and that consists of members appointed by the state's Supreme Court who are instructed to be "broadly representative" of the courts, law enforcement, corrections, juvenile justice, child protective services and substance abuse treatment communities.[68] Specifically, the legislature directed that the Committee "shall receive and review the monthly reports submitted . . . by each certified drug court and [shall] provide comments and make recommendations, as necessary, to the Chief Justice and the Director of the Administrative Office of Courts."[69] The legislature also required the Administrative Office of Courts to "implement and operate a uniform certification process" for specialized courts, and it set out standards that the process must reflect, including a fairly detailed "data collection plan."[70] North Carolina's legislature adopted a similar structure for its specialized courts.[71] Arkansas's did too,[72] but it also required the state specialty court committee to "[c]ontract with a third-party evaluator every five (5) years to conduct an evaluation on the effectiveness of the specialty court program in complying with the key components of [the statute]."[73]

This diversity of approaches across the states should hardly come as a surprise.[74] That, after all, is what the oft-referenced "laboratories of democracy" are all about.[75] As the next Part explores, though, some of these states have found

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[65] *See, e.g.*, *id.* § 13:5304(A) ("may designate"); § 13:5304(K) ("Each drug division shall develop a method of evaluation so that its effectiveness can be measured. These evaluations shall be compiled annually and transmitted to the judicial administrator of the Supreme Court of Louisiana and shall include information on recidivism reduction on the participants in the program.").
[66] TEX. GOV'T CODE ANN. § 124.007.
[67] MISS. CODE ANN. § 9-23-7. This Committee is also charged with "developing statewide rules and policies" for veterans' court programs. *Id.* § 9-25-1(5).
[68] *Id.* § 9-23-9(1).
[69] *Id.* § 9-23-9(5).
[70] *Id.* §§ 9-23-11(1), (2)(b)(vi), 4(a).
[71] *See* N.C. GEN. STAT. ANN. §§ 7A-795, -796, -801.
[72] *See* ARK. CODE ANN. §§ 16-10-139(c), 16-98-303(f), 16-98-306.
[73] *Id.* § 16-98-306(h).
[74] *Cf.* Pollack, *supra* note 1 (exploring other ways in which states differ in how they structure courts' roles outside of dispute resolution).
[75] *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.").

their way toward marginally better paths than others. Those states ought to be considered something like role models for the others, but even these role models are far from perfect. Every state therefore still has work to do to improve how they administer and oversee specialized courts.

III. THE NECESSITY OF LEGISLATION

In the jurisdictions that have not yet established specialized courts but wish to do so, the question arises *who* should be their creator. And even in the jurisdictions which already have specialized courts, the question remains whether they are presently ideally conceived, organized, overseen, and funded. As noted at the outset, I leave to others in this symposium to explore the good and the bad of these courts. Here, assuming that the good outweighs the bad, I make the case for the necessity of proceeding through the legislative process—and in greater detail than tends to be the norm today—rather than through the sort of ad hoc judge-led processes and broad legislative delegations to judges that have predominated in this space.

When we think about choosing and designing decisionmakers in other areas of law and policy, we often focus on values like accountability and expertise.[76] Sometimes we want the decisionmaker to be electorally or politically responsive; at other times, we prefer the decisionmaker to be insulated from political whims and to instead deploy technical knowledge. For example, the U.S. Constitution gives federal judges life tenure because its drafters thought those judges should decide cases with loyalty only to the law rather than to the popular feelings of the crowd.[77] And while many states provide for the election of their judges,[78] a number of those states still provide for some form of protection in office different than that enjoyed by legislators, whether it be in the form of long or staggered terms or in the form of elections structured as retention elections rather than as popular campaigns.[79] Indeed, the debates over how to structure the selection of state court judges historically turned in substantial part on the question of exactly how much public pressure those judges should face and what the best mechanism would be for achieving that balance.[80] Today, some of the most vocal

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[76] *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2255, 2331-38 (2001); *see also* Miriam Seifter, *States, Agencies, and Legitimacy*, 67 VAND. L. REV. 443, 481-82, 488-91, 496-501 (2014); Emily Hammond Meazell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763, 1770-76 (2012); Eric Berger, *Individual Rights, Judicial Deference, and Administrative Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2059 (2011); Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 469-491 (2003).

[77] *See* U.S. CONST. art. III, § 1; *see* The Federalist No. 78 (Alexander Hamilton) (describing the "good behaviour" provision as "excellent barrier to the encroachments and oppressions of the representative body" and emphasizing that "[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution").

[78] *See* Michael S. Kang & Joanna M. Shepherd, *The Partisan Price of Justice: An Empirical Analysis of Campaign Contributions and Judicial Decisions*, 86 N.Y.U. L. REV. 69, 71 (2011) (noting that "89% of all state court judges face the voters in some type of election").

