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# Effectively Implementing Title 1 of the Americans with Disabilities Act for Mentally Disabled Persons: A Therapeutic Jurisprudence Analysis

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# EFFECTIVELY IMPLEMENTING TITLE I OF THE AMERICANS WITH DISABILITIES ACT FOR MENTALLY DISABLED PERSONS: A THERAPEUTIC JURISPRUDENCE ANALYSIS

DEBORAH A. DORFMAN<sup>1</sup>

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## I. INTRODUCTION

The Americans With Disabilities Act<sup>2</sup> (ADA) has been hailed as the "emancipation proclamation" for persons with disabilities and the most important piece of civil rights legislation since the 1960's.<sup>3</sup> Title I of the ADA,

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I would like to thank my husband Stephen Cohn and my parents, Gerald and Penny Dorfman for their support. Additionally, I would like to thank Professor Michael Perlin for his helpful comments and Barbara Morales for her research assistance.

<sup>2</sup>42 U.S.C. §§ 12101-12213 (Supp. V 1993).

<sup>3</sup>Sandra K. Law, *The Americans With Disabilities Act of 1990: Burden for Business or Dignity for the Disabled*, 30 DUQ. L. REV. 99 (1991).

which prohibits discrimination in employment,<sup>4</sup> has been praised as particularly emancipating for those with mental disabilities as it can potentially lead to integration and acceptance into society and provide opportunities for independent living.<sup>5</sup> However, despite the potential that Title I has for enhancing the lives of disabled individuals, there is evidence suggesting that many individuals covered by the statute are not yet fully benefitting from it.<sup>6</sup> This is due, in large part, to the ineffective and inadequate implementation of Title I.

The question thus becomes, what can be done to successfully and adequately enforce Title I of the ADA, particularly for people with mental disabilities. An effective way to assess and analyze this issue is through a therapeutic jurisprudence perspective. Therapeutic jurisprudence is a relatively new concept formulated by Professor David Wexler that views the law as a therapeutic agent.<sup>7</sup> Specifically, therapeutic jurisprudence is used by those in the mental disability law field to assess laws, judicial decisions, procedures, and the roles of "players"<sup>8</sup> in the legal system to determine whether they are therapeutic, antitherapeutic, or atherapeutic.<sup>9</sup> Through analysis from a therapeutic jurisprudence perspective, it is possible to examine the different ways that Title I can be implemented and enforced and whether these means of implementation are therapeutic, antitherapeutic or both. Such an analysis can facilitate a better understanding of how best to implement Title I for mentally disabled persons.

This article discusses the potential impact that Title I has on the lives of individuals with mental disabilities and methods by which it can be most effectively implemented and enforced. The following section discusses the potential impact that Title I can have on the lives of the mentally disabled,

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<sup>4</sup>The ADA requires that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a).

<sup>5</sup>See Laura L. Mancuso, *Reasonable Accommodation For Workers With Psychiatric Disabilities*, PSYCHOSOCIAL REHAB. J. Oct. 1990, at 3, 3-9.

<sup>6</sup>See discussion *infra* part III.A-B.

<sup>7</sup>See David B. Wexler, *Putting Mental Health into Mental Health Law: Therapeutic Jurisprudence*, in ESSAYS IN THERAPEUTIC JURISPRUDENCE 3, 8 (David B. Wexler & Bruce J. Winick eds., 1991) [hereinafter ESSAYS]; see also 1 MICHAEL L. PERLIN, MENTAL DISABILITY LAW: CIVIL AND CRIMINAL § 1.05A (Supp. 1993) (discussing the recent insights of therapeutic jurisprudence in assessing "the ultimate impact of case law and legislation affecting mentally disabled individuals."). See generally THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT (David B. Wexler ed., 1990) [hereinafter LAW AS AGENT] (a collection of essays on therapeutic jurisprudence).

<sup>8</sup>The term "players" refers to judges, attorneys and mental health workers (doctors and staff).

<sup>9</sup>ESSAYS, *supra* note 7, at ix.

specifically in the areas of independent living and quality of life. Part III will examine problems enforcing Title I which interfere with the ability of the mentally disabled to fully benefit from the statute. The second half of this article discusses how to best implement and enforce Title I from a therapeutic jurisprudence perspective. Specifically, Part IV will discuss the therapeutic value of Title I to the mentally disabled. The use of litigation and Alternative Dispute Resolution as possible methods of enforcing Title I will be explored, with emphasis on the therapeutic and antitherapeutic aspects of each method.

## II. IMPACT OF TITLE I OF THE ADA ON MENTALLY DISABLED PERSONS

Of all the Titles of the ADA,<sup>10</sup> Title I arguably has the most significant impact on the lives of the mentally disabled because of its potential for enabling them to live independently and enhancing the quality of their lives. The following section addresses the impact that Title I has on the lives of the mentally disabled, demonstrating the importance of and the need for effective implementation.

### *A. Independent Living*

Living independently is one of the most valued abilities for those with mental disabilities. It is significant because those suffering mental disabilities who are unable to secure housing run the risk of being hospitalized<sup>11</sup> or having their liberty curtailed in other ways<sup>12</sup> when their ability to live independently is lost.

