Reflecting on Therapeutic Jurisprudence in the Criminalization of Mental Illness and Addiction

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Problem-solving courts were created as a means of therapeutic jurisprudence. They arose in the context of the post-deinstitutionalization influx of defendants with behavioral and social problems entering the criminal court system. Seeing that typical judicial practices were poor solutions for individuals primarily facing problems such as homelessness, substance use disorders, and mental illness, courts developed specialized dockets as a solution to the problem of not being able to restrict the flow of these individuals into courtrooms. Although highly regarde, mental health courts (MHCs) and drug courts (DCs) can harm people with mental illness and addiction and contribute to the oppression of disenfranchised populations, including racial and ethnic minorities. By tying access to needed treatment to criminal justice system involvement, MHCs and DCs can increase criminalization of mental illness, subject individuals to long-term collateral consequences, and interfere with social policy reforms that would dismantle the prison-industrial complex (PIC). As forensic mental health professionals, we must reflect on our practices and consider the impact that our professional decisions have on the patients that we serve, and on society as a whole, and advocate for criminal justice and healthcare system reforms that truly free individuals in need of mental health or substance use treatment from the grasp of the PIC.

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In this issue of The Journal, Zhou and Ford[1] discuss mental health courts (MHCs) in a way that we do not usually hear them discussed, as programs with the potential both to augment the already robust criminal justice system in the United States and to potentiate or even worsen criminalization of people with mental illness. MHCs arose in the late 1990s and today there are nearly 500 of this type of problem-solving court in the United States.[1] They, and other problem-solving courts (PSCs) such as drug courts (DCs), are generally positively regarded as a form of therapeutic jurisprudence (TJ), a concept which assigns to legal systems a role in advancing therapeutic outcomes for people with mental illness and substance use disorders. Problem-solving courts emerged because criminal courts were increasingly presented with "a wide range of behavioral and social problems" that became prevalent in communities after deinstitutionalization.[2] Courts had no ability themselves to restrict the flow into their courtrooms of individuals who primarily faced homelessness, substance use, and mental illness, and thus developed specialized dockets with therapeutic practices, including MHCs.

TJ and the Prison-Industrial Complex

The authors' goal was not to discuss efficacy of MHCs by any measure but rather to discuss their relationship to a system that is largely punitive, oppressive, and disenfranchising. The question they explore is, "whether MHCs exacerbate harms caused by the criminal justice system, or work to reduce its oppressive power" (Ref. 1, p 590). They discuss the negative effects that criminal justice involvement brings to individuals with mental illness, the stigmatizing nature of linking mental illness and criminal

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offending, and the potential for MHCs to preserve power differentials in a way that can perpetuate structural racism, oppression, income inequality, and poverty.

Zhou and Ford call on forensic professionals to advocate for expansion of treatment programs that are not tied to court involvement, as well as for social policy reforms that eliminate, limit, or at least do not expand the power of the prison-industrial complex (PIC).[1] The PIC is "a set of bureaucratic, political, and economic interests that encourage increased spending on imprisonment, regardless of the actual need."[3] The PIC is "regarded as the cause of increased incarceration rates especially of poor people and minorities and often for nonviolent crimes."[4] It is understood by Critical Resistance, an organization that advocates for PIC abolition, as "a term we use to describe the overlapping interests of government and industry that use surveillance, policing, and imprisonment as solutions to economic, social and political problems,"[5] including the social problems of homelessness and lack of access to mental health and substance use treatment.

My clinical work as a forensic psychiatrist involves treatment of people with serious mental illness, addictions, and criminal justice system involvement. I provide care for clients of community mental health centers, most of whom are on community control, and clients who are brought by police to a specialized crisis unit designed to divert low-level offenders with mental illness and substance use disorders from jail. My consultative work involves evaluation of defendants in municipal court and evaluating patients at the state hospital regarding their suitability for conditional release. I am also a committed advocate for health policy and criminal justice reform. Zhou and Ford's article motivated me to reflect on my clinical and evaluative practices, as well as my advocacy work, and ask myself if the professional decisions that I routinely make are decisions that expand or reduce the power of the PIC, and whether my advocacy work is truly targeted on reforms that have the potential to dismantle the PIC.

Criminalization of Mental Illness

The assertion that people with mental illness are criminalized is well-established. Zhou and Ford state that about 16% of people who are incarcerated have serious mental illness, which is a four-fold overrepresentation when compared to the percentage of individuals in the community living with these same illnesses.[1] I see this reality every day in my clinical work with community mental health patients. On any given day, I see patients on parole, post-release control, or probation (or some combination of these community control statuses). I see patients wearing electronic-monitors. I see patients with outstanding warrants or pending legal charges. I see patients who are on the Sex Offender, Violent Offender, or Arson Registries (or on multiple registries). I also see, on a daily basis, patients with no current legal problems at all who are nonetheless struggling because of collateral consequences of their past criminal convictions.

Collateral Consequences

Collateral consequences are "legal and regulatory restrictions that limit or prohibit people convicted of crimes from accessing employment, business and occupational licensing, housing, voting, education, and other rights, benefits, and opportunities."[6] The American Bar Association describes collateral consequences as "legal disabilities" that set up social and economic hurdles, or even blockades, on the path of individuals who are working to reintegrate in society after resolving legal charges.[7] Based upon the concept of "civil death," defined as "the status of a living person equivalent in its legal consequences to natural death, specifically, deprivation of civil rights,"[8] collateral consequences deem individuals who have been found guilty of crimes undeserving of the full array of rights and benefits afforded to citizens, and thus able to be excluded or deemed ineligible from important activities (e.g., voting) or for crucial benefits (e.g., public assistance, housing).