[79] *See id.* at 78-81.

[80] *See id.* at 76-78.

critiques of judicial elections are that they make courts *too* responsive and "reduce [judges'] willingness to defend the rule of law against public opposition or special interests."[81]

By contrast, when it comes to questions of broader policymaking, we have consistently tended to care a great deal about democratic legitimacy, and we have consistently wanted our laws to be written and policies to be set by people in whose deliberations we can participate and whom we can ultimately vote out of office.[82] Judicial attacks on the modern administrative state, for example, regularly invoke this rhetoric,[83] but even supporters of the administrative state tend not to dispute the premise and to instead argue that the administrative state is necessary and sufficiently designed so as not to threaten that sort of accountability.[84] Indeed,

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[81] Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1064 (2010); *see id.* ("Recent studies demonstrate that elected judges face more political pressure and reach legal results more in keeping with local public opinion than appointed judges do."). In this article, Professor Shugerman offers a rich history of the shift to elected state courts in the mid-1800s and roots that shift in a desire to liberate judges from the patronage and control of legislatures and governors, which was thought to be necessary to protect the people's rights from government overreach. *See, e.g.*, *id.* at 1139 ("[S]upporters of judicial elections emphasized judicial independence: elections would replace the appointments that gave legislators, governors, and cronyism power over the courts. Independent of these forces, the quality of judging would improve, and judges would be free to be judges."). But ultimately even the elected judiciaries in this era ultimately justified their positions in terms of being *countermajoritarian* and in "identify[ing] the people and the flaws of majority rule as a threat to higher law." *Id.* at 1124.

[82] *See, e.g.*, Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1837 (2015) ("Accountability is primal to American democracy."); Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 657 (2007) (noting that public participation "furthers self-fulfillment and self-definition of individual citizens who play a role in shaping the decisions that affect their lives"); Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 300 (2003) ("Legal authorities gain when they receive deference and cooperation from the public," and such deference and cooperation are more forthcoming when the public has the ability to "state [its] views to an authority and to feel that those views are being considered."); A.E. Dick Howard, *Does Federalism Secure or Undermine Rights?*, *in* FEDERALISM AND RIGHTS 11, 13 (Ellis Katz & G. Alan Tarr eds., 1996) ("The essence of being a citizen is to have the opportunity, not simply to vote for those who make the laws, but also to have a voice in how decisions are to be fashioned, what choices to be made."); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1068 (1980) (describing the widely felt desire for what Hannah Arendt called "'public freedom'—the ability to participate actively in the basic societal decisions that affect one's life") (quoting HANNAH ARENDT, ON REVOLUTION 114-15, 119-20 (1962)).

[83] *See, e.g.*, Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 91 (2015) (Thomas, J., concurring) ("We have overseen and sanctioned the growth of an administrative system that concentrates the power to make laws and the power to enforce them in the hands of a vast and unaccountable administrative apparatus."); City of Arlington v. FCC, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) (lamenting that "administrative agencies enjoy in practice a significant degree of independence" from the elected president).

[84] *See, e.g.*, Gillian Metzger, *Foreword: 1930s Redux: The Administrative State under Siege*, 131 HARV. L. REV. 1, 78-87 (2017) (showing how "[i]t is the internal complexity of the administrative state—the way it marries together presidential control, bureaucratic oversight, expertise, professionalism, structural insulation, procedural requirements, and the like—that holds the key to securing accountable, constrained, and effective exercise of executive power"); Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2136 (2005) ("The idea that we can have accountability without administration is magical thinking . . . . It is

while administrative agencies at both the federal and state levels set specific standards and implement legislatively crafted programs,[85] the question whether a given agency should exist at all and what its charge should be is logically prior. It has therefore generally been the *legislature* that has created these agencies in the first instance.[86] Indeed, from time to time at the state level, including here in Missouri, it has been the *people* who have done so in the form of referenda.[87]

With this brief discussion of the role and origins of administrative agencies, the basic shape of the case for legislative or popular creation of specialized courts should be coming into view. But there is far more at play here than an appeal to history or to broadly articulated norms of popular accountability. Rather, these norms interact with and are bolstered by important functional considerations having to do with achieving good institutional design, uniformity, and fairness.

Let us begin by recognizing that establishing specialized courts is not only a significant decision on its own, but one that in fact entails a number of subsidiary decisions: not only whether to have such courts, but also which ones to establish (which offenses or "problems" or statuses to provide this different treatment for and which not to), what procedures to adopt, who should be eligible and who should not be, what remedial schemes to offer, whence to draw funding, what kind of oversight and data collection or reporting there should be, and so on. In all of these questions, the values and interests at stake may point in different directions. Consider first the interests of the accused individuals—the people entering the court system. They have a stake in participating in a system that offers them a fair hearing, respect for their circumstances and needs, just resolutions, and outcomes

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enticing, but we have learned that we are better off with science and democracy, even if the price we have to pay for these advantages is administrative governance."); Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 509-26 (2002) (describing how judicial review of agency decisionmaking generates accountability).