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<sup>10</sup>There are five Titles of the ADA. Title I prohibits discrimination against qualified individuals with a disability in employment practices and procedures and requires covered entities to provide reasonable accommodations under certain circumstances. 42 U.S.C. §§ 12111-12117 (Supp. V 1993). Title II prohibits discrimination against disabled individuals in any program, activity or service provided by any state or local government. 42 U.S.C. §§ 12131-12165 (Supp. V 1993). Title III prohibits certain private entities from discriminating against disabled individuals in places of public accommodation and in public transportation services. 42 U.S.C. §§ 12181-12189 (Supp. V 1993). Title IV ensures that communication services be made available for all persons with hearing and speech impairments. 47 U.S.C. §§ 221, 225, 611 (1988 & Supp. V 1993). Title V contains various miscellaneous provisions. 42 U.S.C. §§ 12201-12213 (Supp. V 1993).

<sup>11</sup>John Petrla, *An Overview of Judicial Enforcement of the Fair Housing Amendments Act of 1988* 1 (Sept. 1992) (unpublished manuscript, on file with the author).

<sup>12</sup>Persons with mental disabilities can have their freedom limited in ways other than involuntary commitment such as being subject to a conservatorship that curtails an individual's autonomy and personal decisionmaking or losing control of one's finances to a representative payee.

A key component of independent living is housing.<sup>13</sup> Housing is important for several reasons. First, the ability to obtain and maintain housing is a factor considered by both mental disability professionals and judicial officials in determining whether one is capable of living independently or requires the assistance of a guardian or conservator. For example, in California, one is considered "gravely disabled" if that individual is unable to provide food, clothing or shelter for themselves as a result of a mental disorder.<sup>14</sup> Those who are deemed gravely disabled are placed on conservatorships until such time as they are able to provide for their basic needs, including shelter.<sup>15</sup> In determining whether a person is or remains gravely disabled, the court and mental health professionals look closely at the status of one's ability to provide housing for oneself.<sup>16</sup>

In addition to personal liberty considerations, housing is also significant for the mentally disabled because it adds an element of stability to their lives. This stability is important as it helps to reduce stress, which can exacerbate symptoms of mental illness.<sup>17</sup> The lack of stable housing can become an additional stressor in the lives of the mentally disabled, potentially causing decompensation, hospitalization, and possibly even conservatorship.<sup>18</sup>

While the Fair Housing Amendments Act of 1988<sup>19</sup> provides the mentally disabled with increased opportunities to secure housing, it does not provide any financial avenues through which to do so.<sup>20</sup> Title I, however, facilitates access to housing for the mentally disabled by breaking down traditional barriers to employment caused by discrimination and opening up possibilities

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<sup>13</sup>S. Rep. No. 113, 100th Cong., 2d Sess. (1988); Ellen Baxter & Kim Hopper, *Shelter and Housing for the Homeless Mentally Ill*, in *THE HOMELESS MENTALLY ILL* 109, 111 (H. Richard Lamb ed., 1984).

<sup>14</sup>CAL. WELF. & INST. CODE § 5008(h)(1)(A) (West 1994) (defining gravely disabled as "[a] condition in which a person, as a result of a mental disorder, is unable to provide for his or her basic personal needs for food, clothing, or shelter.").

<sup>15</sup>CAL. WELF. & INST. CODE § 5350 (West 1994). This section considers a person able to provide for his basic needs even if he is only able to do so with the assistance of others. *Id.*

<sup>16</sup>See John Petrila, *Redefining Mental Health Law*, 16 L. & HUM. BEHAV. 89, 100 (1992).

<sup>17</sup>See Richard Rapson, *The Right of the Mentally Ill to Receive Treatment in the Community*, 16 COLUM. J.L. & SOC. PROBS. 193 (1980).

<sup>18</sup>Petrila, *supra* note 16, at 101.

<sup>19</sup>42 U.S.C. §§ 3601-3619 (1988 & Supp. V 1993).

<sup>20</sup>See *id.* § 3604; Richard B. Simring, *The Impact of Federal Antidiscrimination Laws on Housing for People With Mental Disabilities*, 59 GEO. WASH. L. REV. 413, 420 (1991) (discussing the relationship between § 504 of the Rehabilitation Act of 1973 and the Fair Housing Amendments Act); see also Minna J. Kotkin, *The Fair Housing Amendments Acts of 1988: New Strategies for New Procedures*, 17 N.Y.U. REV. L. & SOC. CHANGE 755, 757 (1989).

for such persons to support themselves financially. This in turn improves their chances of being able to afford housing in an independent living context.

### *B. Enhancing the Quality of Life for the Mentally Disabled*

Title I, by creating employment opportunities for the mentally disabled, can also enhance the quality of their lives. Traditionally, the mentally disabled have been among the most economically disadvantaged groups.<sup>21</sup> Many are reliant upon government benefits such as Social Security, General Assistance (GA) and Supplemental Social Security (SSI), all of which are constantly being reduced as a result of state and federal budget cuts.<sup>22</sup> With the reduction of these benefits, the mentally disabled are often forced to live on the streets and are unable to afford the basic needs of life.<sup>23</sup> Even when such persons can afford housing, it can exhaust almost all of the individual's resources, leaving them with little or no money to pay for any other needs or wants. Providing the mentally disabled with the chance to work and earn their own money will not only enable them to better obtain housing but also improve their standard of living. For example, those who previously could not afford enough clothing or food will have the opportunity to secure these and other things that will improve their quality of life.

Title I also can enhance the lives of the mentally disabled by integrating such individuals into society. If properly implemented, Title I has the potential to alleviate the traditional prejudices towards the mentally disabled by prohibiting discrimination and requiring employers to provide reasonable accommodations.<sup>24</sup> Integrating the mentally disabled into the workplace is an important step towards integration into society and will likely have positive effects in other areas, such as housing and education. Integration can significantly enhance the lives of the mentally disabled by reducing their level of marginalization in society.