For years, I have watched my patients with mental illness get arrested over and over again, sometimes for behavior related to their illness, sometimes in a manner meant to be compassionate due to homelessness, and often as a direct result of a comorbid substance use disorder. They cycle in and out of jail and prison, amassing criminal records that impede successful reintegration during the periods that they return to the community as citizens. My patients' criminal records render them difficult to house, especially if they have been convicted of arson or a sex offense. Individuals with past felonies and certain misdemeanors, such as theft, have a lot of difficulty finding employment, even through supported employment programs, and these same individuals may be excluded from benefits. Some have requirements to have no contact with

minors, and cannot reestablish family and social support.

My patients who are disenfranchised in these ways become vulnerable to hopelessness as criminogenic risk increases. I have seen patients who expressed hope and pro-social goals upon reentry and have established sobriety and psychiatric stability revert to antisocial attitudes, reengage with antisocial peers, relapse, and decline psychiatrically. Once patients decide that they will not be able to reestablish in society, going back to jail or prison does not seem so bad, and the risk that they return to criminal behaviors such as theft, robbery, or selling drugs increases greatly.

Reflections from Practice

At times I have seen the arrest and jailing of one of my patients as a positive, either as a therapeutic "time out" or an inroad to treatment in a mental health system that is riddled with cracks and gaping holes, even though I am well-aware of the long-term harms that are caused by arrest and incarceration. In my consultative role at the state hospital, I give consideration to how far a reach and how strong a hold the criminal justice system will have on a patient seeking conditional release, and am more inclined to find that the community is the least restrictive alternative for an evaluee when the reach is far and the hold is strong. I often advocate in the municipal court for inclusion of defendants on mental health dockets and make recommendations for mandated treatment if sentenced to probation, with some conscious awareness that this can lead judges to be more inclined to sentence people with mental illness to community control, and influence defense attorneys to believe that it could be detrimental to the client to fight even weak cases that could be won. These practices all expand the power of the PIC. Although my intentions are therapeutic, my clinical decisions can bind people with mental illness and substance use disorders to the criminal justice system (rather than free them from it), resulting in all of the negative effects that come along with conviction, incarceration, and community control.

PSCs can Become Too Big to Fail

Problem-solving courts also have good intentions, and although MHCs and DCs are avenues to care, the goal for our society should be to rethink our practice of imposing charges, convictions, or community control upon people related to an unmet need for mental health or substance use treatment. The larger the role that problem-solving courts play in provision of care, the more difficult it will be to advocate for desperately needed social policy changes that would improve the mental health system, for example by expanding non-police crisis response, increasing prevalence of crisis centers for people with mental health and addiction, or improving access to Assertive Community Treatment teams and outpatient commitment programming.

Furthermore, desire to ensure that problem-solving courts exist and have participants can also directly interfere with criminal justice reforms that could benefit individuals with mental illness. An example of this phenomenon occurred several years ago in Ohio. Voters in Ohio were presented with Issue 1, "The Neighborhood Safety, Drug Treatment, and Rehabilitation Amendment,"[9] on the November 6, 2018, ballot as a citizen-initiated constitutional amendment. Issue 1 proposed to de-felonize low-level drug use and possession offenses, prohibit individuals on community control from being sanctioned to prison for drug relapses without new criminal offenses, and allow people who were in prison for drug convictions to apply for resentencing. The money saved from diversion of individuals from the criminal justice system was to be spent largely on drug treatment programming. People who would face Felony 1, 2, or 3 drug trafficking or distribution offenses, as well as individuals with murder, rape, or child molestation offenses would have been excluded, as would individuals facing a third drug offense within two years.[10]

Issue 1, while supported by groups with strong commitments to criminal justice reform, including the ACLU, NAACP, Legislative Black Caucus, and the Ohio Justice & Policy Center,[10] was met with strong opposition. An argument advanced in opposition was that Issue 1 would end DCs. A well-respected judge who presides over a DC vocally opposed Issue 1 and caught the attention of media when he began walking in on pools of potential jurors urging them to oppose Issue 1,[11] because if they voted yes it would mean "Goodbye Drug Courts" and people would die. Similarly, the Chief Ohio Supreme Court Justice urged citizens through an Op-Ed to vote no on Issue 1, and stated that DCs would not be efficacious if jail time was not able to be imposed on participants.[12] The argument that continuing to

charge individuals with substance use disorders with felonies was necessary to preserve DCs was very effective with voters, as well as with medical organizations and treatment providers, who largely opposed the ballot measure. The issue was defeated when nearly two out of three Ohio voters cast "no" votes.

Conclusion

As forensic psychiatrists we know that jail and prison are not therapeutic or even safe places for people with mental illness. We also know that community control can be very oppressive, and that the collateral consequences of criminal conviction can affect a person for many years and increase criminogenic risk. Although the theory of therapeutic jurisprudence is highly regarded, problem-solving courts are becoming an integral part of mental health and substance use treatment and we must be cautious of this growing trend because it can lead to further criminalization of mental illness and increased collateral consequences for people with mental illness, and interfere with the implementation of criminal justice reforms that aim to divert individuals in need of treatment away from the criminal justice system. Zhou and Ford urge readers to recognize the collateral consequences that criminal justice involvement brings to individuals with mental illness, and to advocate for expansion of treatment programs that are not tied to court involvement, as well as for social reforms that limit the reach and hold of the criminal justice system. I hope that we, as forensic professionals, will rise to the authors' call to be introspective about our practices and policy work, and resolve to engage in actions that move to abolish the PIC.

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