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**MENTAL HEALTH COURTS AND TITLE II OF THE ADA:  
ACCESSIBILITY TO STATE COURT SYSTEMS FOR INDIVIDUALS  
WITH MENTAL DISABILITIES AND THE NEED FOR DIVERSION**

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S. ELIZABETH MALLOY\*\*\*

I. INTRODUCTION

Individuals with disabilities face a wide spectrum of unique challenges in our society. In fact, people with disabilities face special problems in exercising some of their most fundamental rights—rights that many in American society take for granted. Access to the judicial system, a fundamental right that has paramount importance in our society, can often present obstacles to people with disabilities in a variety of significant ways. Title II of the Americans with Disabilities Act of 1990 (“Title II”) mandates that state and local judicial facilities, and the provision of government programs and services, when viewed in their entirety should be accessible to

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individuals with disabilities.<sup>1</sup> Furthermore, state and local government programs that are recipients of federal funding are also subject to the mandates of Section 504 of the Rehabilitation Act of 1973 (“Rehabilitation Act”), which requires basically the same degree of accessibility as is required by Title II. Federal judicial facilities are also subject to Sections 504 and 501 of the Rehabilitation Act, but do not meet the definition of a “public entity” as it is defined in the American with Disabilities Act (“ADA”), and are therefore not covered under Title II.<sup>2</sup>

Analysis of the disability antidiscrimination legislation, implementing regulations, technical assistance manual, applicable case law on judicial access and the ADA’s protection of those with mental disabilities, and the policy behind the creation of mental health courts suggests that mental health courts may be successful in practice and withstand ADA scrutiny. In addition, information on existing mental health courts in cities in Ohio and around the country will help determine whether mental health courts can pass statutory muster under the ADA by reducing recidivism and supplying people with mental disabilities the treatment that they might not otherwise receive through participation in the mainstream judicial system. Moreover, if people with mental disabilities are not receiving adequate or sufficiently equal opportunities within regular state court systems, mental health courts, or at least some aspects of these courts or other similar remedies, are arguably necessary requirements for state courts to be in compliance with ADA mandates by being readily accessible to persons with mental disabilities.

In Part II, the paper gives a more detailed account of the background and history of the disability antidiscrimination legislation that Congress has enacted to counteract widespread discrimination against individuals with physical and mental impairments in the United States. Closer examination of the statutory language of the ADA, viewed in conjunction with Congress’ intent in passing the legislation, demonstrates how and why the statutory protection should be applied to individuals with mental disabilities who are seeking access to the judicial system at state and local levels. Additionally, careful analysis of the Department of Justice’s regulations for the implementation of Title II and the Technical Assistance Manual for Title II (“TAM”) provides information intended to better instruct state court systems as to their legal obligation to provide readily accessible services to individuals with mental disabilities.

Part II also takes a closer look at the Supreme Court’s decision in *Tennessee v. Lane*,<sup>3</sup> which dealt with whether Congress had § 5 authority to enforce the Fourteenth Amendment against the states by enacting Title II,

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1. 42 U.S.C. §§ 12131-12132 (West 2006).

2. 29 U.S.C. § 794(a) (West 2006); 42 U.S.C. § 12131.

3. 541 U.S. 509 (2004).

thereby abrogating states' immunity under the Eleventh Amendment.<sup>4</sup> Examination of the Court's analysis in *Lane* indicates that Congress completed a great deal of research and deliberation before drafting Title II to remedy the systemic deprivation of fundamental rights to individuals based solely on the fact that a person is physically or mentally disabled. The evidence of the historical problem of discrimination in the provision of judicial accessibility to persons with disabilities probably persuaded the Court that Title II was congruent and proportional to the harm that it was enacted to prevent.

Part III discusses the historical context giving rise to the creation of mental health courts and describes the first modern mental health courts.<sup>5</sup> Part IV explores the challenges and criticisms faced by these specialty courts.<sup>6</sup> Part V evaluates mental health courts under two integral concepts of Title II, accessibility and integration, and it concludes that mental health courts may withstand scrutiny under Title II.<sup>7</sup> Part VI then evaluates how the State of Ohio is addressing the increase of defendants who are mentally ill in its criminal justice system.<sup>8</sup> Finally, Part VII concludes that, despite the imperfections of mental health courts, the goals and policies of these courts are aligned with Congress's intent in enacting Title II.<sup>9</sup> Moreover, if individuals who have mental disabilities are denied sufficiently equal opportunities by a state's mainstream judicial system, then Title II may require that mental health courts, or some other similar remedy, be provided so that the judicial system is readily accessible to persons with mental disabilities.

## II. STATUTORY PROTECTION AGAINST DISCRIMINATION BASED ON DISABILITIES: THE AMERICANS WITH DISABILITIES ACT

Over the years, Congress has recognized that individuals with disabilities face discrimination in almost every aspect of their lives.<sup>10</sup> To combat this discrimination, Congress has invoked its powers under the Fourteenth Amendment to help put individuals with disabilities on an equal playing field with others in American society.<sup>11</sup> Congress enacted the Rehabilitation Act and the ADA in an effort to provide more expansive protection against discrimination for individuals with physical and mental disabilities in the United States.<sup>12</sup>

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4. See *infra* notes 3-134 and accompanying text.

5. See *infra* notes 135-236 and accompanying text.

6. See *infra* notes 237-51 and accompanying text.

7. See *infra* notes 252-74 and accompanying text.

8. See *infra* notes 275-300 and accompanying text.

9. See *infra* notes 301-04 and accompanying text.

10. See 29 U.S.C. § 701(a) (West 2006); 42 U.S.C. § 12101(a) (West 2006).

11. 42 U.S.C. § 12101(b)(4).

12. 29 U.S.C. § 701(b)-(c); 42 U.S.C. § 12101(b).

A. *Background, Purpose, and Analysis of Claims Under the Americans with Disabilities Act of 1990*

The ADA stems from its predecessor, the Rehabilitation Act.<sup>13</sup> The Rehabilitation Act was enacted to protect against discrimination of disabled individuals solely on the basis of their disability.<sup>14</sup> However, its scope was limited to cover only state and local governments that received federal funding.<sup>15</sup> Because many state and local programs, including many state court systems, do not receive federal assistance, more expansive antidiscrimination legislation was needed in order to protect individuals with disabilities from being discriminated against by state and local governments and their agencies in the provision of services, programs, and activities.<sup>16</sup> In 1990, Congress promulgated the ADA, drawing from the language of the Rehabilitation Act, with the express purpose of codifying a “national mandate for the elimination of discrimination against individuals with disabilities” in all areas of society.<sup>17</sup>

The ADA expanded upon the protection against disability discrimination that the Rehabilitation Act had provided by including individuals, private businesses, and organizations, as well as the government, under the auspices of a disability antidiscrimination statute.<sup>18</sup> The ADA was enacted with the express congressional intent of eliminating the utilization of fear and negative stereotypes of the disabled from both employment decisions and in the allocation of public services in the United States.<sup>19</sup> Congress clearly intended to put persons with disabilities on an equal footing with the rest of society.<sup>20</sup>

Congress noted in the ADA’s “findings” section that “some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older . . . .”<sup>21</sup> Furthermore, Congress declared that individuals with disabilities have historically faced isolation and segregation within American society, and that this problem persists in such “critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services.”<sup>22</sup> Congress further noted that unlike other forms of invidious discrimination, people with disabilities have had “no legal recourse to redress such

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13. LAURA ROTHSTEIN, *DISABILITY LAW: CASES, MATERIALS, PROBLEMS* 18 (2002).

14. § 701(a)-(c).

15. 29 U.S.C. § 794(a)-(b) (West 2006).

16. See Nancy Lee Jones, *Overview and Essential Requirements of the Americans with Disabilities Act*, 64 *TEMP. L. REV.* 471, 475-76 (1991).

17. 42 U.S.C. § 12101(b)(1).

18. 42 U.S.C. §§ 12111(2), 12131(1), 12181(7) (West 2006).

19. § 12101(a)-(b)(1).

20. See § 12101(a)(8), (b)(1)-(2).

21. § 12101(a)(1).

22. § 12101(a)(2)-(3).

discrimination.”<sup>23</sup> In addition, Congress found that individuals with disabilities continue to encounter many forms of discrimination, and according to census data, national polls, and other studies, persons with disabilities “occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally,” and are therefore

a discrete and insular minority who have been . . . subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society . . . .<sup>24</sup>

Congress determined that the proper goals regarding individuals with disabilities in the United States are to “assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals . . . .”<sup>25</sup> Finally, Congress found that discrimination based on disabilities “denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and non-productivity.”<sup>26</sup> Congress also explicitly stated that the ADA’s purpose was,

- (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
- (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
- (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
- (4) to invoke the sweep of congressional authority, including the power to enforce the Fourteenth Amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.<sup>27</sup>

In reviewing ADA claims for unlawful disability discrimination, federal courts must first determine whether an individual meets the statutory definition of being “disabled.”<sup>28</sup> Next, the individual must be “otherwise qualified” to

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23. § 12101(a)(4).

24. § 12101(a)(6)-(7).

25. § 12101(a)(8).

26. § 12101(a)(9).

27. § 12101(b).

28. *See* 42 U.S.C. §12111(8) (West 2006).

carry out the fundamental requirements of the program with or without reasonable accommodations.<sup>29</sup> The individual must then prove that discrimination has taken place and that they have been discriminated against by an entity that is covered by the ADA.<sup>30</sup> These issues are quite complex and the outcome of the analysis can vary greatly depending on the nature and context of the claim.

#### 1. Analysis for Being Considered “Disabled” Under the ADA

The ADA prohibits discrimination based on disability and defines a disability for purposes of the statute as:

- (A) a physical or *mental impairment* that substantially limits one or more of the major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.<sup>31</sup>

In determining whether or not an individual has a disability that is covered by the ADA, the first step of the analysis is to determine whether or not there is a physical or mental impairment.<sup>32</sup> The regulations that were issued by the Department of Health, Education, and Welfare (“HEW”) interpreting § 504 of the Rehabilitation Act are informative in making this determination.<sup>33</sup> The HEW listed several specific conditions in defining “physical or mental impairment” to mean:

- (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or
- (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.<sup>34</sup>

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29. § 12111(8).

30. 42 U.S.C. §§ 12111(2), 12112(a)-(b) (West 2006).

31. 42 U.S.C. § 12102(2) (West 2006) (emphasis added). *See* Susan Stefan, *Unequal Rights: Discrimination Against People with Mental Disabilities and the Americans with Disabilities Act*, Washington, DC, American Psychological Association (June 2001).

32. *Bragdon v. Abbott*, 524 U.S. 624, 632 (1998).

33. *See* 45 C.F.R. § 84.1 (West 2006). Section 504 of the Rehabilitation Act is the disability antidiscrimination statute that predated and served as the basis for many provisions of the ADA. *See* Laura Rothstein, *Disability Law* (2002).

34. 45 C.F.R. § 84.3(j)(2)(i)(A)-(B).