Effective enforcement of Title I will provide greater employment opportunities for the mentally disabled as employers will be forced to comply with the requirements of Title I by providing reasonable accommodations.<sup>25</sup>

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<sup>21</sup>JOHN Q. LAFOND & MARY L. DURHAM, *BACK TO THE ASYLUM: THE FUTURE OF MENTAL HEALTH LAW AND POLICY IN THE UNITED STATES* 140-41 (1992).

<sup>22</sup>Center on Social Welfare Policy & Law, *The New Welfare Cutbacks and Litigation Responses*, 26 CLEARINGHOUSE REV. 756, 757-59 (1992) (discussing the recent cuts in benefits to the poor in GA and AFDC benefits). See also Mental Health Law Project, *Mental Health Developments*, 26 CLEARINGHOUSE REV. 1079, 1090 (1993) (noting the availability of low cost housing to persons with physical and mental disabilities has been reduced by Congress).

<sup>23</sup>Michael L. Perlin, *Competency, Deinstitutionalization, and Homelessness: A Story of Marginalization*, 28 HOUS. L. REV. 63, 78-79 (1991).

<sup>24</sup>Michael L. Perlin, *The ADA and Mentally Disabled Persons: Can Sanist Attitudes Be Undone?* 8 J. LAW & HEALTH 15 (1994) (this issue).

<sup>25</sup>Under Title I, an employer is required to make a reasonable accommodation for a qualified individual with a known disability (physical or mental) that would not place

With such accommodations, the mentally disabled will be better able to gain meaningful employment and reduce or possibly eliminate their dependence on government benefits. Money earned through employment will enable the mentally disabled to provide for their basic needs, including food, clothing and shelter. With this ability they are more likely to maintain their liberty and to enhance their quality of life.

### III. PROBLEMS IN ENFORCING TITLE I OF THE ADA

Despite the potentially significant impact of Title I on the mentally disabled, many individuals covered by the law are not benefiting from it because of problems in implementation and enforcement. These problems arise, in part, because the law itself is not self-executing, and must be actively enforced.<sup>26</sup> Additionally, for those who are mentally disabled, the difficulty in exercising the rights provided under Title I is exacerbated by the inaccessibility of adequate counsel. The following section discusses these issues, with a particular focus on why these problems serve as impediments to the mentally disabled in benefiting from Title I.

#### A. Law Not Self-Executing

Like any other law, Title I of the ADA is not self-executing.<sup>27</sup> Although the Equal Employment Opportunity Commission (EEOC) has the duty of enforcing Title I,<sup>28</sup> the mere creation of a statutory duty is not enough. While the EEOC has an initial duty to enforce Title I, the ADA provides a private right of action for plaintiffs to sue under Title I.<sup>29</sup> Thus, it is important for effective implementation of the ADA that disabled persons and employers understand their rights and responsibilities under Title I.

Disabled individuals must take the necessary steps to trigger and benefit from the law. Specifically, such persons must request a reasonable

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an undue hardship on the employer. 42 U.S.C. § 12112. The disabled employee, however, must first request the accommodation. 29 C.F.R. app. § 1630.9 (1994). Each accommodation must be made on a case-by-case basis. *See id.* For a discussion on possible accommodations for persons with mental disabilities, *see generally* Mancuso, *supra* note 5, at 14-16.

<sup>26</sup>*See* discussion *infra* part III.A.

<sup>27</sup>*See* Michael L. Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 L. & HUM. BEHAV. 39, 47 (1992); *see also* Alan H. Macurdy, *The Americans With Disabilities Act: Time For Celebration, or Time for Caution?*, 1 PUBLIC INT. L.J. 21, 29 (1991); John Parry, *Rights Aplenty But Not Enough Money: A Paradox in Federal Disability Policies*, 12 MENTAL & PHYSICAL DISABILITY L. REP. 486 (1988) (pointing out that while there has been legislation to enhance the civil rights of persons with disabilities, the laws are not always fully implemented due to the lack of funding and other resources).

<sup>28</sup>*See* 29 C.F.R. app. § 1630 (1994).

<sup>29</sup>*See* 42 U.S.C. § 12117(a) (Supp. V 1993).

accommodation, otherwise the employer has no duty to offer or provide one.<sup>30</sup> At the same time, employers must understand and comply with their responsibilities under the law. Employers' duties under Title I include providing a reasonable accommodation to a qualified individual with a disability who makes such a request absent proof of an undue burden on the employer's business or a direct threat of harm to the individual or others.<sup>31</sup>

Disabled persons and employers, however, often are not aware of their rights and responsibilities under Title I of the ADA. For example, one study of employer awareness of the requirements of Title I showed thirty of the forty-four employers responding to the poll (sixty-eight percent) did not even know about the ADA.<sup>32</sup> This ignorance of the law on the part of employers and disabled persons, coupled with the problems faced by the mentally disabled in independently enforcing Title I, serves as an obstacle to effective implementation of the law.

### B. Access to Counsel

Another problem that interferes with the enforcement of Title I is the difficulty encountered by the mentally disabled in obtaining meaningful legal representation. This difficulty stems from at least three pervasive problems. First, the Sixth Amendment right to counsel generally applies only to criminal cases.<sup>33</sup> There is, in most cases, no right to counsel in civil cases, including actions involving civil rights and discrimination violations.<sup>34</sup> Second, most mentally disabled individuals, especially those who have been institutional-

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<sup>30</sup>29 C.F.R. app. § 1630.9 (1994). See also Mancuso, *supra* note 5, at 17 (pointing out the importance of mental health professionals understanding the law so that they may trigger the benefits of Title I for psychiatric patients).