[85] *See, e.g.*, Elizabeth V. Foote, *Statutory Interpretation or Public Administration: How* Chevron *Misconceives the Function of Agencies and Why It Matters*, 59 ADMIN. L. REV. 673, 675 (2007) ("[A]gencies are charged with carrying out statutory provisions—that is, with implementing public policies through operational programs. Administrative rules represent interstitial, provisional, operational applications that can be, and often are, altered as agency expertise evolves and political currents shift. Accordingly, agencies by law use institutional processes that involve controls by the political branches. They have mechanisms for public input and accountability that advance bureaucratic and management objectives and rely on technical expertise.").

[86] *See, e.g.*, Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002) (creating federal Department of Homeland Security); Housing and Urban Development Act of 1965, Pub. L. No. 89-117, 79 Stat. 451 (1965) (creating federal Department of Housing and Urban Development); Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (1970) (creating federal Occupational Safety and Health Administration).

[87] *See, e.g.*, MO. CONST. art. IV, §§ 40-42 (adopted by voters Nov. 3, 1936) (establishing Missouri Department of Conservation); § 36(b) (adopted by voters Aug. 7, 1990) (establishing Department of Insurance); *see also* David C. Valentine, *Constitutional Amendments, Statutory Revision and Referenda Submitted to the Voters by the General Assembly or by Initiative Petition, 1910-2010*, Report 19-2010, UNIV. MO. SYS. (Dec. 2010), https://web.archive.org/web/20140502223410/http://ipp.missouri.edu/files/ipp/attachments/19-2010_constitutional_amendments.pdf (cataloging referenda and initiative in Missouri).

that provide meaningful opportunities for rehabilitation.[88] Even if those were the only interests on the table, it would remain open to debate how to best achieve that system and how it should be made to function. As many of the contributions to this symposium illustrate, those answers are not straightforward and there are likely many ways to achieve those goals.

But the interests of the accused are also not the only interests at stake. There are also the interests of the state in operating a criminal legal system that advances public safety, deters offenses and recidivism, and that functions efficiently and cost-effectively. There are the interests of victims—at least where the offenses are not victimless—in having *their* needs met and in seeing *their* vision of justice implemented. And there are the families of the accused, the immediate community, the broader public, and so on, all of them with a stake in the criminal legal system, its structure, its processes, and its outcomes. These various stakeholders might see eye to eye on any number of things; their values need not be in conflict with those of the accused. Of course, they might well be. And where they are, the consequence is that in addition to figuring out how to achieve a given set of goals, there will also be the more fundamental task of figuring out which goals to achieve (or at least to prioritize) and which goals to subordinate. That means figuring out which *people* to serve and which people not to serve—or, at least, to serve less.

As described in Part II, in many states today, these specialized courts have been and continue to be established and designed by judges themselves. Are these diverse and weighty interests well-served by this approach? There is some weight to the position that state court judges really are reasonably legitimate sources of authority when it comes to establishing and designing specialized courts. Think again about the values of accountability and expertise. State court judges certainly have expertise in the functioning of the criminal legal system. They see it and participate in it every day, and they understand its operation in detail.[89] Their position enables them to see numerous cases across a range of offenses and defendants and victims, so they have a wide-angle lens view that may be more nuanced and broadly informed than other participants in the system. And what of accountability? For people most familiar with the federal judiciary, the reflexive response is to say that judges are unaccountable because they are unelected.[90] But

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[88] Collins, *Status Courts*, *supra* note 2, at 1483-84.

[89] *See* Andrew Manuel Crespo, *Systemic Facts: Toward Institutional Awareness in Criminal Courts*, 129 HARV. L. REV. 2049, 2052 (2016) ("[S]ystemic facts [about the criminal legal system] frequently reside within the considerable amounts of information already within criminal courts' custody and control." (emphasis removed)).

[90] *See, e.g.*, Chevron v. NRDC, 467 U.S. 837, 866 (1984) ("[F]ederal judges — who have no constituency — have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of . . . policy choices and resolving the struggle between competing views of the public interest are not judicial ones."). Accusations of overstepping one's role are routinely traded on the Supreme Court. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2644 (2022) (Kagan, J., dissenting) ("[T]he Court today prevents congressionally authorized agency action to curb power plants' carbon dioxide emissions. The Court appoints itself—instead of Congress or the expert agency—the decisionmaker on climate policy. I cannot think of many things

as noted above, many state court judges *are* elected.[91] That means they can often be voted out of office if the people disagree with their choices—including, as relevant here, the choice to establish a specialized court or to structure it in a particular way.