The HEW determined that it was not sensible to enumerate the number or types of disabilities that should be covered by the statute because such an enumeration might result in no coverage under the antidiscrimination statute those not specifically mentioned by the legislation.<sup>35</sup> However, a representative list of conditions that constitute physical or mental impairments was contained in the commentary to the regulations, including “such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.”<sup>36</sup>

Next, an evaluating court must look at the life activity that is affected by the impairment and determine whether or not it is a *major* life activity.<sup>37</sup> The third and final consideration for whether or not a person has a disability under the ADA ties the first two parts of the analysis together by looking to see if the impairment actually *limits* a major life activity.<sup>38</sup> The ADA also provides protection for those who may not have a physical or mental impairment that substantially limits a major life activity; if it can be demonstrated that they had a previous record of, or are incorrectly regarded as having such an impairment by the party who is discriminating against them.<sup>39</sup>

Although through the ADA, Congress *does* provide protection for persons who have had *past* drug and alcohol abuse problems, as long as those individuals meet certain requirements, the statute’s definition of disability *does not* include an individual who is “*currently* engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.”<sup>40</sup> This distinction is important for some defendants with mental disabilities, as it is not uncommon for persons with mental disabilities to also suffer from alcohol or drug addiction problems.<sup>41</sup>

## 2. Otherwise Qualified

Title I of the ADA, concerning employment, and Title II, concerning the allocation of public services, contain requirements that a disabled individual be

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35. 45 C.F.R. pt. 84, app. A.

36. 45 C.F.R. pt. 84, app. A.

37. *Bragdon*, 524 U.S. at 631.

38. *Id.*

39. 42 U.S.C. §§ 12102(2)(B)-(C) (West 2006).

40. 42 U.S.C. § 12210(a)-(b) (West 2006) (emphasis added). These requirements for the former drug and alcohol abuser include participating on a supervised rehabilitation program and no longer engaging in the use of drugs or alcohol. *Id.*

41. See U.S. DEPT. OF HEALTH AND HUMAN SERVICES, CO-OCCURRING MENTAL AND SUBSTANCE ABUSE DISORDERS: A GUIDE FOR MENTAL HEALTH PLANNING + ADVISORY COUNCILS 3 (2003), available at <http://media.shs.net/ken/pdf/NMH03-0146/NMH03-0146.pdf> (last visited Apr. 6, 2006).



“otherwise qualified,” with or without reasonable accommodations, in order to come under the protection of the statute.<sup>42</sup> For purposes of determining whether the ADA applies to a particular individual with a disability, Title II defines that term in the following manner:

The term “qualified individual with a disability” means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.<sup>43</sup>

If a person does not meet the statutory definition of “qualified individual with a disability[,]” then the ADA does not apply to them. Additionally, if a person with a disability is determined to be a “direct threat” to the safety or health of others, then he or she is also not considered to be otherwise qualified, and is thus not protected by the ADA.<sup>44</sup>

### 3. Major Life Activities

To meet the definition of disability for purposes of applying the ADA, an individual must not only have a physical or mental impairment, but that impairment must also substantially limit at least one of that individual’s major life activities.<sup>45</sup> In holding that asymptomatic HIV/AIDS meets the definition of a disability under the ADA framework, the U.S. Supreme Court in *Bragdon v. Abbott* stated that “[t]he [ADA] statute is not operative, and the definition not satisfied, unless the impairment affects a major life activity.”<sup>46</sup> The Court went on to explain what should be considered as major life activities for purposes of applying the ADA:

[T]he ADA must be construed to be consistent with regulations issued to implement the Rehabilitation Act. Rather than enunciating a general principle for determining what is and is not a major life activity, the Rehabilitation Act regulations instead provide a representative list, defining the term to include “functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.” As the use of the term “such as” confirms, the list is illustrative, not exhaustive.<sup>47</sup>

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42. 42 U.S.C. §§ 12111(8), 12131(2) (West 2006).

43. § 12131(2).

44. 42 U.S.C. § 12113(b) (West 2006).

45. 42 U.S.C. § 12102(2)(A) (West 2006).

46. *Bragdon v. Abbott*, 524 U.S. 624, 637, 639 (1998).

47. *Id.* at 638-39 (citations omitted).

#### 4. Substantial Limitation on Major Life Activity

In *Bragdon*, the Court gave further guidance as to the final element that must be met before the ADA is applicable: whether an individual's physical or mental impairment poses a substantial limitation on the major life activity that he or she asserts has been affected by the impairment.<sup>48</sup> In addressing the fact that conception and childbirth are not completely foreclosed to an HIV-positive woman, the Court noted that "[t]he Act addresses substantial limitations on major life activities, not utter inabilities. . . . When significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable."<sup>49</sup>

Many of the mental impairments that are listed in the HEW regulations above (any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities) and those that were mentioned by the Court in *Bragdon*, arguably pose substantial limitations on several major life activities, including the ability to care for oneself, work, take care of family obligations, interact with others, etc., even if it were disputed that these life activities should be considered as "major" for purposes of the statute. The ADA itself, the implementing regulations discussed in more detail below, and the holdings of the Supreme Court reinforce the determination that mental and developmental disorders are qualifying impairments under the ADA.

#### B. *The Applicability of Title II to State Court Systems*

Unlike its predecessor, Section 504 of the Rehabilitation Act, Title II of the ADA prohibits discrimination based on disabilities by public entities, whether or not they receive federal funding.<sup>50</sup> Public entities include "any department, agency, special purpose district, or other instrumentality of a State or . . . local government . . . ."<sup>51</sup> Title II can be used to protect the disabled in a variety of ways, including the protection of voting rights by requiring accessible polling stations and protection of the right of access to the courts by requiring accessible courtrooms and courthouses.<sup>52</sup> Title II broadly states "no qualified individual with a disability shall, by reason of such disability, be *excluded from*

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48. *Id.* at 631.

49. *Id.* at 641.

50. See 42 U.S.C. §§ 12131(1)(A)-(B), 12132 (West 2006).

51. § 12131(1)(B).

52. See The Bazelon Center for Mental Health Law, *Voting: Federal Laws Can Overcome Barriers to the Ballot*, <http://www.bazelon.org/issues/voting/> (last visited Apr. 6, 2006) ("The effectiveness of the ADA has not yet been tested in several areas relating to voting rights of people with mental disabilities. . . . [But one] case banned their improper exclusion from voting through vague or overbroad competency standards and the need for reasonable accommodations in the voting process.").

*participation in or be denied the benefits of the services, programs or activities of a public entity or be subjected to discrimination by any such entity.”*<sup>53</sup>

Once an individual has a physical or mental disability meets the statutory definition laid out in the previous section, state courts are required by Title II to provide accessible judicial services to that individual.<sup>54</sup> Success in meeting this requirement is evaluated by looking at a state’s court system as a whole. In the next section, we utilize the Department of Justice’s guidance, as stated in the ADA’s implementing regulations and in the explanations and illustrations found in the Technical Assistance Manual (TAM), to evaluate the applicability of Title II to state and local judicial systems in an effort to better instruct state court systems as to their legal obligations for the provision of judicial services to persons with mental disabilities.

### 1. The Implementing Regulations and Title II’s Technical Assistance Manual

In 1991, the United States Department of Justice (“DOJ”), the agency charged with interpreting Title II, issued Title II’s implementing regulations, which include a more detailed interpretation of how the ADA is to be applied to state and local governments.<sup>55</sup> In addition, the DOJ published the TAM that is updated annually to help state and local governments with the implementation and interpretation of the law.<sup>56</sup> The express purpose of the TAM is “to present the ADA’s requirements for state and local governments in a format that will be useful to the widest possible audience.”<sup>57</sup> The DOJ’s regulations and accompanying preambles were “carefully reorganized to provide a focused, systematic description of the ADA’s requirements. . . . [T]o avoid an overly legalistic style without sacrificing completeness.”<sup>58</sup>

The DOJ’s implementing regulations define the reach of Title II in such a manner that it clearly includes state court systems:

The scope of title II’s coverage of public entities is comparable to the coverage of Federal Executive agencies under the 1978 amendment to section 504, which extended section 504’s application to all programs and activities “conducted by” Federal Executive agencies, in that title II applies to anything a public entity does. Title II coverage, however, is not limited to “Executive”

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53. § 12132.

54. *See Tennessee v. Lane*, 541 U.S. 509, 511 (2004).

55. *See* 28 C.F.R. § 35.101 (West 2006).

56. *See* THE AMERICANS WITH DISABILITIES ACT: TITLE II TECHNICAL ASSISTANCE MANUAL Introduction, <http://www.usdoj.gov/crt/ada/taman2.html> (last visited Apr. 6, 2006) [hereinafter “TAM”].

57. *Id.*

58. *Id.*

agencies, but includes activities of the legislative and *judicial branches of State and local governments*.<sup>59</sup>

In Subpart B to the implementation regulations, which addresses the general prohibition against discrimination that is codified in the ADA, the DOJ explained that after reviewing the notice of proposed rule-making, numerous commenters suggested that the proposed regulations should be amended to include the requirement that law enforcement and court personnel be trained to recognize the difference between criminal activity and mental disabilities, including mental retardation, cerebral palsy, traumatic brain injury, mental illness, or other disabilities such as deafness or the effects of seizures.<sup>60</sup> The DOJ declined to mandate a training requirement for law enforcement or court personnel, even though several disabled commenters gave personal statements detailing serious abuse that they had suffered at the hands of law enforcement personnel.<sup>61</sup> The DOJ instead remarked that behavior of this sort is already considered unlawful, and rather than amend the regulation, the DOJ encouraged the states that had not already adopted the Uniform Duties to Disabled Persons Act to consider that approach to solve the problem of police brutality and violence that is misdirected toward the mentally disabled.<sup>62</sup>

The ADA clearly states that it is unlawful to discriminate against an otherwise qualified individual with a physical or mental impairment.<sup>63</sup> The TAM adopts the same definition of mental impairment that appeared in the HEW regulations that were used in the implementation of the Rehabilitation Act, as discussed in greater detail above.<sup>64</sup> For purposes of applying the ADA and Rehabilitation Act, a mental impairment is defined as any “mental or psychological disorder, such as retardation, organic brain syndrome, emotional or mental illness, or specific learning disabilities.”<sup>65</sup>

When the HEW issued the regulations that implemented the Rehabilitation Act, the DOJ “decided against including a list of disorders constituting physical or mental impairments, out of concern that any specific enumeration might not be comprehensive.”<sup>66</sup> However, the DOJ does explain in the TAM for Title II that some characteristics are not meant to fall under Title II’s protection, including “disadvantages attributable to environmental, cultural, or economic factors . . . common personality traits such as poor judgment or a quick temper, where these are not symptoms of a mental or psychological

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59. 28 C.F.R. pt. 35, app. A, § 35.102 (West 2006) (emphasis added).

60. 28 C.F.R. pt. 35, app. A, § 35.130.

61. 28 C.F.R. pt. 35, app. A, § 35.130.

62. 28 C.F.R. pt. 35, app. A.

63. *See* 42 U.S.C. § 12132 (West 2006).

64. *See* TAM, *supra* note 56, at II-2.2000.