<sup>31</sup>42 U.S.C. § 12112 (Supp. V 1993); 29 C.F.R. app. § 1630.9.

<sup>32</sup>Peter David Blanck, *Empirical Study of the Employment Provisions of the Americans With Disabilities Act: Methods, Preliminary Findings, and Implications*, 22 N.M. L. REV. 119, 225-26 (1992).

<sup>33</sup>U.S. CONST. amend. VI; *United States v. Michelle's Lounge*, 39 F.3d 684, 698 (7th Cir. 1994) (explaining that the Sixth Amendment right to counsel expressly extends only to criminal defendants, although the right to counsel may apply to civil proceedings in certain limited circumstances); *Ganz v. Bensinger*, 480 F.2d 88, 89 (7th Cir. 1973) (stating that the Sixth Amendment does not apply outside the context of a criminal trial). Cf. *Mallard v. United States Dist. Ct.*, 490 U.S. 296, 304 (1989).

<sup>34</sup>Todd MacFarlane, *Mallard v. United States District Court: Without Imposing Compulsory Service, How Can the Legal Profession Meet Indigents' Pressing Needs for Legal Representation?*, 1990 UTAH L. REV. 923, 931-42 (1990) (discussing the problems that indigent persons face in obtaining legal representation in civil cases, particularly after the Supreme Court's 1989 decision in *Mallard v. United States District Court*). In *Mallard*, the Court held that while a court can request counsel to represent indigent persons in civil cases, the courts cannot require attorneys to provide such representation. 490 U.S. at 296.



zed, lack the financial resources to hire private counsel.<sup>35</sup> Although the ADA provides for an award of attorneys fees to the successful plaintiff,<sup>36</sup> the lawyer must still confront the prospect of costly and time-consuming litigation. Thus, many members of the private bar will likely be unwilling to take on these cases without a significant fee. At the same time, the realities of limited financial resources often prevent public interest lawyers from taking on these cases.<sup>37</sup> As a result, disabled persons are often unable to use the law designed to benefit them.

A third and equally important problem is the dearth of counsel that are qualified to provide mentally disabled individuals with meaningful and adequate representation.<sup>38</sup> The lack of competent counsel for the mentally disabled is not unique to ADA issues, rather it is a pervasive problem in all areas of mental disability law.<sup>39</sup> In civil commitment cases, for example, counsel often fails to represent their clients zealously.<sup>40</sup> There are a number of reasons for this failure of counsel: ignorance of the law,<sup>41</sup> fear of blame if their clients are released and later hurt themselves or others,<sup>42</sup> tendency to advocate

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<sup>35</sup> See Durham and LaFond, *supra* note 21, at 140-41 (discussing the economically disadvantaged status of most mentally disabled persons); see also Mancuso, *supra* note 5, at 4 (referring to a 1987 study which estimated that 85% of the mentally disabled are unemployed).

<sup>36</sup> 42 U.S.C. § 12205 (Supp. V 1993).

<sup>37</sup> Cf. Perlin, *supra* note 27, at 54 (referring to the Protection and Advocacy for Individuals with Mental Disabilities Act (PAIMI), as amended in 1991, which provides legal representation to the mentally ill in each state, but limits such representation primarily to issues of neglect and abuse of the mentally disabled).

<sup>38</sup> *Id.* at 41-52 (discussing the problems of inadequate counsel in mental disability cases). See also Deborah A. Dorfman, *Through a Therapeutic Jurisprudence Filter: Fear and Pretextuality in Mental Disability Law*, 10 N.Y.L. SCH. J. HUM. RTS. 805, 813-15 (1993) (discussing pretextual and ineffectual representation by attorneys and advocates of mentally disabled clients in commitment hearings).

<sup>39</sup> See Perlin *supra* note 27, at 42.

<sup>40</sup> See Michael L. Perlin & Robert L. Sadoff, *Ethical Issues in the Representation of Individuals in the Commitment Process*, 5 L. & CONTEMP. PROBS., Summer 1982, at 161, 165 (discussing the extreme lack of zealous legal representation afforded to mentally disabled individuals in civil commitment hearings); see also Dorfman, *supra* note 38, at 815 (discussing pretextual decision making on the part of defense counsel from a therapeutic jurisprudence perspective).

<sup>41</sup> See *In re Brazelton*, 604 N.E.2d 376, 378 (Ill. App. Ct. 1992) (court-appointed defense counsel incorrectly believed the State's burden of proof in a civil commitment hearing was by a preponderance of the evidence when in fact it was by clear and convincing evidence).

<sup>42</sup> See Dorfman, *supra* note 38, at 815; cf. Eric Turkheimer & Charles D.H. Parry, *Why the Gap? Practice and Policy in Civil Commitment Hearings*, 47 AM. PSYCHOLOGIST 646, 649 (1992) (evidence shows that attorneys at civil commitment hearings are afraid of being labelled "socially irresponsible" if they zealously advocate for their client's release from involuntary commitment).

for the "best interest" rather than the "expressed interest" of their clients<sup>43</sup> and sanism.<sup>44</sup> Similarly, in criminal cases where a defendant suffers from a mental illness, defense counsel often fails to address specific issues related to their client's mental disability that might mitigate their culpability.<sup>45</sup>

Without adequate and affordable counsel, it is difficult (if not impossible) for the mentally disabled to pursue their claims in court. Thus, the inaccessibility to counsel is yet another impediment faced by the mentally disabled in taking advantage of Title I and a barrier to effective enforcement.