At the same time, these claims to expertise and accountability are importantly limited, with consequences for both the *perceived* legitimacy and the *actual* quality of the institutions in question. First, judges' expertise necessarily remains that of just one particular participant in the system—and one privileged participant, at that. No doubt defendants, victims, witnesses, jurors, community members, and even prosecutors are likely to have different perspectives on the system which are also valid and valuable. While judges are among the experts, they are surely not the *only* experts. And that reality raises the question of the proper weight to give their expertise vis-à-vis that of others—a question that even the most well-intentioned judges are not necessarily well-situated to answer objectively. Moreover, as Erin Collins has powerfully argued, judges exhibit "a great deal of commitment to and personal investment in these programs" and thus find some "professional self-interest in sustaining and expanding" them.[92] That is, "judges like them."[93] Even if these self-serving motivations and preferences only manifest on a subconscious level, and even if judges think in good faith that they like these courts because they do good work, these personal commitments nonetheless offer good reason to worry that many judges are unable to be fully objective when it comes to evaluating the design of specialized courts—and, in turn, good reason to doubt that the best approach is for judges to make these significant decisions left largely to their own devices.

Second, judges' democratic accountability is often more theoretical than real. Even on state supreme courts, reelection and retention rates for judges are exceptionally high and many races are of low salience for most voters.[94] Selection

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more frightening."); Obergefell v. Hodges, 135 S. Ct. 2584, 2624 (2015) (Roberts, C.J., dissenting) ("Those who founded our country . . . risked their lives and fortunes for the precious right to govern themselves. They would never have imagined yielding that right on a question of social policy to unaccountable and unelected judges."). Recall as well that, for Hamilton, this insulation from accountability was seen as something of a feature rather than a bug. *See supra* note 77.

[91] *See supra* notes 78-79 and accompanying text.

[92] Collins, *The Problem*, *supra* note 22, at 1597-1601.

[93] *Id.* at 1579.

[94] *See, e.g.*, Michael S. Kang & Joanna Shepherd, *Judicial Campaign Finance and Election Timing*, 2021 WIS. L. REV. 1487, 1494 (2021) ("Judicial elections, even state supreme court races, are generally low salience elections that receive less public and media attention than federal and state executive and legislative races."); Allison P. Harris, *Voter Response to Salient Judicial Decisions in Retention Elections*, 44 LAW & SOC. INQUIRY 170, 170 (2019) ("[S]cholars have noted two important characteristics of retention elections: (1) voter participation is usually lower in these elections than it is in contested nonpartisan and partisan judicial elections, and (2) it is very rare for voters not to retain judges in these election."); Melinda Gann Hall, *Voting in State Supreme Court Elections: Competition and Context as Democratic Incentives*, 69 J. POL. 1147, 1149-50 (2007) (finding that elections for state supreme court justices exhibit high rates of ballot roll-off—voters who vote for the top race on the ballot but fail to cast a vote for the judicial candidate—in the neighborhood of 25% and as high as 59%); Steven P. Croley, *The Majoritarian Difficulty*, 62 U. CHI. L. REV. 689, 732 (1995) ("Potential judicial voters in fact seemed to have little inclination to vote. Empirical work

of judges on lower state courts is likely to be of even lower salience. Indeed, where voters do focus on judicial elections, they tend to respond to high-visibility cases implicating hot-button issues like abortion or newsworthy criminal cases, but even that sort of response is not assured.[95] The establishment of specialized courts, particularly by lower court judges, is simply unlikely to break through in any meaningful way such that the public has a chance to weigh in on those judges' choices.

The deeper problem, however, is not simply that judges do not have a monopoly on expertise, or that they might be self-interested, or that they are not likely to face serious electoral consequences when it comes to these sorts of questions, though all of these things are true. Rather, it is that the various interests at stake point in so many different directions, as discussed above, which means that they must be weighed and reconciled, that some likely must be sacrificed or subordinated, and so on. Whatever expertise and accountability judges may have, judges are not ideally situated to set institutional policy that demands *balancing* the diverse needs and preferences of the public. At least as compared to legislatures, the courts as an institution lack the capacity for public debate and for the sorts of compromise that policymaking necessarily entails.[96] They are not equipped to hold the sort of hearings that would enable them to absorb and evaluate policy recommendations from the whole host of interested individuals and groups.[97] They do not control their own appropriations, so they cannot count on

revealed that actual voter turnout was often modest. In the rare states where judicial elections are not contemporaneous with elections for legislative and executive offices, voter turnout was smaller still.").