65. *Id.*

66. *Bragdon v. Abbott*, 524 U.S. 624, 633 (1998).

disorder.”<sup>67</sup> Additionally, for purposes of Title II, “[t]he phrase ‘physical or mental impairment’ does not include homosexuality or bisexuality.”<sup>68</sup>

The implementing regulations also explain that it is discriminatory under Title II to deny a person with a mental disability the right to participate in or benefit from the aid, benefit, or services that are provided by a state or local government entity.<sup>69</sup> The regulations permit state and local governments

to develop separate or different . . . benefits, or services when necessary to provide [disabled] individuals . . . with an equal opportunity to participate in . . . the public entity’s programs or activities, but only when necessary to ensure that the . . . benefits, or services are as effective as those provided to others. . . . Even when separate or different . . . benefits, or services would be more effective . . . a qualified [disabled] individual . . . still has the right to choose to participate in the program that is not designed to accommodate individuals with disabilities.<sup>70</sup>

Title II requires a state or local government entity to make its programs readily accessible in all cases, except where to do so would “result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.”<sup>71</sup> This requirement is in contrast to the obligations imposed under Title III of the Act, which “requires public accommodations to remove architectural barriers where such removal is ‘readily achievable,’ or to provide goods and services through alternative methods, where those methods are ‘readily achievable.’”<sup>72</sup> The DOJ concluded in the ADA’s implementing regulations that

Congress intended the “undue burden” standard in title II to be significantly higher than the “readily achievable” standard in title III. . . . [And that] the program access requirement of title II should enable individuals with disabilities to participate in and benefit from the services, programs, or activities of public entities in all but the most unusual cases.<sup>73</sup>

Furthermore, the TAM makes it clear that a public entity is not relieved of its duty to make its facilities, programs, and services accessible simply because no individuals with disabilities are known to live in the area served by the entity.<sup>74</sup> If the ADA allowed this type of test for when public entities should

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67. TAM, *supra* note 56, at II-2.2000.

68. *Id.*

69. 28 C.F.R. § 35.130(b)(1)(i) (West 2006).

70. 28 C.F.R. pt. 35, app. A (West 2006).

71. 28 C.F.R. § 35.150(a)(3) (West 2006).

72. DEP’T OF JUST., NONDISCRIMINATION ON THE BASIS OF DISABILITY IN STATE AND LOCAL GOVERNMENT SERVICES § 35.150 (Jan. 1992), *available at* <http://www.usdoj.gov/crt/ada/reg2.html> (last visited Apr. 6, 2006) [hereinafter “NONDISCRIMINATION ON THE BASIS OF DISABILITY”].

73. *Id.*

74. TAM, *supra* note 56, at II-5.1000.

be required to make their public facilities, programs, and services readily accessible, it would have the inherent effect of discouraging individuals with disabilities from moving to that particular area, thus subjugating the ADA's expressed purpose of achieving greater integration for individuals with disabilities in American society.

The DOJ realized that implementation of Title II could be quite burdensome on public entities, both financially and in terms of practicality.<sup>75</sup> For this reason, the ADA allows some public facilities, programs, and services to go unaltered if they meet certain criteria.<sup>76</sup> The implementation regulations explain that,

[a]lthough a public entity is not required to take actions that would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens, it nevertheless must take any other steps necessary to ensure that individuals with disabilities receive the benefits or services provided by the public entity.<sup>77</sup>

The DOJ set forth a number of methods by which program accessibility can be achieved, including "redesign of equipment, reassignment of services to accessible buildings, [and] assignment of aides."<sup>78</sup> In recognition of the fact that structural changes to facilities and significant alterations to programs and services may not always be economically or administratively feasible, the TAM states that the "public entity may, however, pursue alternatives to structural changes [and significant alterations to programs and services] in order to achieve program accessibility. Nonstructural methods include acquisition or redesign of equipment, assignment of aides to beneficiaries, and provision of services at alternate accessible sites."<sup>79</sup> The TAM provides the following instructive examples:

ILLUSTRATION 1: The office building housing a public welfare agency may only be entered by climbing a flight of stairs. If an individual with a mobility impairment seeks information about welfare benefits, the agency can provide the information in an accessible ground floor location or in another accessible building.

ILLUSTRATION 2: A public library's open stacks are located on upper floors having no elevator. As an alternative to installing a lift or elevator, library staff may retrieve books for patrons who use wheelchairs. The aides must be available during the operating hours of the library.

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75. See 28 C.F.R. § 35.150(a)(3).

76. 28 C.F.R. § 35.150(a)(3).

77. NONDISCRIMINATION ON THE BASIS OF DISABILITY, *supra* note 72, at § 35.150.

78. 28 C.F.R. § 35.150(b)(1).

79. TAM, *supra* note 56, at II-5.2000.

ILLUSTRATION 3: A public university that conducts a French course in an inaccessible building may relocate the course to a building that is readily accessible.<sup>80</sup>

The DOJ declared in the implementing regulations that alterations to existing facilities, programs, and services “would in most cases not result in undue financial and administrative burdens on a public entity.”<sup>81</sup> The DOJ also concluded that all of a public entity’s available resources that are earmarked for use in the funding and operation of a service, program, or activity should be taken into account to determine whether or not the financial and administrative burdens are undue.<sup>82</sup> The TAM gives an additional explanation of the standard for determining whether an alteration is an undue burden:

If an action would result in such an alteration or such burdens, the public entity must take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits and services of the program or activity.<sup>83</sup>

The public entity has the burden of proving that compliance with Title II would fundamentally alter the nature of a service, program, or activity or would result in undue financial and administrative burdens.<sup>84</sup> Should a public entity claim that the government would be unduly burdened by an alteration, the head of the public entity, or his or her designee, must make this decision and must provide a written statement of the reasons that he or she has come to that conclusion.<sup>85</sup> In recognition of the fact that it is sometimes difficult to determine who the head of a state or local entity actually is, the DOJ declared in the implementing regulations that the determination shall be made by “a high level official, no lower than a Department head, having budgetary authority and responsibility for making spending decisions.”<sup>86</sup>

An individual with a disability who objects to how a public entity has treated them because of their disability can bring a complaint under the procedures specified in the regulations.<sup>87</sup>

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80. *Id.*

81. NONDISCRIMINATION ON THE BASIS OF DISABILITY, *supra* note 72, at § 35.150.

82. *See* 28 C.F.R. § 35.150(a)(3).

83. TAM, *supra* note 56, at II-5.1000.

84. 28 C.F.R. § 35.150(a)(3).

85. 28 C.F.R. § 35.150(a)(3).

86. NONDISCRIMINATION ON THE BASIS OF DISABILITY, *supra* note 72, at § 35.150.

87. Title II provides specific remedial procedures for an individual who believes that he or she, as an individual or as part of any specific class of persons, has been injured by the decision (or lack thereof) by a public entity that alterations would be unduly burdensome. They are instructed to file a complaint under the compliance procedures established in the implementation regulations, which provide that a complainant should file a complaint with any federal agency within 180 days. *See* 28 C.F.R. § 35.170(a)-(b). The TAM gives additional guidance for disabled

In determining whether or not state court systems must comply with Title II, it is important to note that Title II only applies to public entities that employ more than 50 persons.<sup>88</sup> In regards to state court systems, the TAM unequivocally resolves this issue by stating that because “all States have at least 50 employees, all State departments, agencies, and other divisional units are subject to title II’s administrative requirements applicable to public entities with 50 or more employees.”<sup>89</sup>

Since many state court systems, located both in large urban centers and in small rural areas, are implementing mental health courts, the development of this type of alternative judicial service is likely within the budgetary reach and in the best interest of, state judicial systems.

## 2. The U.S. Supreme Court’s Interpretation of the Applicability of Title II to State Court Systems: *Tennessee v. Lane*

Since the ADA was enacted, the U.S. Supreme Court has held that Title II does apply to state court systems. In *Tennessee v. Lane*, the U.S. Supreme Court held that Title II’s abrogation of the states’ Eleventh Amendment immunity was a legitimate exercise of Congress’ enforcement power under § 5 of the Fourteenth Amendment with respect to the fundamental right of access to state courts.<sup>90</sup> While this decision dealt directly with physical access to courtrooms and courthouse facilities for the physically disabled,<sup>91</sup> it is likely that the Court’s decision should be applied to guarantee the mentally disabled access to the state court systems as well.

Respondents George Lane and Beverly Jones, who were both paraplegics that required the use of a wheelchair for mobility, sued the State of Tennessee

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individuals, stating that a complaint may be filed in a variety of places, including with a Federal agency that provides funding to the public entity that is the subject of the complaint, with a Federal agency designated in the Title II regulation to investigate Title II complaints, or with the Department of Justice. See TAM, *supra* note 56, at II-9.2000. Alternatively, an aggrieved party can also bring a lawsuit in a Federal district court. *Id.* at II-9.1000. The TAM also provides that:

The Federal agency processing the complaint will resolve the complaint through informal means or issue a detailed letter containing findings of fact and conclusions of law and, where appropriate, a description of the actions necessary to remedy each violation. Where voluntary compliance cannot be achieved, the complaint may be referred to the Department of Justice for enforcement. In cases where there is Federal funding, fund termination is also an enforcement option.

*Id.* at II-9.2000.

88. See TAM, *supra* note 56, at II-8.1000.

89. *Id.*

90. *Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004). For further discussion of this case, see Timothy J. Cahill & Betsy Malloy, *Overcoming the Obstacles of Garrett: An “As Applied” Saving Construction for the ADA’s Title II*, 39 WAKE FOREST L. REV. 133 (2004).

91. *Lane*, 541 U.S. at 513, 533-34.



and a number of Tennessee counties, claiming “that they were denied access to, and the services of, the state court system because of their disabilities.”<sup>92</sup>

Mr. Lane was compelled to appear by a state trial court to answer a set of criminal charges on the second floor of a county courthouse that had no elevator.<sup>93</sup> For his first appearance, Mr. Lane had crawled up the stairs in order to get to the courtroom.<sup>94</sup> When he returned to the courthouse for a subsequent hearing, he refused to crawl up the stairs and he also refused to allow officers to carry him up to the second floor courtroom.<sup>95</sup> The judge had Mr. Lane arrested for failing to appear at the hearing.<sup>96</sup>

Ms. Jones was a certified court reporter in the State of Tennessee, who claimed that she lost a great deal of work and the opportunity to participate in the judicial process because she was unable to gain access to many county courthouses.<sup>97</sup>

In finding that Congress had acted within its enforcement power under § 5 of the Fourteenth Amendment, the Court described the breadth of Congress’ § 5 power as follows:

Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever trends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.<sup>98</sup>

The Court applied the “congruence and proportionality” test, in which legislation is “valid if it exhibits ‘a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.’”<sup>99</sup> The majority, by way of illustration, explained how previous cases before the Court that dealt with Congress’ use of its § 5 power remedial were valid because the injury or remedy that was meant to be prevented passed or failed the congruence and proportionality test.<sup>100</sup>

Probably most relevant to the Court’s analysis in *Lane* was its recent 2001 decision in *Board of Trustees v. Garrett*, a case in which the Court found that the Eleventh Amendment bars private suits seeking monetary damages for state violations of Title I of the ADA.<sup>101</sup> In *Garrett*, the Court concluded,

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92. *Id.* at 513.

93. *Id.* at 513-14.