#### IV. A THERAPEUTIC JURISPRUDENCE ASSESSMENT OF EFFECTIVELY ENFORCING TITLE I OF THE ADA

In light of the difficulty of adequately implementing and enforcing Title I for those with mental disabilities, it is important to examine how to resolve this problem most effectively. One way to make this determination is through a therapeutic jurisprudence analysis.<sup>46</sup> As discussed briefly in the introduction, therapeutic jurisprudence is a recently developed concept used in mental disability law to look at laws, policies, procedures and other aspects of the law to see if they are therapeutic, antitherapeutic or atherapeutic.<sup>47</sup>

In exploring how to best implement Title I for the mentally disabled, therapeutic jurisprudence can be used as a research tool.<sup>48</sup> Specifically, therapeutic jurisprudence can be utilized to assess which means of implementation will be most effective and beneficial to mentally disabled persons by determining its therapeutic value.<sup>49</sup>

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<sup>43</sup>See Estate of Roulet, 590 P.2d 1, 10 (Cal. 1979) ("[s]ome appointed counsel, regardless of how experienced they may be, tend to play a paternalistic rather than an advocacy role in commitment proceedings.") (citing Elliott Andalman & David L. Chambers, *Effective Counsel for Persons Facing Civil Commitment: A Survey, a Polemic, and a Proposal*, 45 Miss. L.J. 43 (1974); Thomas R. Litwack, *The Role of Counsel in Civil Commitment Proceedings: Emerging Problems*, 62 CAL. L. REV. 816 (1974)).

<sup>44</sup>Michael L. Perlin, *On Sanism*, 46 SMU L. REV. 373, 374 (1992) (describing "sanism" as the irrational prejudice and bias that permeates our legal system, particularly in the area of mental disability law).

<sup>45</sup>See Peter Cubra, *Discrimination of People With Disabilities and Their Federal Rights-Still Waiting After All These Years*, 22 N.M. L. REV. 277, 292 (1992) (arguing that New Mexico's public defender system does not provide adequate assistance of counsel to most mentally ill defendants due to excessive caseloads and the difficult legal issues that arise for mentally disabled clients).

<sup>46</sup>Perlin, *supra* note 24, at 44 (suggesting that a therapeutic jurisprudence analysis should be applied to ADA issues).

<sup>47</sup>ESSAYS, *supra* note 7, at ix.

<sup>48</sup>See generally David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence as a New Research Tool*, in ESSAYS, *supra* note 7, at 303, 303-20.

<sup>49</sup>*Id.* at 304.

The following section, examines the therapeutic value of Title I for mentally disabled individuals from a therapeutic jurisprudence perspective. Section B will discuss how, through litigation and alternatives to litigation (ADR), Title I can be implemented to benefit the mentally disabled. The benefits and problems of both litigation and ADR will be explored through a therapeutic jurisprudence "filter" to assess whether either method is therapeutic, antitherapeutic or potentially both. This analysis will attempt to clarify what attorneys, employers, and the mentally disabled can do to more effectively carry out Title I.

#### A. *The Therapeutic Value of Title I*

As a law, Title I of the ADA arguably has great therapeutic value. One of the most therapeutic attributes of this law is that it encourages the mentally disabled to seek employment and makes it more difficult for employers to refuse to hire an individual because of a mental disability.<sup>50</sup> This attribute is significant because many of those who are mentally disabled are reluctant to seek employment. This reluctance is in part due to the fact that many of the mentally disabled who are receiving disability benefits have become labelled by these benefits. As a result, they have grown to believe that they cannot work because they are disabled.<sup>51</sup> A second factor causing resistance towards employment among the mentally disabled is that the work traditionally available has generally been low-paying positions.<sup>52</sup> Finally, work experiences are often negative for many of the mentally disabled as they can be subjected to ostracism and criticism.<sup>53</sup> Title I, by prohibiting discrimination and making employment more accessible to the disabled by requiring employers to make reasonable accommodations, can encourage employment, which is therapeutic.

There are at least two reasons why the opportunity to work and be compensated has therapeutic effects on the mentally disabled individual. Employment is therapeutic because it builds self-esteem.<sup>54</sup> A sense of self-worth is therapeutic to those with mental disabilities as it contributes to stability which is often a key factor to independent living. Additionally, the

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<sup>50</sup>See 42 U.S.C. § 12112.

<sup>51</sup>Susan E. Estroff, *Making it Crazy: An Ethnography of Psychiatric Clients in an American Community*, in LAW AS AGENT, *supra* note 7, at 61.

<sup>52</sup>See Mancuso, *supra* note 5, at 4 (pointing out that institutionalized individuals often have had to work for little or no pay).

<sup>53</sup>Estroff, *supra* note 51, at 67.