[95] *See* Harris, *supra* note 94, at 188-89 (finding that, although "voters do respond to salient judicial decisions in supreme court retention elections," they do not respond in the form of increased turnout but rather, "in response to these decisions, those who vote will vote further down their ballots and participate in the judicial retention race"); Croley, *supra* note 94, at 731-32 (observing that "the 'policy' jurisdiction of judges has traditionally been relatively small," "that the likelihood that a given judicial candidate would render a decision affecting any given voter is small" and that "even a voter who might anticipate being a party to a future case would have little incentive to vote for a judicial candidate"); Richard L. Hasen, *"High Court Wrongly Elected": A Public Choice Model of Judging and Its Implications for the Voting Rights Act*, 75 N.C. L. REV. 1305, 1326 (1997) ("In low-salience races, which comprise an overwhelming majority of judicial elections, voters receive no reliable cues to inform their choices about judicial candidates, and judicial incumbents rarely have incentives to supply such information. Therefore, these judges may vote their values, that is, act independently, most of the time. In some high-salience races, judges are accountable to the extent that their most visible decisions will tend to reflect majority preferences. In other high-salience races, judicial decisions may reflect the interests of campaign contributors rather than the interests of a majority of voters.").

[96] *See* JEREMY WALDRON, THE DIGNITY OF LEGISLATION 89-90 (1999) (arguing that we can only consider law to be "*ours*" when it emerges from "deliberation that stands credibly in the name of us all, deliberation that confronts our differences in public and settles on a common view as a matter of social choice"); *id.* at 90 ("It is in the legislature that we or our representatives argue about justice; it is in the legislature where we disagree about justice, where we have second thoughts about justice, where we revise our sense of justice or keep it up to date.").

[97] *Cf. id.* at 103 (assimilating views of democracy offered by Aristotle, John Stuart Mill, and Jeremy Bentham and concluding that "[m]aybe what happens when the many come together to make a decision [in a legislature] is that they find out from each other how each person's well-being may be

the funding to support their programmatic plans. And they tend not to be transparent and, in turn, not to face the sort of detailed reporting requirements that would allow other governmental actors or the public to evaluate their activities.[98] Any evaluation of outcomes or of cost-effectiveness of those programs therefore tends to take place, if at all, by the judges themselves.[99] Asking or allowing judges, with all of these decisional shortcomings, to create, structure, and monitor their own institutions is suboptimal at best.

Of course, common law judges "set policy" all the time in the course of deciding cases. The question of establishing specialized courts is quite different, though, because it takes place outside the crucible of litigation. There, the adversarial process means that the parties have structural incentives to provide the court with the information necessary to resolve the case, and amici can weigh in to provide additional expertise as well.[100] But as set out in Part II, these specialized courts are often established without those information-generating benefits and even without the open opportunity for public comment.[101] Indeed, the history in this area shows that far too much has turned on a particular judge's personal experience or personal feelings.[102] Even if establishing specialized courts were thought of as merely an extension of a judge's common law policymaking role, it is widely acknowledged by judges themselves that they are a second-best policymaker. Indeed, common law judges often write opinions that invite other governmental entities like legislatures or administrative agencies to step in and ratify, revise, or remake altogether the policy choice the judge has made.[103] My argument is simply that legislatures must take up that invitation in this context now.

affected by the matter under consideration, so that they put themselves collectively in a better position to make a judgment of overall social utility").

[98] *See* Collins, *The Problem*, *supra* note 22, at 1601; *cf.* Cong. Rsch. Serv., RL32935, Congressional Oversight of Judges and Justices (2005), at 1-3, https://www.everycrsreport.com/files/20050531_RL32935_abe11e2261c7d40c8d508904070150ed3016d43d.pdf (noting obstacles to legislative oversight of federal judges).

[99] *See* Collins, *The Problem*, *supra* note 22, at 1601-03; *supra* Part II (collecting examples).

[100] *See, e.g.*, Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1488 (1999) ("Because trial lawyers are compensated directly or indirectly on the basis of success at trial, their incentive to develop evidence favorable to their client and to find the flaws in the opponent's evidence is very great . . . . If the size of the stakes in a case is at least a rough proxy for the social costs of an inaccurate decision, there will be at least a rough alignment between the amount of search that is actually conducted and the amount that is socially optimal.").

[101] *Compare* 5 U.S.C. § 553(c) (requiring federal administrative agencies to "give interested persons an opportunity to participate in [rulemaking] through submission of written data, views, or arguments with or without opportunity for oral presentation").

[102] *See* Collins, *Status Courts*, *supra* note 2, at 1484, 1498, 1522; Ines Novacic, *For Veterans in Legal Trouble, Special Courts Can Help*, CBS NEWS (Nov. 10, 2014, 2:32 PM), https://www.cbsnews.com/news/for-veterans-legal-trouble-special-courts-can-help (relating how Judge Patrick Dugan, a veteran and judge on the Philadelphia Municipal Veterans Court, explained that he can relate to the defendants who appear before him because he has "been there, done that, walked in their boots").