94. *Id.* at 514.

95. *Id.*

96. *Id.*

97. *Lane*, 541 U.S. at 514.

98. *Id.* at 518, n.3 (quoting *Ex parte Virginia*, 100 U.S. 339, 345-46 (1880)).

99. *Id.* at 520 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997)).

100. *Id.* at 521.

101. *Id.* at 514.

“Congress’ exercise of its prophylactic § 5 power was unsupported by a relevant history and pattern of constitutional violations.”<sup>102</sup> The Court in *Garrett* left open the possibility that money damages for violation of Title II may pass the congruence and proportionality test.<sup>103</sup> In *Garrett*, the Court identified the constitutional right or rights that Congress sought to enforce by enacting Title I as the prohibition against irrational disability discrimination.<sup>104</sup> The *Lane* Court noted that Title II seeks to enforce the same prohibition, but unlike Title I, Title II also “seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review.”<sup>105</sup>

The Court noted that the right of access to the court system is protected by the Due Process Clause of the Fourteenth Amendment; the Due Process and the Confrontation Clause of the Sixth Amendment, as applied to the states by the Fourteenth Amendment; as well as a right to access to criminal proceedings that is guaranteed by the First Amendment.<sup>106</sup>

In *Lane*, the Court gave numerous examples that “document a pattern of unequal treatment in the administration of a wide range of public services, programs, and activities, including the penal system, public education, and voting.”<sup>107</sup> The Court recognized that this pattern of discrimination continued despite several federal and state legislative attempts to remedy the problem.<sup>108</sup>

The Court also took note of the extensive deliberations and research that went into drafting the ADA.<sup>109</sup> Through this research, Congress discovered that many individuals from across the country were being excluded from courthouses and court proceedings because of their disabilities:

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102. *Id.* at 521 (citing *Board of Trustees v. Garrett*, 531 U.S. 356, 368, 374 (2001)).

103. *Lane*, 541 U.S. at 514.

104. *Id.* at 522.

105. *Id.* at 522-23.

106. *Id.* at 523 (citing *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996); *Press-Enterprise Co. v. Superior Court of Cal., County of Riverside*, 478 U.S. 1, 8-15 (1986); *Faretta v. California*, 422 U.S. 806, 819, n.15 (1975); *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)).

107. *Id.* at 525 & nn.11-13 (citing *Key v. Grayson*, 179 F.3d 996 (6th Cir. 1999) (deaf inmate denied access to sex offender therapy program allegedly required as precondition for parole); *LaFaut v. Smith*, 834 F.2d 389, 394 (4th Cir. 1987) (paraplegic inmate unable to access toilet facilities); *Mills v. Board of Educ.*, 348 F. Supp. 866 (D.C. Cir. 1972) (exclusion of mentally retarded students from the public school system); *Doe v. Rowe*, 156 F. Supp. 2d 35 (D. Me. 2001) (disenfranchisement of persons under guardianship by reason of mental illness); *New York ex. rel. Spitzer v. County of Delaware*, 82 F. Supp. 2d 12 (N.D.N.Y. 2000) (mobility-impaired voters unable to access county polling places); *Schmidt v. Odell*, 64 F. Supp. 2d 1014 (D. Kan. 1999) (double amputee forced to crawl around the floor of a jail); *New York State Assn. for Retarded Children, Inc. v. Carey*, 466 F. Supp. 487, 504 (E.D.N.Y. 1979) (segregation of mentally retarded students with hepatitis B)).

108. *Id.* at 526.

109. *Lane*, 541 U.S. at 526.

A report before Congress showed that some 76% of public services and programs housed in state-owned buildings were inaccessible to and unusable by persons with disabilities, even taking into account the possibility that the services and programs might be restructured or relocated to other parts of the buildings. Congress itself heard testimony from persons with disabilities who described the physical inaccessibility of local courthouses. And its appointed task force heard numerous examples of the exclusion of persons with disabilities from state judicial services and programs, including exclusion of persons with visual impairments from jury service, failure of state and local governments to provide interpretive services for the hearing impaired, failure to permit the testimony of adults with developmental disabilities in abuse cases, and failure to make courtrooms accessible to witnesses with physical disabilities.<sup>110</sup>

This evidence of a systemic problem of discrimination against disabled individuals influenced the Court in *Lane* to find that Congress's determination, as articulated in the ADA itself, "makes clear beyond peradventure that inadequate provision of public services and access to public facilities was an appropriate subject for prophylactic legislation."<sup>111</sup>

Next, the Court determined whether or not Title II was an appropriate response to the history and pattern of disability discrimination in American society.<sup>112</sup> The State of Tennessee urged the Court to find that Title II is overbroad in that it attempts to regulate everything from schools, to voting booths, to hockey arenas, to the courthouse.<sup>113</sup> The Court was not persuaded "to examine the broad range of Title II's applications all at once," but rather focused on the question presented in the case: "whether Congress had the power under § 5 to enforce the constitutional right of access to the courts."<sup>114</sup>

The Court determined that "Congress' chosen remedy for the pattern of exclusion and discrimination described above, Title II's requirement of program accessibility, is congruent and proportional to its objective of enforcing the right of access to the courts."<sup>115</sup> While the Court recognized that the remedy that Congress created in Title II is a powerful one, the majority also noted that it is nevertheless limited:

Title II does not require States to employ any and all means to make judicial services accessible to persons with disabilities . . . . It requires only "reasonable modifications" that would not fundamentally alter the nature of the

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110. *Id.* at 527 (citations omitted).

111. *Id.* at 529.

112. *Id.* at 530.

113. *Id.*

114. *Id.* at 530-31.

115. *Lane*, 541 U.S. at 531.

service provided, and only when the . . . [person who is] seeking modification is otherwise eligible for the service.<sup>116</sup>

The majority also pointed out that Title II's implementing regulations add some insight into the limited reach of the requirement that public entities should require readily accessible services. "[I]n no event is the entity required to undertake measures that would impose an undue financial or administrative burden, threaten historic preservation interests, or effect a fundamental alteration in the nature of the service."<sup>117</sup>

The Court concluded "Title II, as it applies to the *class of cases* implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress' § 5 authority to enforce the . . . Fourteenth Amendment."<sup>118</sup>

The Court clearly states that Title II is constitutional and enforceable as it applies to the *class of cases* that implicate the fundamental right of access to the courts.<sup>119</sup> Furthermore, in its analysis of the harm that Title II was enacted to prevent, the Court cited several cases that involved the denial of access to mentally disabled individuals to the court system, and also characterized this denial as an unconstitutional deprivation of rights.

### C. Title II Principles Relevant to Mental Health Courts

Two fundamental principles relevant to assessment of mental health courts emerge from the above discussion of the TAM and the U.S. Supreme Court's holding in *Lane*: equally effective access to mental health court programs and integration.

First, the TAM explains that a state or local government entity's services, programs, or activities must be readily accessible to and usable by individuals with disabilities.<sup>120</sup> The "program accessibility" standard is not limited to the building of new structures or the creation of new programs, but it also applies to all existing facilities, programs, and services of a public entity.<sup>121</sup> With respect to persons with mental disabilities in the criminal justice context, defining adequate accessibility for a criminal defendant may be difficult. For instance, does accessibility mean simply a judicial determination of culpability not skewed by misunderstandings and prejudices about mental disorders? Is adequate access simply protection against being punished for manifestations of a mental disability? Or does adequate access require something more, such as

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116. *Id.* at 531-32.

117. *Id.* at 532.

118. *Id.* at 533-34 (emphasis added).

119. *Id.*; see also *Goodman v. Georgia*, 126 S.Ct. 877, 880-81 (2006) (ruling that the denial of access to programs and aid by a prison "amount to 'exclusion from participation in or . . . den[ial] benefit of' the person's 'services, programs or activities.'").

120. TAM, *supra* note 56, at II-5.1000.

121. *Id.*

substantive treatment in a separate mental health court program with specific guidelines?

Second, integration is another key principle that must be considered when determining whether the creation of separate mental health courts is in compliance with the ADA. While state and local governments have the right to create benefits and services especially for individuals with disabilities, Title II requires that a public entity administer all services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.<sup>122</sup>

The TAM reiterates that one of the primary goals of the ADA is to include disabled individuals in the “mainstream” of American society.<sup>123</sup> The TAM explains that, under the ADA, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different, notwithstanding the existence of separate or different programs or activities provided in accordance with this section.<sup>124</sup> Furthermore, the implementing regulations state that there is no requirement that an individual with a disability accept an accommodation, aid, service, opportunity, or benefit that he or she chooses not to accept.<sup>125</sup> For these reasons, it is important that individuals with mental disabilities who are diverted into mental health courts have the choice to remain in the regular court system.

When these provisions of the ADA’s implementing regulations are considered in conjunction with one another, they operate to “prohibit exclusion and segregation of individuals with disabilities and the denial of equal opportunities enjoyed by others, based on, among other things, presumptions, patronizing attitudes, fears, and stereotypes about individuals with disabilities.”<sup>126</sup> Accordingly, state and local government entities must ensure that their actions and decisions regarding the provision of public services are based on an individual’s particular circumstances and “not on presumptions as to what a class of individuals with disabilities can or cannot do.”<sup>127</sup> The TAM is also instructive on this issue, as it states that while a public entity may offer separate or special programs when necessary to provide disabled individuals with equal opportunities to benefit from the programs, such programs “must, however, be specifically designed to meet the needs of the individuals with disabilities for whom they are provided.”<sup>128</sup>

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122. *Id.* at II-5.2000.

123. *Id.* at II-3.4000.

124. *Id.* at II-3.4300-3.4400.

125. 28 C.F.R. § 35.130(e)(1) (West 2006).

126. 28 C.F.R. pt. 35, app. A (West 2006).

127. 28 C.F.R. pt. 35, app. A.

128. TAM, *supra* note 56, at II-3.4100.

Although it may be acceptable in some circumstances to provide separate services for the disabled, the implementing regulations make it very clear that “[i]ntegration is fundamental to the purposes of the Americans with Disabilities Act” and that “[p]rovision of segregated accommodations and services relegates persons with disabilities to second-class status.”<sup>129</sup> The TAM further provides that “[p]ublic entities should make every effort to ensure that alternative methods of providing program access do not result in unnecessary segregation.”<sup>130</sup> The TAM also provides an example that is instructive for a state that wishes to create a mental health court system that deals exclusively with individuals with mental disabilities:

A school system should provide for wheelchair access at schools dispersed throughout its service area so that children who use wheelchairs can attend school at locations comparable in convenience to those available to other children. Also, where “magnet” schools, or schools offering different curricula or instruction techniques are available, the range of choice provided to students with disabilities must be comparable to that offered to other students.<sup>131</sup>

It is important to remember that even if a public entity provides separate or special programs that are designed to better meet the needs of the disabled, individuals with disabilities cannot be denied the chance to participate in similar programs that are created for the general public, without regard for disability status. The implementing regulations clearly establish this interpretation of the statute by stating that “[s]eparate, special, or different programs that are designed to provide a benefit to persons with disabilities cannot be used to restrict the participation of persons with disabilities in general, integrated activities.”<sup>132</sup>

Concerns about these Title II principles, particularly integration, arise from the idea of creating separate mental health courts. At first glance, mental health courts segregate those defendants with qualifying mental disabilities. However, voluntary entry into mental health court programs resolves this issue because eligible defendants decide whether or not to enter the program and may opt out at any time after entry.<sup>133</sup> In actuality, voluntariness can present a difficult issue for two reasons: (1) can a defendant deemed incompetent, and therefore eligible, really make a knowing and willful choice to enter the mental health court program?, and (2) if the defendant is capable of making this decision, is the option between the mental health court or jail really a

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129. 28 C.F.R. pt. 35, app. A. See *Ohlmstead v. L.C. ex rel. Zimring*, 527 US 581 (1999) (requiring states to provide community-based treatment for persons with mental disabilities when a mental health professional determines that such treatment is appropriate).