<sup>54</sup>Michael L. Perlin, *The Right to Voluntary, Compensated, Therapeutic Work As Part of the Right to Treatment: A New Theory in the Aftermath of Souder*, 7 SETON HALL L. REV. 298, 319 (1976) (pointing out that the opportunity to work provides mental health patients with "a meaningful work role" that "modifies the tendency for a 'person' to erode into a 'patient' for the long-term or chronically ill," and "can serve as a pivotal force in rehabilitation.").

opportunity to work facilitates rehabilitation for the mentally disabled and enhances their ability to live independently, which is also therapeutic.<sup>55</sup>

### *B. Implementing Title I*

While it is clear that Title I has therapeutic value, the goals of Title I are not being fully realized because of the problems in enforcing the statute. Thus, Title I must be adequately enforced in order for the mentally disabled to fully benefit from the statute. However, the means of implementing and enforcing the law can also potentially have both therapeutic and antitherapeutic effects. The different ways this law can be implemented must be examined and weighed to determine how to best trigger the benefits of Title I for the mentally disabled.<sup>56</sup>

#### 1. Litigation

One means of enforcing Title I is through litigation. There are a number of therapeutic benefits to litigating Title I cases for the mentally disabled. First, litigating Title I issues involving mental disability can help to interpret and define the law. Since the ADA is still relatively new, there has been little litigation of issues which would clarify what is required by Title I. For example, controversial issues such as who is a "qualified individual" under the ADA and what constitutes a reasonable accommodation will eventually become more defined as more case-by-case determinations are made.<sup>57</sup>

Second, when a plaintiff is successful in litigating Title I claims, non-compliant employers are more likely to be held responsible for their actions. When employers are held accountable they are less likely to violate the requirements of Title I in the future. Moreover, other employers may be deterred from such violations as they realize the consequences of noncompliance with the requirements of Title I.

A third therapeutic aspect of litigation is that it affords the mentally disabled an opportunity to present their case in a formal court setting. Formal court

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<sup>55</sup>Michael S. Arnoff, *Employment of Patient Workers*, 32 MED. TRIAL Q. 1 (1985) (arguing that mental patients should be allowed to work and be compensated for their work while institutionalized). See also Janet Lowder Hamilton, *New Protections For Persons With Mental Illness in the Work place Under The Americans With Disabilities Act of 1990*, 40 CLEV. ST. L. REV. 63, 97 (1992).

<sup>56</sup>David B. Wexler, *An Introduction to Therapeutic Jurisprudence*, in *ESSAYS*, *supra* note 7, at 17, 24 (explaining that even when a law is intended to be therapeutic, this goal is not being realized). While the ADA has therapeutic goals and is arguably therapeutic on its face, it must be properly implemented to realize the therapeutic aspects of the law. Moreover, the means to implementing Title I must also be analyzed to determine their therapeutic value in order to determine how to best enforce the law.

<sup>57</sup>Peter David Blanck, *On Integrating Persons With Mental Retardation: The ADA and ADR*, 22 N.M. L. REV. 259 (1992). See also Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482, 589 (arguing that litigation is "the most influential tool for clarifying and applying the law.").

proceedings may have therapeutic value in civil commitment hearings.<sup>58</sup> A piece by John Ensminger & Thomas Liguori explains the therapeutic value of formal hearings in the civil commitment process, arguing that such hearings are therapeutic because they force the individual to face reality<sup>59</sup> and also give him an opportunity to present and hear evidence in a meaningful court procedure.<sup>60</sup>

Although this research was on the therapeutic value of civil commitment hearings, these hearings can be analogized to litigation of Title I claims. The opportunity for the mentally disabled to bring their claims into court is therapeutic because it gives them the chance to be heard in a formal setting with full procedural protections.<sup>61</sup> The formality of litigation also provides a forum that gives an appearance of fairness. The perception of receiving a fair trial is therapeutic because it contributes to the individual's sense of dignity and makes them feel as though they are being taken seriously.<sup>62</sup>

While the benefits of litigation are significant there are also antitherapeutic aspects of litigating these cases as a means for implementing Title I. One antitherapeutic effect of litigation is the stress that the entire litigation process can place on a mentally disabled individual.<sup>63</sup> The tremendous cost involved in litigation is one potential stressor. As previously discussed, mentally disabled persons tend to have very limited financial resources.<sup>64</sup> Therefore, many mentally disabled individuals are likely to have difficulty paying an attorney to litigate their Title I claims. As a result of financial restraints, for example, a mentally disabled person may exhaust most or all of their money paying for an attorney to represent them in a Title I action. As a result, they may not have enough money to pay for their housing and other living expenses.

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<sup>58</sup>David B. Wexler, *Therapeutic Aspects of the Legal Process*, in *LAW AS AGENT*, *supra* note 7, at 243.

<sup>59</sup>By this I mean that individuals are forced to confront and deal with their situations.

<sup>60</sup>See John J. Ensminger & Thomas D. Liguori, *The Therapeutic Significance of the Civil Commitment Hearing: An Unexplored Potential*, in *LAW AS AGENT*, *supra* note 7, at 245.

<sup>61</sup>Silver, *supra* note 57, at 589.

<sup>62</sup>See Note, *The Role of Counsel in the Civil Commitment Process: A Theoretical Framework*, in *LAW AS AGENT*, *supra* note 7, at 309, 323 n.83; see also Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implications For Civil Commitment Hearings*, 46 *SMU L. REV.* 433, 444 (1992) (discussing the therapeutic value of judicial civil commitment hearings and pointing out that individuals benefit from hearings which are "fair" and in which they can take part and are treated with dignity).

<sup>63</sup>See generally Thomas L. Hafemeister and W. Larry Ventis, *Juror Stress: What Burden Have We Placed On Our Juries?*, 56 *TEX. BAR J.* 586 (1993) (discussing the effects that stress has on jurors both during and after trial including flashbacks, depression, crying, and mood swings among other symptoms).

<sup>64</sup>See *supra* part II.B; see LaFond & Durham, *supra* note 21, at 140-41.