[103] *See, e.g.*, Plowman v. Fort Madison Cmty. Hosp., 896 N.W.2d 393, 408 (Iowa 2017) ("If the legislature disagrees with our decision, it is free to enact a statute."); Doe v. Forrest, 853 A.2d 48, 67 (Vt. 2004) ("If the Legislature disagrees with our balancing of the various considerations behind this decision, it can and should enact a different . . . rule."); Kelly v. Gwinnell, 476 A.2d 1219,

One final and urgent reason for legislative action is that an individual judge cannot establish policy in this area that is uniform across the state. A lower court judge's choice to establish and design a specialized court—whether in the face of a blanket legislative authorization or in the face of legislative silence—necessarily goes no further than their own courtroom, and in contrast to common law rulings, that choice carries no horizontal stare decisis effect. There is therefore a serious danger of disparate treatment of accused individuals and disparate access to the rehabilitation and services offered by specialized courts based on the happenstance of where in a given state the individual happens to live, or perhaps even the happenstance of which judge the individual happens to draw.[104] True, a state's high court can set uniform policy, and a number have done so.[105] But even in many of those states, those courts have been relatively late arrivals to the party and have tended to reinforce in broad strokes the first steps taken instead by individual judges.[106] In any event, as demonstrated in Part II, many states continue to lack uniformity with respect to the details of their specialized courts.[107]

These are all serious challenges to specialized courts as they exist in many states. These institutions lack the democratic imprimatur often thought to be essential for real and perceived legitimacy;[108] they lack the broad-based expertise,

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1227 (N.J. 1984) ("This Court has decided many significant issues without any prior legislative study. In any event, if the Legislature differs with us on issues of this kind, it has a clear remedy [namely, enacting a statute].").

[104] *See, e.g.*, Shanda K. Sibley, *The Unchosen: Procedural Fairness in Criminal Specialty Court Selection*, 43 CARDOZO L. REV. 2261, 2263 (2022) ("Currently, judges and prosecutors serve as the gatekeepers to these [specialized] courts . . . . Selection criteria vary widely from court to court; in some it is codified or at least discoverable. In others, the process is almost completely opaque and ad hoc, with the presiding judge and prosecutor's office exercising virtually unfettered discretion."); *id.* at 2276 (noting that "specialized court stakeholders have paid little attention to creating standardized, preannounced, and discoverable rules for defendant selection" and that this lack of attention can be "attributed to the makeshift process through which these courts came into being").

[105] *See supra* Part II.

[106] *See* Letter from Mary J. Mullarkey, *supra* note 18 (observing that specialized courts had been established in Colorado "at the local level with little coordination with other judicial districts" and ordering the creation of a "Problem Solving Court Advisory Committee" to remedy that disuniformity).

[107] *See supra* Part II; *see also* Sibley, *supra* note 104, at 2276-77 ("Even when these courts are created through legislative action, little attention is given to specifying the criteria that the courts will use to identify and select eligible defendants."); Kalyn Heyen, Note, *Drug Court Discrimination: Discretionary Eligibility Criteria Impedes the Legislative Goal to Provide Equal and Effective Access to Treatment Assistance*, 43 CARDOZO L. REV. 2509, 2516 (2022) ("Because drug court programs are localized efforts, each drug court varies in operation, targeted populations, resources, and management."); *id.* at 2520-21 (discussing, for example, the open-ended nature of Oklahoma's drug court statute, which "delegat[es] the determination of further eligibility restrictions and requirements to the discretion of each individual, local drug court" and which does not require drug courts to "consider every offender with a treatable condition . . . even if the controlling offense is eligible" (quoting OKLA. STAT. tit. 22, § 471.1(C))).

[108] *See* Sibley, *supra* note 104, at 2264 ("[T]he perception . . . that the selection processes are fair has an inherent practical value, and the current lack of constraints on discretionary bias leads to a perception of illegitimacy."); *cf.* Tyler, *supra* note 82, at 283, 300 (discussing importance of perceived legitimacy for buy-in and compliance); JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 173 (1991) ("[I]t is a personal injustice to withhold from anyone . . .

pluralistic voice, and quality-control mechanisms often thought to be essential for wise policymaking; and they often lack the uniformity that is essential for fundamental fairness.