130. TAM, *supra* note 56, at II-3.4200.

131. *Id.*

132. 28 C.F.R. pt. 35, app. A.

133. See *infra* Part IV.

choice?<sup>134</sup> This latter problem also arises with drug courts, where the choice between a treatment program or incarceration seems like a coercive choice at best.

Mental health courts face an additional challenge unique to their target population in that a defendant may not really comprehend the choices being made. Thus, while most mental health courts purport to be a voluntary option for eligible defendants in theory, in reality this may not be the case.<sup>135</sup> Critics take issue with this problem in particular, claiming that mental health courts are not truly diversionary and may actually violate Title II.<sup>136</sup> If defendants with mental disabilities have no real choice but to enter the mental health court program, they may be disadvantaged by exclusion from the available activities of the traditional criminal justice system.<sup>137</sup>

Although this argument is certainly meritorious, it ignores a couple of important factors. The abundant statistics about defendants with mental disabilities in the regular criminal court indicate that the current criminal justice system has failed miserably in its attempts to address the population with mental disabilities that comes before it.<sup>138</sup> Thus, one is hard pressed to understand how the traditional system, which on paper integrates persons with mental disabilities but in reality acts to deny that group meaningful access to the courts, is itself in compliance with the ADA.<sup>139</sup> Moreover, inmates suffering from a severe mental illness may not be “qualified” to participate in the criminal justice system programs or services if they are considered unstable or deemed a threat to personnel or other inmates.<sup>140</sup> Individuals who need those services may be denied in the traditional system, whereas in the mental health courts eligibility hinges upon the level of offense, not stability, and in fact, often requires that the defendant have a serious mental illness.<sup>141</sup> Thus, while voluntariness presents a significant challenge to mental health courts,

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134. See BUREAU OF JUST. ASSISTANCE, NCJ 18254, EMERGING JUDICIAL STRATEGIES FOR THE MENTALLY ILL IN THE CRIMINAL CASELOAD: MENTAL HEALTH COURTS IN FORT LAUDERDALE, SEATTLE, SAN BERNARDINO, AND ANCHORAGE xi (2000), available at <http://www.ncjrs.gov/pdffiles1/bja/182504.pdf> (last visited Apr. 5, 2006) [hereinafter EMERGING JUDICIAL STRATEGIES].

135. See *id.*

136. See, e.g., SUSAN STEFAN, UNEQUAL RIGHTS: DISCRIMINATION AGAINST PEOPLE WITH MENTAL DISABILITIES AND THE AMERICANS WITH DISABILITIES ACT 135-36 (2001).

137. *Id.* at 136.

138. See *infra* Part III.A.

139. See *infra* Part V.

140. Paula N. Rubin & Susan W. McCampbell, *The Americans with Disabilities Act and Criminal Justice: Mental Disabilities and Corrections*, NAT'L INST. OF JUST.: RES. IN ACTION 1, 3 (July 1995), available at <http://www.nicic.org/Library/serial479> (last visited Apr. 5, 2006).

141. See *infra* Part III.B (describing the eligibility requirements of the first mental health courts).

careful and thorough evaluation by courtroom teams can help alleviate this concern while achieving compliance with Title II.

To further evaluate these questions about mental health courts under the rubric of Title II, one first needs to know more about the background, policy goals, structures, and outcomes of existing mental health courts.

### III. MENTAL HEALTH COURTS

Part II suggests that a strong case may be made that interpretation of Title II allows for mental health courts. In order to support this argument, more must be known about mental health courts. The following sections explore mental health courts, beginning with their historical underpinnings, and then identify the policy goals, difficulties, and criticisms involved with these entities. The article then analyzes these specialty courts under Title II and provides a glimpse into Ohio's treatment of persons with mental disabilities within the criminal law context.

#### A. *Historical Context: Derivation of the Mental Health Court Concept*

To reiterate, the ADA defines a mental impairment as "any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."<sup>142</sup> A mental illness can further be thought of as:

[A] group of disorders causing severe disturbances in thinking, feeling, and relating. They result in substantially diminished capacity for coping with ordinary demands of life. A mental illness can have varying levels of seriousness. Identical illnesses can cause different reactions . . . at different times in the same person.<sup>143</sup>

Early applications of Title II focused solely on criminal facilities themselves, namely jails and prisons.<sup>144</sup> The scope of the attention at that time emphasized ways in which facilities conducted their programs, services, and activities in order to insure that eligible inmates with mental disabilities were included in accordance with Title II.<sup>145</sup> Despite this narrow, post-booking inquiry into Title II compliance, however, practitioners realized that "[p]rosecution and incarceration are inappropriate responses to symptoms of mental illness" and that community diversion programs incorporating multidisciplinary

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142. EEOC, *Technical Assistance Manual for the Americans with Disabilities Act* § 2.2(a)(i) (1992).

143. Rubin & McCampbell, *supra* note 140, at 1-2 (quoting Gerard R. Murphy, Police Executive Research Forum, *Managing Persons with Mental Disabilities: A Curriculum Guide for Police Trainers*, 2-5 (1989)).

144. *See id.* at 1.

145. *Id.* at 2.



cooperation are more suitable for assisting persons with mental disabilities.<sup>146</sup> Additionally, practitioners also noted the need for “better and more effective” approaches for handling the needs of inmates with mental disabilities.<sup>147</sup>

The statistics concerning persons with mental illnesses in the criminal justice system are staggering. As of 2004, approximately 1.3 million people were in state and federal prisons, while an incredible thirteen million people were jailed annually, with 631,000 inmates serving jail time.<sup>148</sup> Individuals with serious mental illnesses comprised seven percent of those incarcerated at the federal level and sixteen percent at the state level, with approximately 93,000 in prisons, 44,000 in jail, and 320,000 under corrections supervision,<sup>149</sup> generally for non-violent offenses and misdemeanors.<sup>150</sup> The demographics for this group present a grim picture. Individuals in this group typically are poor, uninsured, disproportionately members of minority groups, homeless, suffering with co-existing substance abuse problems and mental disorders, and are likely to be repeatedly shuffled through the mental health, substance abuse, and criminal justice systems.<sup>151</sup> The percentage of women and juveniles with mental disabilities entering these systems is also on the rise.<sup>152</sup>

Several factors account for disproportionate numbers of persons with mental disabilities in the criminal justice system. During the 1960s, 1970s, and 1980s, deinstitutionalization programs placed many individuals with mental disabilities into the community.<sup>153</sup> Simultaneously, the community mental health system failed to effectively absorb and treat these individuals.<sup>154</sup> Furthermore, the 1970s, 1980s, and 1990s witnessed an increase in homelessness, a population also notoriously overrepresented by individuals with mental disabilities.<sup>155</sup> The latter two decades also experienced the “War Against Drugs,” with law enforcement cracking down on drug offenders, many of whom also suffer from mental illness concurrently with a substance abuse

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146. *Id.* at 2, 4.

147. *Id.* at 6.

148. NEW FREEDOM COMM’N ON MENTAL HEALTH, DHHS PUB. NO. SMA-04-3880, SUBCOMMITTEE ON CRIMINAL JUSTICE: BACKGROUND PAPER 1 (2004), available at [http://www.mentalhealthcommission.gov/papers/CJ\\_ADACompliant.pdf](http://www.mentalhealthcommission.gov/papers/CJ_ADACompliant.pdf) (last visited Apr. 5, 2006) [hereinafter “BACKGROUND PAPER”].

149. *Id.*; EMERGING JUDICIAL STRATEGIES, *supra* note 134, at 2.

150. Robert Bernstein & Tammy Seltzer, *Criminalization of People with Mental Illnesses: The Role of Mental Health Courts in System Reform*, 7 U. D.C. L. REV. 143, 145 (2003).

151. BACKGROUND PAPER, *supra* note 148, at 1; NEW FREEDOM COMM’N ON MENTAL HEALTH, ACHIEVING THE PROMISE: TRANSFORMING MENTAL HEALTH CARE IN AMERICA, FINAL REPORT 32 (2003), available at <http://www.mentalhealthcommission.gov/reports/FinalReport/toc.html> (last visited Apr. 5, 2006) [hereinafter “ACHIEVING THE PROMISE”].

152. ACHIEVING THE PROMISE, *supra* note 151, at 32.

153. EMERGING JUDICIAL STRATEGIES, *supra* note 134, at 2.

154. *Id.*

155. *Id.*

problem.<sup>156</sup> As a result of these events, many persons with mental disabilities, who were unable to function successfully on their own, landed in the criminal justice system.<sup>157</sup>

Not surprisingly, during the heightened attention on drug enforcement, the number of drug-related arrests and prosecutions increased.<sup>158</sup> The large amount of drug offenders in the criminal justice system, coupled with overcrowding in jails and prisons, prompted the creation of specialty drug courts to channel some of these offenders out of the criminal justice system.<sup>159</sup> Emergence of the drug courts ushered in a paradigmatic shift from the typical “process and punish” philosophy of the criminal justice system to a therapeutic, treatment-oriented philosophy.<sup>160</sup> The goal of this approach was to target and treat the underlying root cause of the crime – substance abuse.<sup>161</sup> Instead of doing this by incarceration, which did little to effectively treat the substance abuse, the policy-makers behind the drug courts aimed to incorporate a multi-disciplinary team of drug treatment professionals, health care professionals, social workers, and criminal justice professionals, with judges playing a key role as leader and supervisor.<sup>162</sup> Placement of the judge in the driver’s seat of a therapeutic approach to drug treatment also marked a new way of thinking; normally, judges ruled with a “hands-off” manner.<sup>163</sup> The bifurcation of eligible drug offenders from standard criminal courts into drug courts, as well as the general concept of separate courts for special categories of offenders, spread throughout the nation.<sup>164</sup> Given the common co-occurrence of substance abuse and mental illness, as well as the inability of criminal courts to effectively address the issues of offenders with mental disabilities, contemplation of mental health courts was inevitable.

Despite the current increase in attention on defendants with mental disabilities, the issues accompanying these individuals in the criminal justice setting are nothing new. During the 1960s two courts, one in Chicago and one

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156. *Id.*

157. *Id.* see Grant H. Morris, *Pursuing Justice for the Mentally Disabled*, 42 SAN DIEGO L. REV. 757 (2005); Jennifer S. Bard, *Re-arranging Deck Chairs on the Titanic: Why the Incarceration of Individuals with Serious Mental Illness Violates Public Health, Ethical and Constitutional Principles and Therefore Cannot Be Made Right by Piecemeal Changes to the Insanity Defense*, 5 HOUS. J. HEALTH L. & POL’Y 1 (2005).