Other causes of stress include the possibility that the mentally disabled plaintiff may be subjected to long depositions, difficult cross examination and intimidating courtroom procedures. Additionally, the litigation process can be lengthy; it can take years for a cause to go to trial. After trial there is the possibility that the process could be prolonged by appeals, which can also contribute to stress.<sup>65</sup> For the mentally disabled, stress caused by the trial, appeal, having to wait for a decision and the financial costs involved can potentially cause relapse of mental illness.<sup>66</sup> This risk of decompensation illustrates an antitherapeutic aspect of litigation as a means of enforcing Title I for mentally disabled persons.

A second antitherapeutic aspect of litigation is the difficulty that mentally disabled persons face in obtaining competent counsel. As previously discussed, few attorneys have experience in working with mentally disabled clients.<sup>67</sup> As a result, they may not be equipped to represent their clients' expressed interests. This factor may also have antitherapeutic effects. Mentally disabled individuals who obtain strong adversarial counsel in the context of civil commitment are more likely to have their interests represented zealously.<sup>68</sup> Similarly, for Title I cases, zealous adversarial representation is a key component to successful litigation. A lawyer who is not willing to represent their client's expressed interest is unlikely to pursue all the possible angles and issues in a Title I case.<sup>69</sup> Failure to provide zealous representation in a true adversarial manner will thwart a mentally disabled plaintiff's effort to enforce Title I through litigation.

It is clear that litigation has therapeutic advantages. At the same time, however, it has antitherapeutic aspects that raise serious concerns regarding the use of litigation as a viable means for enforcing Title I. It is for this reason that the therapeutic value of alternatives to litigation must be explored.

## 2. Alternatives to Litigation

An option to litigation as a means to implement Title I for the mentally disabled is through alternative dispute resolution (ADR).<sup>70</sup> Title I, in fact,

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<sup>65</sup>*Litigation Stress Syndrome Affects Clients, Says Psychologist*, TRIAL July 1988, at 133.

<sup>66</sup>See MING T. TSUANG ET AL., SCHIZOPHRENIA, THE NEW HARVARD GUIDE TO PSYCHIATRY 278-79 (Armand M. Nicholi ed., 1988)(noting that stressful events can cause persons already diagnosed with schizophrenia to relapse); see also JUDITH GODWIN RABKIN, HANDBOOK OF STRESS: THEORETICAL AND CLINICAL ASPECTS 486-88 (Leo Goldberger & Shlomo Breznitz eds., 2d ed., 1993).

<sup>67</sup>See *supra* part III.B.

<sup>68</sup>*The Role of Counsel in the Civil Commitment Process: A Theoretical Framework*, *supra* note 62, at 322-23.

<sup>69</sup>*Id.* at 322.

<sup>70</sup>Alternative Dispute Resolution (ADR) involves innovative and alternative methods of resolving legal disputes. These methods range from formal dispute resolution through arbitration to informal negotiation. ADR is utilized in a number of

encourages the use of ADR.<sup>71</sup> Like litigation, ADR has a number of therapeutic effects which can benefit the mentally disabled individual in a Title I dispute. At the same time, however, it can also have antitherapeutic effects. The following section examines both the therapeutic and antitherapeutic attributes of ADR to determine whether it is a viable means of enforcing Title I for those with mental disabilities.

ADR has a number of therapeutic aspects. First, ADR is therapeutic because it enables mentally disabled applicants or employees to have their grievance for an alleged Title I violation heard and resolved without having to go through the emotionally taxing, expensive and lengthy process of litigation. Avoiding the stress of litigation, as discussed above, means that the individual is less likely to relapse.<sup>72</sup>

An additional therapeutic aspect of ADR is that while one could obtain legal representation from an attorney it is not necessary. Alternatively, a claimant could be assisted by an advocate who does not necessarily have a law degree nor is licensed to practice law. It is also possible that the individual can even represent himself or herself.<sup>73</sup>

ADR also facilitates better access to resolutions of Title I issues as a result of its flexibility. There are different types of ADR that can be used to resolve Title I claims including mediation, arbitration and negotiation, among other forms of resolution.<sup>74</sup> The fact that the parties can choose the type of dispute resolution that they wish creates a more flexible system that is amenable to Title I. For example, some parties may choose to avoid overly formal procedures and prefer to negotiate a resolution through mediation.<sup>75</sup> Other parties, however, may wish to utilize arbitration. The built-in flexibility may itself be viewed as a reasonable accommodation and thus serve as a therapeutic benefit in utilizing ADR in Title I claims brought by mentally disabled persons.

A fourth therapeutic aspect of utilizing ADR in enforcing Title I claims is that ADR generally affords mentally disabled individuals (with or without the assistance of an advocate) better control of the proceedings. One advantage to having control over the situation is that the parties can choose the facilitator or

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legal contexts including: divorce cases, landlord and tenant disputes, and small claims issues. See generally Linda Singer et al., *Alternative Dispute Resolution and the Poor Part I: What ADR Processes Exist and Why Advocates Should Become Involved*, 26 CLEARINGHOUSE REV. 142 (1992).

<sup>71</sup>42 U.S.C. § 12212 (Supp. V 1993).

<sup>72</sup>See *supra* part IV.B.1.

<sup>73</sup>See Singer et al., *supra* note 70, at 152-53.

<sup>74</sup>*Id.* at 142-43.

<sup>75</sup>See Mancuso, *supra* note 5, at 14 (pointing out that negotiation with an employer is also an important method in formulating a reasonable accommodation for the mentally disabled).

arbitrator.<sup>76</sup> Thus, the parties may be able to choose an individual who is either an expert in mental health issues or at least has experience dealing with these issues and individuals with mental disabilities. In litigation, the parties do not have this choice, and there is a strong likelihood that the judge will not be accustomed to addressing the unique issues raised by mental disability in Title I actions.