A number of the judges who have established or studied these specialized courts seem to share these concerns.[109] Truman Morrison, a judge on the District of Columbia Superior Court, has called it "terribly odd that America is looking to the judicial branch to solve these problems," and he places the blame with the "abject failure of the other branches of government."[110] Judge Morrison went on to note that he is "concerned about the power that judges have" to create new courts and to emphasize that he does not think that judges should be free "to leave their traditional role and be informed only by their own personal definition of what justice is."[111] "When you try and channel the energies of social change into the judicial branch," he cautioned, "it's not a good fit."[112] Similarly, Judge Cindy Lederman of the Florida courts' Judicial Division observed that "the public is now coming to the courts and asking for solutions to problems like crime, domestic violence, and substance abuse," and cautioned that, if judges "accept this challenge, we're no longer the referee or the spectator. We're a participant in the process [which is] quite a leap. It's not traditional."[113] At best, these judges consider themselves to be second-best alternatives—necessary only because nobody else in state government is stepping up.[114] For example, then-Chief Judge of the New York Court of Appeals, the late Judith Kaye, lamented that "[t]he political branches are choosing to put more and more cases into the courts" and that judges are "simply trying to do the best job that [they] can" to "improve the system" by establishing these specialized courts.[115]

I firmly associate myself with these jurists' thoughtful concerns. Again, I do not wish to criticize any judge for their work with respect to these specialized courts. They should be recognized as pioneers, and they should be thanked for their creativity and their attention to a critical problem. Now, however, it is time that they be brought on board to a larger and more comprehensive policymaking agenda led by the branch of state government best situated to pursue that agenda: the legislature. The legislature has the sort of accountability that judges lack, the power to make uniform choices, and the institutional ability to marshal the broad-based expertise that judges that judges are situated to capture only parts of. The next and

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the ordinary privilege of having his voice reckoned in the disposal of affairs in which he has the same interest as other people.").

[109] *But see* Janet DiFiore, *Brennan Lecture: The Excellence Initiative and the Rule of Law*, 93 N.Y.U. L. REV. 1053, 1061 (2018) (former New York chief judge lauding opioid courts as examples of "how state court systems are laboratories of reform, with judges and court staff increasingly taking on leadership roles" that "gain [them] credibility with the public and [with] partner branches of government" and that "advance the rule of law").

[110] Greg Berman, *"What is a Traditional Judge Anyway?" Problem Solving in the State Courts*, 84 JUDICATURE 78, 80 (2000); *see id.* at 83 (quoting Professor Ellen Schall as saying that "the system from which the problem-solving courts have emerged was a failure on any count").

[111] *Id.* at 81.

[112] *Id.* at 82.

[113] *Id.* at 80.

[114] *See* Nolan, *supra* note 2, at 1541-42.

[115] Berman, *supra* note 110, at 85.

final Part briefly sets out a specialized courts agenda for state legislatures to pursue.

IV. A LEGISLATIVE AGENDA

As I have articulated in the preceding pages, one of the significant deficiencies with a judiciary-centered process for the establishment of specialized courts is the structural lack of capacity to effectively hear from and take on board a range of voices and expert advice. This is exactly what legislatures are designed to do. So, to begin, relevant committees of state legislatures should hold hearings—educational, information-generating hearings, not sound-bite potshot-taking hearings—and gather input. There are big questions at stake here: What are the goals of a specialized criminal justice system? What values should be taken into account? Which of the interests at stake should be centered and which should yield? There are also fairly fine-grained implementation questions on the table too.

Legislators should therefore hear first and foremost from people who have navigated the specialized court system themselves and from their families.[116] They should hear from prosecutors and the defense bar. They should hear from addiction and recovery specialists, from doctors and psychologists, from community leaders, from scholars who research the forces that shape recovery and recidivism, and so on. And, of course, they should hear from judges—including the very judges who have established or who wish to establish specialized courts, but also including those who have doubts about the endeavor. All of these people should be asked to weigh in on the bigger picture and on the details.

Perhaps this close study—conducted in a transparent manner by democratically elected officials—will lead those officials to conclude that establishing these courts is a bad idea. I have no particular stake in that question. If that is what they conclude, then that should be the end of the conversation, and individual judges should not "go rogue" to establish these courts on their own. Of course, when I say it should be the end of the conversation, I mean until the next election, when the people can weigh in on whether a wise choice was made and can elect different legislators if they so desire.

On the other hand, if those elected legislators conclude that establishing specialized courts is a good idea, there are two critical features they must include in the design which are too often lacking today. The first is uniformity. No longer should a defendant's access to a specialized court turn on the municipality or county in which they were charged or even the judge or prosecutor assigned to their case. The ad hoc nature of specialized courts must end: If a specialized court is worthwhile, it is worthwhile for every member of that population across the state. Access should be equally available and clearly communicated to every qualifying defendant, and the establishing legislation should make that command explicit. This means, too, that sufficient funding must be appropriated by legislatures to afford uniform access across the state. It might also mean expanding

[116] *See* Sibley, *supra* note 104, at 2309 (similarly calling for more voices to be included in the design process, though without directly calling for legislators to do that work).

funding for drug treatment programs themselves, for example, so that those programs can absorb additional participants derived from expanded specialized courts.