158. *Id.*

159. EMERGING JUDICIAL STRATEGIES, *supra* note 134, at 3. Dade County, Florida initiated the first drug court in 1989. *Id.* at 4.

160. *Id.*; Henry J. Steadman, Susan Davidson, & Collie Brown, *Mental Health Courts: Their Promise and Unanswered Questions*, 52 PSYCHIATRIC SERVICES 457, 457 (2001), available at <http://psychservices.psychiatryonline.org/cgi/reprint/52/4/457.pdf> (last visited Apr. 5, 2006).

161. *Id.*

162. *Id.*

163. *Id.*

164. *See id.* at 5.

in New York City, portrayed the early outlines of mental health courts.<sup>165</sup> The Municipal Court of Chicago, aided by the Psychiatric Institute, presided over misdemeanors.<sup>166</sup> The Psychiatric Institute made determinations of competency, and the court could recommend diversion alternatives to incarceration, such as probation conditioned on outpatient therapy or civil commitment.<sup>167</sup> The New York City court was similar, although its determinations were generally made at the arrest phase rather than the dispositional phase like the Chicago court.<sup>168</sup> In most instances, however, any “alternatives” hinged on the offender’s competency, and a finding of “incompetent” usually resulted in either voluntary or involuntary commitment.<sup>169</sup> Today, the criminal justice system continues to struggle with persons with mental disabilities, particularly because many require integrated treatment for substance abuse as well as for the mental illness, many are poor and cannot afford their medication, and law enforcement officers are often ill-equipped to deal with situations involving persons with mental disabilities.<sup>170</sup> These difficulties, as well as the escalating population of offenders with mental disabilities, overcrowded facilities, success of drug courts, and shift in judicial philosophy, paved the way for modern-day mental health courts.

*B. Contemporary Mental Health Courts: Policies and Models*

The new “therapeutic jurisprudence,” which has been embraced by specialty courts, particularly mental health courts,

reflects a focus on “the extent to which legal rule or practice promotes the psychological and physical well-being of a person subject to legal proceedings” as well as an “exploration of ways mental health and related disciplines can help shape the law” and concern with “the roles of lawyers and judges in producing therapeutic . . . consequences for individuals involved in the legal process.”<sup>171</sup>

This therapeutic focus translates into the following two goals of mental health courts: (1) “break the cycle of worsening mental illness and criminal behavior that begins with the failure of the community mental health system and is

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165. EMERGING JUDICIAL STRATEGIES, *supra* note 134, at 5-6.

166. *Id.* at 6.

167. *Id.*

168. *Id.*

169. *Id.* Incompetent misdemeanor offenders had the option of voluntary civil commitment, whereas incompetent felony offenders were committed by mandate. *Id.*

170. *Id.* at 7; Bernstein & Seltzer, *supra* note 150, at 145 (stating that “[d]uring street encounters, police officers are almost twice as likely to arrest someone who appears to have a mental illness. A Chicago study of thousands of police encounters found that 47 percent of people with a mental illness were arrested, while only 28 percent of individuals without a mental illness were arrested for the same behavior”).

171. Steadman et al., *supra* note 160, at 457.

accelerated by the inadequacy of treatment in prisons and jails,” and (2) “provide effective treatment options instead of the usual criminal sanctions for offenders with mental illnesses.”<sup>172</sup> Commentators agree that the way to achieve this is via community-based services geared toward diversion of the criminal justice system.<sup>173</sup> Thus far, mental health courts structurally diverge in their attempts to achieve these goals. The first contemporary mental health courts created in Broward County (Fort Lauderdale), Seattle, San Bernardino, and Anchorage, attempted to concretely address the shortcomings of the criminal justice system and the needs of offenders with mental disabilities.<sup>174</sup>

### 1. The Broward County (Fort Lauderdale) Mental Health Court

In 1997, Broward County became the first county in the nation to establish a mental health court.<sup>175</sup> Circuit court Judge Mark Speiser spearheaded an inquiry into the plight of defendants with mental disabilities in the criminal justice system by leading the Criminal Justice Mental Health Task Force, which was formed in 1994.<sup>176</sup> The task force, comprised of individuals across various disciplines, reached the same conclusions discussed above – the normal criminal justice approach worked poorly with respect to its population of persons with mental disabilities.<sup>177</sup> In response to these findings, the mental health court was formed and organized as follows.

First, the defined goals for the court are to “expedite case processing, create effective interactions between [the] mental health and criminal justice systems, increase access to mental health services, reduce recidivism, improve public safety, [and] reduce [the] length of confinement of mentally ill offenders.”<sup>178</sup> The mental health court is designed to intervene after arrest for

172. Bernstein & Seltzer, *supra* note 150, at 148. See also Susan Daicoff, *Law as a Healing Profession: The Comprehensive Law Movement*, 6 PEPP. DISP. RESOL. L.J. 1 (2006).

173. *Id.*; BACKGROUND PAPER, *supra* note 148, at 5. See also Susan Stefan & Bruce J. Winick, *A Dialogue on Mental Health Courts*, 11 PSYCHOL. PUB. POL’Y & L. 507 (2005) (providing an excellent introduction to mental health courts); LeRoy L. Kondo, *Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders*, 24 SEATTLE U. L. REV. 373 (2000).

174. EMERGING JUDICIAL STRATEGIES, *supra* note 134, at vii. For an excellent discussion of the important role of therapeutic jurisprudence in the development of mental health courts, drug treatment courts and juvenile courts, see Bruce J. Winick and David B. Wexler, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Carolina Academic Press) (2003). For a more thorough discussion see Gregory L. Acquavva, Comment, *Mental Health Courts: No Longer Experimental*, 36 SETON HALL LAW REV. 971 (2006).

175. EMERGING JUDICIAL STRATEGIES, *supra* note 134, at 9; Judge Randy T. Rogers, *Mental Health Courts: Fad or Future?* 2 (July 2005), <http://www.butlercountyprobatecourt.org/pdf/Mental%20Health%20Courts%20-Illustrated.pdf> (last visited Apr. 5, 2006).

176. EMERGING JUDICIAL STRATEGIES, *supra* note 134, at 9; Rogers, *supra* note 175, at 2-3.

177. EMERGING JUDICIAL STRATEGIES, *supra* note 134, at 9; Rogers, *supra* note 175, at 3.

178. EMERGING JUDICIAL STRATEGIES, *supra* note 134, at xvii.

offenders who suffered from a serious mental illness, organic brain impairment, or developmental disability, who committed misdemeanors and non-violent felonies.<sup>179</sup> Eligible defendants gain entry into the mental health court before the disposition of the charges in order to divert the defendant.<sup>180</sup> Potential defendants are generally identified within twenty-four hours of arrest or very shortly after a referral from a magistrate, county jail, family member, etc. and subjected to a competency evaluation from a private psychiatrist.<sup>181</sup> The judge has the ultimate authority to determine eligibility, with input from the “courtroom team” consisting of the judge, prosecutor, public defender, court monitor, court clinician, case manager, and mental health court liaison before resolution of the charges.<sup>182</sup>

Once a defendant is deemed eligible, a treatment plan is created by the “courtroom team,” and a defendant undergoing treatment may be monitored up to a year, with progress hearings held frequently.<sup>183</sup> During the defendant’s treatment, the arrest charges are suspended, and if a defendant requests a traditional trial at any time, he will be transferred to a traditional criminal court but may still receive community-based treatment via the mental health court team.<sup>184</sup> Noncompliance with a treatment plan rarely results in the use of jail time as a sanction.<sup>185</sup> Instead, the court may respond by increasing hearings before the judge, changing the treatment plan, and increasing support and encouragement in keeping in sync with a therapeutic, as opposed to punitive, perspective.<sup>186</sup> A defendant may be unfavorably terminated, however, if he “commits [a] serious new crime, [has] repeated willful violations, or wants to get out of [the] program.”<sup>187</sup> Under this scenario, the normal sentencing options are available to the judge.<sup>188</sup> Misdemeanor defendants who successfully complete their treatment program generally receive deferred prosecution, may withdraw their guilty pleas, and avoid having a conviction listed on their record.<sup>189</sup> Guilty pleas are entered for more serious offense defendants, but those who successfully complete their mental health treatment

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179. *Id.* The eligible misdemeanor offenses excluded DUIs and domestic violence. *Id.* Persons with mental disabilities who committed misdemeanor battery offenses were eligible only with the victim’s consent. *Id.*

180. *Id.*

181. *Id.* at xviii.

182. *Id.* See also Robert Bernstein & Tammy Seltzer, *The Louisa Van Wezel Schwartz Symposium Criminalization of People with Mental Illnesses: The Role of Mental Health Courts in System Reform*, 7 U. D.C. L. REV. 143 (2003).

183. EMERGING JUDICIAL STRATEGIES, *supra* note 134, at xix.

184. EMERGING JUDICIAL STRATEGIES, *supra* note 134, at xix.

185. *Id.*

186. *Id.*

187. *Id.* at xx.

188. *Id.*

189. *Id.* at xix.

program receive credit for time served.<sup>190</sup> The structure of the Broward County mental health court served as the model for later mental health courts.

## 2. The King County (Seattle) Mental Health Court

Inception of the King County mental health court was strongly influenced by the Broward County mental health court.<sup>191</sup> Unlike the Broward County mental health court, which was motivated by general increases in the incarcerated population of persons with mental disabilities, King County's attention to the same issue arose with a specific incident – the random murder of its fire department captain by an offender with a mental disability in 1997.<sup>192</sup> The offender turned out to be a misdemeanor defendant deemed incompetent by the municipal court and released shortly before the murder.<sup>193</sup> Subsequently, the county formed a task force to improve upon the system's handling of defendants with mental disabilities.<sup>194</sup>

The goals of the King County Mental Health Court are identical to those of the Broward County mental health court, but the structure it uses to achieve those goals differs in some ways.<sup>195</sup> The mental health court intervention is available at the plea/sentencing hearing stage, rather than immediately after arrest, and a defendant must enter a plea in order to enter the program.<sup>196</sup> Like the Broward County court, the King County mental health court is only available to defendants who have committed misdemeanors, and defendants must suffer from a “serious mental illness or developmental disability that triggers [the] charged crime.”<sup>197</sup> The county jail screens the defendant for signs of mental illness within the first forty-eight hours of arrest but prior to the first court hearing.<sup>198</sup> Defendants may be referred to the mental health court by the county jail, magistrate, family, police, etc., and the defendant usually appears before the mental health court within twenty-four hours after referral.<sup>199</sup> A state hospital psychiatrist conducts the competency evaluation in

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190. *Id.* at xix. See also Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1 (2003).

191. Rogers, *supra* note 175, at 2-3. Although the Anchorage mental health court technically began operation prior to the King County mental health court, in reality King County was the second county in the nation to research and consider implementation of such a court. See *id.*; EMERGING JUDICIAL STRATEGIES, *supra* note 134, at xvii.