It is true that judges often preside over cases which involve complex issues with which they are not familiar. In these situations, judges can rely on expert testimony and social science data to help them in making their decisions. In instances where mental disability issues arise, however, research shows that courts are reluctant to rely on such evidence and make decisions based on their preconceived ideas and fears.<sup>77</sup> A decision-maker who is experienced with mental health issues will more likely make more fair and meaningful decisions which will ultimately have a therapeutic effect.

Just as with litigation, however, ADR is not without its potentially antitherapeutic disadvantages. ADR, self-evidently, lacks the formality that litigation entails. Specifically it fails to provide the substantive and procedural protections of litigation.<sup>78</sup> For example, unlike litigation, the use of ADR does not utilize formal rules of evidence. Thus, evidence which would otherwise be excluded at trial may be included in a proceeding using ADR which may place an unfair advantage of one party over the other.

ADR is also more likely to appear unfair than the judicial process used in litigation. For example, if a private arbitrator hired by the employer is used to resolve a Title I dispute, the proceeding is likely to seem (and may in fact be) unfair. As discussed earlier there is therapeutic value in both actual fairness and the appearance of fairness.<sup>79</sup>

Reliance on ADR can also be antitherapeutic in that its informal nature can convey the message to employers, mental health consumers, and society, that these cases are not worthy of litigation.<sup>80</sup> This message can have antitherapeutic effects on the mentally disabled person as it can cause him or

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<sup>76</sup>David J. Shapiro, *Private Judging in the State of New York: A Critical Introduction*, 23 COLUM. J. L. & SOC. PROBS. 282 (1990) (explaining a type of alternative dispute resolution called private judging, where the parties chose a private judge and stipulate to this choice at a court hearing). See also KIMBERLEE K. KOVACH, *MEDIATION: PRINCIPLES & PRACTICE* 8 (1994).

<sup>77</sup>Michael L. Perlin & Deborah A. Dorfman, *Sanism, Social Science, and the Development of Mental Disability Law Jurisprudence*, 11 BEHAVIORAL SCI. & L. 47 (1993). "Sanist" (irrational) attitudes affect judges' decisions in mental disability cases. *Id.* at 51-52. When these decision makers review social science data, they tend to accept or reject such evidence on the basis of these attitudes. *Id.* at 53.

<sup>78</sup>Silver, *supra* note 57, at 525-27.

<sup>79</sup>*The Role of Counsel in the Civil Commitment Process: A Theoretical Framework*, *supra* note 62, at 323. See also Tyler, *supra* note 62, at 444.

<sup>80</sup>Silver, *supra* note 57, at 496-97 (citing Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984)).



her to have doubts that their claims are meaningful or that they have value as people (e.g., that they are not important enough to have their claims heard in court).<sup>81</sup>

A third problem with ADR is the potential for uneven bargaining power, particularly for persons with mental disabilities.<sup>82</sup> This disparity can create a situation where the mentally disabled individual is unable to adequately articulate what he or she wants and ends up feeling compelled to accept a settlement that in fact is not to their satisfaction.

Clearly there are therapeutic advantages and disadvantages in using either litigation or alternative dispute resolution in implementing Title I for mentally disabled persons. Litigation, if made accessible, can provide a formal and meaningful process by which to bring Title I claims. However, the current realities suggest that the ability of mentally disabled persons to successfully bring Title I claims in court is low, particularly in light of the difficulty in obtaining affordable and adequate counsel.

In balancing the litigation against ADR, overall it appears that ADR is the more therapeutic and beneficial choice in enforcing Title I for mentally disabled persons, at least in the beginning. While the lack of formality of the ADR processes can have antitherapeutic effects on the individual, this same informality also has great therapeutic benefits that can outweigh litigation. Additionally, utilizing ADR promotes flexibility, which can serve as a reasonable accommodation itself. Not only can the parties choose the type of ADR to use, but if there is an unsatisfactory result, the individual has the option of later going to court.<sup>83</sup>

## V. CONCLUSION

For those with mental disabilities, the stakes are high when it comes to effective implementation of Title I of the ADA. If Title I is carried out as it was intended, the mentally disabled have a great deal to gain beyond just employment. They have the opportunity to become substantially more integrated and accepted into society, the ability to support themselves financially, and thus become better equipped to live independently and enhance the quality of their lives.

If, however, Title I is not adequately enforced, mentally disabled individuals risk losing one of the most significant opportunities to overcome traditional barriers to employment and social integration. With so much riding on Title I for persons with mental disabilities, it is imperative that lawyers, advocates,

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<sup>81</sup>See generally Tyler, *supra* note 62, at 442-44 (discussing the importance of due process to individuals in terms of dignity and self worth).

<sup>82</sup>Linda Singer et al., *Alternative Dispute Resolution and the Poor Part II: Dealing with Problems in Using ADR and Choosing a Process*, 26 CLEARINGHOUSE REV. 288, 289 (1992).

<sup>83</sup>It should be noted that the individual will still be held to the strict filing deadlines with the EEOC and the court. Therefore it is advisable that the claimant file claims as soon as possible, even if that person has chosen to go through ADR.

disabled persons, and employers examine the different implementation and enforcement mechanisms of litigation and ADR. In doing so, it is useful to assess the options through a therapeutic jurisprudence filter to determine which means is the most beneficial in carrying out the provisions of Title I.