There is likely to be an understandable temptation to legislate at a fairly high level of generality. If the legislature were to simply authorize specialized courts, appropriate some funding, and call it a day, then, one might say that the judges could shift to implementing policy rather than creating it. This is, as noted above, exactly what many states have done.[117] But while this would be a step forward from where things stand in states without any legislation at all,[118] it would be a mistake because it would leave in place the ad hoc-ery and the dis-uniformity that still characterizes too many systems today.[119] Statewide policy and standards are key, and many states right now do have something in that vein—whether from the legislature or from the legislature's charge to the state court system.[120] The latter route remains fraught with a serious lack of political accountability, and the former often remains too thinly developed.[121] If legislatures are going to go to the trouble of gathering all of this expertise, they should make the investment worthwhile and do much more of the job themselves.

The second necessary feature is transparent accountability. Legislatures should include in the enabling legislation for specialized courts regular data collection and data reporting requirements, and those reports should not only be directed to the legislature but made public so that they can be analyzed by scholars, participants in the system, and the general public.[122] Just recently, for example, the New York Times reported that "no one knows how many are helped or how much Veterans Treatment Courts in New York cost" and that "data on how many veterans are readily identified and referred to these programs and how many succeed in staying employed and out of trouble is woefully incomplete."[123] This is unacceptable—and unwise. Legislatures should commit to ongoing and meaningful oversight in order to ensure that these programs truly work for the

[117] *See generally supra* notes 28-36 and accompanying text (collecting examples).

[118] *See generally supra* notes 12-21 and accompanying text (collecting examples).

[119] As Professor Mari Matsuda has famously put it, "informality and oppression are frequent fellow-travelers." *See* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2325 (1989). Ad hoc, informal structures tend to leave space for implicit and explicit discretionary biases, and filling that vacuum with legislative content can help to reduce that bias and clothe the institution in greater legitimacy.

[120] *See generally supra* notes 37-73and accompanying text (collecting examples and discussing both strengths and deficiencies).

[121] *See id.*

[122] As noted above, some states' legislation points in this direction. *See generally supra* notes 66-73 and accompanying text (collecting examples). Some judge-established specialized courts also should be applauded for voluntarily compiling and sharing data. *See generally* Montana Supreme Court Office of Court Administrator, *Montana Drug Courts: An Updated Snapshot of Success and Hope* (Jan. 2023), https://courts.mt.gov/external/drugcourt/report/2023drugcourt-report.pdf. But it would be far better and far more consistent for legislatures to demand as much and to clearly set expectations.

[123] Chelsia Rose Marcius, *Veterans Trickle Through a Special New York Court Known Only to a Few*, N.Y. TIMES (Jan. 1, 2023), https://www.nytimes.com/2023/01/01/nyregion/new-york-veterans-court.html.

people participating in them and are serving communities' needs.[124] Granted, this may be tough to achieve in a given piece of legislation since it requires the efforts of future legislators and since ex ante data-driven benchmarks of success can be elusive to define, but it can only happen at all if the data are collected and reported, and that is very much within the power of the enabling legislature to require.

None of this is to say that specialized courts should be viewed with heightened suspicion or that they are inherently in need of justification in a way that the traditional criminal legal system is not. Hardly: The traditional criminal legal system could surely benefit from more transparency, more data-sharing, more voices, and more public rethinking too. But as long as we are considering designing an alternative from the ground up, we have an opportunity to get it right the first time. Further, because the very premise of specialized courts is that they serve the people who pass through them *better* than the ordinary courts, and because that is their proponents' goal, it is in the interests of those proponents and the people they serve to ensure that specialized courts are actually achieving that outcome.[125] If they are, that should be cause for celebration and emulation in other jurisdictions. If they are not, that should be cause for reassessment and revision.

V. CONCLUSION

Whether specialized courts are a good idea or a bad idea, what their goals should be, what metrics we should use to evaluate them, and how they should be designed to best achieve those goals are all critically important questions. I do not pretend to have many of those answers. Evidently, many judges think they do. They are only some of the numerous stakeholders whose expertise and lived experiences are relevant, though. And whatever their many strengths, they lack the institutional capacity to make statewide policy in a uniform, democratically accountable manner that assimilates all of that expertise and all of those experiences in a way that is and will be viewed as legitimate by the public. Instead, legislating these specialized courts into existence, shaping them in the ordinary course of lawmaking, and overseeing them like other vital legislative programs is essential to these courts' effective functioning, their legitimacy, and their success.

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[124] *See* Collins, *The Problem*, *supra* note 22, at 1607-08 ("Even Illinois, which *required* every judicial district to open a veterans court as of January 2018, does not require these courts to regularly collect or report data about their performance.").

[125] *See* Sibley, *supra* note 104, at 2296 ("If defendants do not view the courts as legitimate, two things can happen: those who are selected may not self-generate a desire to comply with the program, and those who are not selected may feel (additional) resentment and distrust toward the traditional courts to which they are relegated.").