192. EMERGING JUDICIAL STRATEGIES, *supra* note 134, at 21.

193. *Id.*

194. *Id.*

195. See *id.* at xvii-xx.

196. *Id.* at xvii.

197. *Id.* However, like the Broward County court, the King County court will allow misdemeanor defendants to enter the program if they have a felony in their criminal history, but violent offenses are considered on a case-by-case basis. *Id.*

198. EMERGING JUDICIAL STRATEGIES, *supra* note 134, at xviii.

199. *Id.*

the county jail, unless the defendant is hospitalized.<sup>200</sup> Again, the judge has the ultimate authority to determine eligibility, with input from a team consisting of the judge, prosecutor, public defender, program manager, court monitor, jail psychiatric liaison, and probation officer.<sup>201</sup>

Eligible defendants begin an interim treatment plan before the charges are resolved, and the defendant must return after a couple of weeks to resolve the charges.<sup>202</sup> Once regular treatment commences, the defendant usually has a two-year probationary period supervised by a probation officer and the mental health staff at the treating facility, while a court monitor supervises the treatment plan itself.<sup>203</sup> Unlike the Broward County court, defendants in the King County mental health court program typically have convictions on their record at the conclusion of treatment, but the sentence gets suspended.<sup>204</sup> In the rare cases where sentencing dispositions are deferred, defendants who successfully complete the program may have their charges dismissed.<sup>205</sup> Regular hearings are held to monitor the defendant's progress.<sup>206</sup> If the defendant does not comply with the treatment plan, the judge first increases the number of counseling sessions and court hearings but may use jail time to sanction the defendant as a last resort.<sup>207</sup> Additionally, defendants who request to go to trial after acceptance by the mental health court lose their eligibility for the mental health court and are referred back to the regular criminal court.<sup>208</sup>

As mentioned above, defendants who successfully complete the program usually receive credit for time served and retain the guilty plea on their record.<sup>209</sup> In some cases, successful defendants may receive deferred prosecution, withdraw their pleas, and get their charges dismissed on a recommendation by the district attorney.<sup>210</sup> Defendants who repeatedly and willfully violate their treatment plans or commit a serious new crime during the program are terminated from the mental health court, and the original charges are transferred back to the regular criminal court.<sup>211</sup>

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200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at xix.

204. EMERGING JUDICIAL STRATEGIES, *supra* note 134, at xix.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. EMERGING JUDICIAL STRATEGIES, *supra* note 134, at xix.

211. *Id.* at xx.

### 3. The Anchorage, Alaska Mental Health Court

The backdrop prompting the adoption of Anchorage's mental health court in 1998 was even more bleak than that of the rest of the country. As much as one-third of Alaska's incarcerated population consisted of inmates with mental disabilities, largely suffering from serious mental illnesses like developmental disabilities and organic brain injuries.<sup>212</sup> A commission set up to examine overcrowding in Anchorage jails identified persons with mental disabilities as a particular difficulty within the system.<sup>213</sup> This finding prompted formation of a pilot program to divert defendants with mental disabilities from the criminal justice system and, ultimately, a mental health court was created in 1998, modeled after the Broward County and King County systems.<sup>214</sup>

The goals, stage of intervention, criminal offense and criminal history eligibility, method of entry, and referral processes of the Anchorage court are identical to those of the King County mental health court discussed above.<sup>215</sup> The Anchorage system differs, however, in that it involves two programs – the Jail Alternative Services (“JAS”) program for individuals with mental disabilities already incarcerated, and the Court Coordinated Research Project (“CCRP”), which resembles the prior two mental health courts by dealing with misdemeanants in the adjudication process.<sup>216</sup>

Participation in the JAS program requires that inmates be suffering from a “major mental illness with history of psychosis.”<sup>217</sup> Eligibility for the CCRP is broader, encompassing not only those individuals diagnosed with a serious mental illness, developmental disability, or organic brain syndrome, but also individuals exhibiting signs of such a condition.<sup>218</sup> The courtroom team for the programs consists of the judge, prosecutor, public defender, and JAS case coordinator.<sup>219</sup> The county jail conducts the initial screening of each defendant, usually within twenty-four hours of arrest and before arraignment.<sup>220</sup> For the competency evaluation, defendants in police custody are referred to the state hospital, and those defendants not in custody must schedule an independent evaluation.<sup>221</sup> If a defendant is still incompetent ninety days after the initial competency exam, the court reevaluates the

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212. *Id.* at 35.

213. *Id.*

214. *Id.*

215. *Id.* at xvii-xviii.

216. EMERGING JUDICIAL STRATEGIES, *supra* note 134, at 35-36.

217. *Id.* at xvii.

218. *Id.*

219. *Id.* at xviii.

220. *Id.*

221. *Id.*



situation and may dismiss the charges, particularly if the defendant was civilly committed.<sup>222</sup>

Like the judges in the previous two mental health courts, the judge in the Anchorage system makes the final eligibility determination using the input of the courtroom team.<sup>223</sup> If a defendant is eligible, a treatment plan is formulated as a condition of probation following the sentencing hearing.<sup>224</sup> The typical treatment probation period for individuals in the Anchorage mental health court system, three to five years, is much longer than that of the other mental health courts.<sup>225</sup> In some misdemeanor cases it may run as long as ten years.<sup>226</sup> Participants in the CCRP are monitored solely by the court and prosecutor, and JAS participants are frequently and closely monitored by a caseworker.<sup>227</sup> Defendants who successfully complete the treatment usually still have the conviction on their record but receive a suspended sentence; while those few who receive deferred dispositions receive a dismissal of their charges.<sup>228</sup> Defendants who request trial can still receive treatment from the CCRP but proceed before a judge functioning in dual roles as a CCRP judge and a regular criminal judge.<sup>229</sup> Defendants who have minor violations of their treatment plan receive adjustments in their treatment; however, jail time is used as a threat, and when repeated efforts at counseling fail, the defendant may be jailed.<sup>230</sup> Defendants' participation in the program may be terminated for perpetration of a new serious crime or willful and repeated violations of their treatment plan, and if this occurs, the original charges are referred to the regular criminal court.<sup>231</sup>

#### 4. The San Bernardino, California Mental Health Court

The conditions stimulating the creation of the San Bernardino mental health court in 1999 were the same as those leading to the formation of the previous three courts – an increase of defendants with mental disabilities in the criminal justice system as a result of deinstitutionalization and failure within the community-based mental health system.<sup>232</sup> Specifically, persons with mental disabilities comprised 12% of the San Bernardino local jail population.<sup>233</sup>

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222. EMERGING JUDICIAL STRATEGIES, *supra* note 134, at xviii.

223. *Id.*

224. *Id.*

225. *Id.* at xix.

226. *Id.*

227. *Id.*

228. EMERGING JUDICIAL STRATEGIES, *supra* note 134, at xix.

229. *Id.*

230. *Id.*

231. *Id.* at xx.

232. *Id.* at 49.

233. *Id.*

Again, the goals, structure, and eligibility requirements of this court are nearly identical to those of the courts discussed above.<sup>234</sup> However, the San Bernardino court differs in several key ways. First, the court considers low-level felony offenders, rather than just misdemeanor offenders, for eligibility.<sup>235</sup> Regarding misdemeanants, though, the court will only consider ones with a prior record.<sup>236</sup> The court carefully screens any defendants with a violent felony in their prior criminal history.<sup>237</sup> Second, the court only receives referrals from the county jail, not outsiders.<sup>238</sup> Third, the judge does not have the ultimate say in a defendant's eligibility for the treatment program – admission to the program requires the consensus of all of the court team members: the judge, prosecutor, public defender, mental health court administrator, case managers, and probation officer.<sup>239</sup> Treatment begins immediately while the individual is still in jail, but the defendant is typically released to the program after the first court appearance.<sup>240</sup> The sanctions for noncompliance available to the mental health court judge range “from reprimands by [the] judge to stricter treatment conditions, community service, and jail, which are used liberally.”<sup>241</sup> The final major difference from this program and the others is that the charges are dismissed for defendants who successfully finish the treatment, and they may also petition for their record to be expunged.<sup>242</sup>

These pioneering mental health courts, though differing organizationally, clearly began in response to common, recurring problems: inadequate handling of persons with mental disabilities by both community-based and criminal justice systems, an increase in the number of substance abusers with mental disabilities, and the resulting increase in the number of persons with mental disabilities cycling through the criminal justice system.<sup>243</sup> Despite the innovativeness of these specialty courts, problems and criticisms have arisen.

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234. See EMERGING JUDICIAL STRATEGIES, *supra* note 134, at xvii-xx.

235. *Id.* at xvii.

236. *Id.*

237. *Id.*

238. *Id.* at xviii.

239. *Id.*

240. EMERGING JUDICIAL STRATEGIES, *supra* note 134, at xviii.

241. *Id.* at xix.

242. *Id.*

243. See BUREAU OF JUST. ASSISTANCE, COUNCIL OF STATE GOVERNMENTS, A GUIDE TO MENTAL HEALTH COURT DESIGN AND IMPLEMENTATION 3 (May 2005), available at <http://www.nicic.org/Library/020757> (last visited Apr. 5, 2006) [hereinafter “GUIDE TO MENTAL HEALTH”].

## IV. MENTAL HEALTH COURTS: CHALLENGES AND CRITICISMS

The formation of mental health courts increased across the country following the success of drug courts and the inception of the Broward County, King County, Anchorage, and San Bernardino mental health courts.<sup>244</sup> Today, over 100 mental health courts exist throughout the United States.<sup>245</sup> As with any new entity, however, mental health courts face practical challenges to effectuating their goals, creating some skepticism.

A key component of mental health courts is identifying the “target population” as early in the process as possible in order to intervene with the appropriate treatment.<sup>246</sup> Equally important, however, is the need to accurately assess a defendant while maintaining confidentiality. These needs – speed, accuracy, and confidentiality – often conflict during the screening process for the following reason:

Early intervention by the mental health court depends on timely and accurate information about the defendants’ criminal justice and mental health backgrounds. However, the goal of early intervention and prompt treatment conflicts in part with the need for confidentiality and for consent by the defendants to share the mental health information with the court staff.<sup>247</sup>

Implementing procedures that adequately address these issues presents a difficult dilemma from the outset.

Another difficulty faced by mental health courts is reconciliation of criminal justice goals with mental health treatment goals.<sup>248</sup> The creation of mental health courts reflects a paradigmatic shift toward therapeutic goals, but the purposes of the criminal justice system (e.g. punishment, deterrence, retribution, etc.) must also be addressed. As noted above, however, punishment is often inappropriate and ineffective for the root causes of mentally ill defendants’ transgressions. Nonetheless, many mental health courts evince a hybrid of both systems’ goals by retaining punitive sanctions as a last resort to noncompliance with treatment.<sup>249</sup>

Achieving uniformity in composition and in defining success also impose obstacles to mental health courts. For example, the four original mental health

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244. *See id.*

245. *Id.*; Rogers, *supra* note 175, at 4. *See also* Acquaviva, *supra* note 174 (providing overview of new mental health courts).

246. EMERGING JUDICIAL STRATEGIES, *supra* note 134, at x. *See* Allison D. Redlich, *Voluntary, But Knowing and Intelligent?: Comprehension in Mental Health Court*, 11 PSYCHOL. PUB. POL’Y & L. 605 (2005).

247. EMERGING JUDICIAL STRATEGIES, *supra* note 134, at x-xi.

248. *Id.* at xii. For a thorough critique of mental health courts, *see* Tammy Seltzer, *Mental Health Courts: A Misguided Attempt to Address the Criminal Justice System’s Unfair Treatment of People with Mental Illnesses*, 11 PSYCHOL. PUB. POL’Y & L. 570 (2005).

249. *See supra* Part III. *See also* Timothy Casey, *When Good Intentions are not Enough: Problem-solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459 (2004).

courts varied to some degree in their structure and eligibility requirements.<sup>250</sup> Likewise, since each individual grapples with dissimilar problems related to the mental illness, one defendant's success will necessarily differ from another defendant's success.<sup>251</sup> Some critics view this fact as a red flag to the rapid expansion of mental health courts.<sup>252</sup> Drug courts also dealt with uniformity issues in the beginning but were eventually unified, unlike mental health courts:

[D]rug courts rapidly moved to a common model aided by technical assistance and information on program models from national sources – the Office of Justice Programs' Drug Courts Program Office of the U.S. Department of Justice, American University's National Technical Assistance Center, and the National Association of Drug Court Professionals. Unlike drug courts, mental health courts have no such infrastructure or model. Any similarities among current mental health courts occur more or less by chance at the implementation level and stem mostly from mirror-imaging by new jurisdictions seeking to replicate recently visited mental health courts or to duplicate drug courts.

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... [A]lmost any special effort by the courts to better address the needs of persons with serious mental illness who engage with the criminal justice system can qualify as a mental health court by current standards. In its diffusion, the [mental health court] concept has come to have little meaning.

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Until similar evidence-based conclusions [to that of drug courts] about appropriate structures and interventions are available for mental health courts, some pause may be advisable before widespread implementation.<sup>253</sup>

In recognition of this criticism, proponents of mental health courts responded by articulating a general definition of a mental health court as follows:

A specialized court docket for certain defendants with mental illnesses that substitutes a problem-solving model for traditional court processing. Participants are identified through specialized screening and assessments, and voluntarily participate in a judicially supervised treatment plan developed jointly by a team of court staff and mental health professionals. Incentives reward adherence to the treatment plan and other court conditions, non-adherence may be sanctioned, and success or graduation is defined according to specific criteria.<sup>254</sup>

250. *See supra* Part III.

251. EMERGING JUDICIAL STRATEGIES, *supra* note 134, at xii.

252. *See generally* Steadman et al., *supra* note 160.

253. *Id.* at 457-58.

254. GUIDE TO MENTAL HEALTH, *supra* note 243, at 2.

Furthermore, proponents have outlined ten essential elements a mental health court should possess to achieve success: (1) Goals, (2) Target Population, (3) Confidentiality, (4) Terms of Participation, (5) Informed and Voluntary Choice, (6) Participant Identification, (7) Integration of Treatment and Community Supports, (8) The Court Team, (9) Monitoring Adherence to Court Conditions, and (10) Sustainability.<sup>255</sup> How these elements are incorporated structurally should necessarily be left to each court based on system needs and the demographics of the particular jurisdiction.

The final major challenge presented to mental health courts is one common to any organization – resources. Part of the problem contributing to the increase of mentally ill persons' entrance into the criminal justice system, as well as that system's failure to adequately deal with the population of persons with mental disabilities, is a lack of resources and training. Ironically, mental health courts rely, at least to some extent, on these same community-based resources in their treatment plans.<sup>256</sup> Critics assert that, despite good intentions, mental health courts may face the same doom as the traditional criminal system unless funding and resources are greatly improved.<sup>257</sup>

As with any innovative concept, mental health courts face difficulties and critiques. As mental health courts continue to be implemented, attempts to remedy and adjust to these difficulties will undoubtedly be made. Moreover, more empirical studies of mental health court outcomes are warranted to aid in tweaking the mental health court system. In the meantime, the visible successes and failures of existing mental health courts help shape future courts and programs. Ohio's current experiment with the diversion of defendants with mental disabilities is one such reflection of these concepts.<sup>258</sup>

## V. ANALYSIS OF MENTAL HEALTH COURTS UNDER TITLE II

Persons with mental disabilities can present major challenges to law enforcement personnel who sometimes mistake manifestations of mental illness for criminal activity and to state court systems that must then try to deal with persons with mental disabilities in an appropriate manner. Obviously, some training in dealing with people with mental disabilities would be of great benefit to the law enforcement and state court personnel who regularly face these situations. By possessing a better understanding of mental disabilities

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255. *Id.* at 24.

256. EMERGING JUDICIAL STRATEGIES, *supra* note 134, at xiv.

257. Steadman et al., *supra* note 160, at 458. See Nancy Wolff & Wendy Pogorzelski, *Measuring the Effectiveness of Mental Health Courts*, 11 PSYCHOL. PUB. POL'Y & L. 539 (2005).

258. Sandra F. Cannon & Deborah Nixon-Hughes, *Community Linkage Program: A Partnership Between the Ohio Department of Mental Health and the Ohio Department of Rehabilitation and Correction*, THE SUP. CT. OF OHIO ADVISORY COMM. ON MENTALLY ILL IN THE CTS. ARTICLE SERIES, 1-2 (Dec. 2003), available at <http://www.sconet.state.oh.us/ACMIC> (last visited Apr. 5, 2006).

and their symptoms, state court systems can more adequately provide for the needs of individuals with disabilities and for state judicial systems as a whole.

This principle forms the foundation of the policy for creating and maintaining mental health courts. Currently, statistical information regarding the relative successes of mental health courts is very limited. If mental health courts are more effective in reducing recidivism and providing adequate treatment for individuals with mental disabilities, it seems fairly certain that these courts will pass muster under the ADA as a separate, segregated judicial system, so long as individuals who are diverted into this system still have the option to participate in the “regular” court system. If mainstream state court systems are not providing mentally disabled persons with adequate or equal services and opportunities, both the existing case law and the guidance offered by the DOJ seem to clearly indicate that mental health courts may even be required under the ADA so that state court systems are readily accessible to persons with mental disabilities.

In *Lane*, the Supreme Court noted that Title II “seeks to enforce a variety of . . . basic constitutional guarantees, infringements of which are subject to more searching judicial review.”<sup>259</sup> The Court noted that the right of access to the court system is protected by the Due Process Clause of the Fourteenth Amendment; the Due Process and the Confrontation Clause of the Sixth Amendment, as applied to the states by the Fourteenth Amendment; as well as a right to access to criminal proceedings that is guaranteed by the First Amendment.<sup>260</sup> The Court explained that whether Title II enforces all of these constitutional rights is a question that “must be judged with reference to the historical experience which it reflects.”<sup>261</sup> The Court was convinced that Title II was designed to address harm that often resulted from “a pattern of unconstitutional treatment in the administration of justice.”<sup>262</sup>

The Court carefully examined the history of discrimination based on disability in this country.<sup>263</sup> “Congress enacted Title II against a backdrop of pervasive unequal treatment . . . in the administration of state services and programs, including systematic deprivations of fundamental rights.”<sup>264</sup>

The *Lane* opinion went on to provide numerous examples of the unequal treatment of physically and mentally disabled individuals in our society, including the fact that “as of 1979, most States categorically disqualified idiots

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259. *Tennessee v. Lane*, 541 U.S. 509, 522-23 (2004).

260. *Id.* at 523 (citing *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996); *Press-Enterprise Co. v. Superior Court of Cal., County of Riverside*, 478 U.S. 1, 8-15 (1986); *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975); *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)).

261. *Id.* (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)).

262. *Id.* at 525.

263. *Id.* at 531.

264. *Id.* at 510.

from voting, without regard to individual capacity. . . . [A] number of States have prohibited and continue to prohibit persons with disabilities from engaging in activities such as marrying and serving as jurors.”<sup>265</sup> The Court further explained that a long line of Supreme Court cases that “have identified unconstitutional treatment of disabled persons by state agencies in a variety of public programs and services[,]” further reinforcing the proposition that “[d]ifficult and intractable problems often require powerful remedies.”<sup>266</sup>

Some of the examples of previous cases that implicated disability discrimination that the Court gave as evidence of a systemic problem included, “unjustified commitment, the abuse and neglect of persons committed to state mental health hospitals, and irrational discrimination in zoning decisions.”<sup>267</sup>

The *Lane* opinion makes it clear that state court systems must be readily accessible to persons with disabilities, which the ADA, the implementing regulations, and the TAM explicitly state includes persons with *mental* disabilities.<sup>268</sup>

The TAM is also instructive on the rights of disabled individuals to participate in programs that are designed without regard for disability status.<sup>269</sup> “Qualified individuals with disabilities are entitled to participate in regular programs, even if the public entity could reasonably believe that they cannot benefit from the regular program.”<sup>270</sup> The TAM also clarifies that just because a special program has been created for persons with a disability, a public entity must still make its regular programs accessible to disabled individuals, although the requirement that a disabled individual should be “qualified” to participate in the program still applies.<sup>271</sup> The TAM also clarifies that a disabled individual who is qualified for a regular program cannot be denied access to the regular program because a special program has been created. Disabled individuals are not required to accept any special “benefits” if they choose not to do so.<sup>272</sup> The TAM gives some examples of the practical application of this principle:

ILLUSTRATION 1: A museum cannot exclude a person who is blind from a tour because of assumptions about his or her inability to appreciate and benefit

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265. *Lane*, 541 U.S. at 524 (quoting *Cleburne v. Cleburne Living Center, Inc.* 473 U.S. 432, 464 & n.14 (1985)).

266. *Id.* at 510, 524 (quoting *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88 (2000)).

267. *Id.* at 524-25 (citing *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985); *Youngberg v. Romeo*, 457 U.S. 307 (1982); *Jackson v. Indiana*, 406 U.S. 715 (1972)).

268. *Id.* at 533-34. *See also* *United States v. Georgia*, 126 S.Ct. 877 (2006). In this case, the Supreme Court reaffirmed that Congress had validly abrogated state sovereign immunity under Title II for claims of violations of the Eighth Amendment and the Fourteenth Amendment. *Id.*

269. *See* TAM, *supra* note 56, at II-3.4300.

270. *Id.*

271. *Id.*

272. *Id.*

from the tour experience. Similarly, a deaf person may not be excluded from a museum concert because of a belief that deaf persons cannot enjoy the music.

ILLUSTRATION 2: Where a State offers special drivers' licenses with limitations or restrictions for individuals with disabilities, an individual with a disability is not eligible for an unrestricted license, unless he or she meets the essential eligibility requirements for the unrestricted license.

ILLUSTRATION 3: A State that provides optional special automobile license plates for individuals with disabilities and requires appropriate documentation for eligibility for the special plates cannot require an individual who qualifies for a special plate to present documentation or accept a special plate, if he or she applies for a plate without the special designation.<sup>273</sup>

The implementing regulations also provide an example that is instructive as to whether or not creating separate or special services for the individuals with disabilities violates the ADA:

[I]t would be a violation of this provision to require persons with disabilities to eat in the back room of a government cafeteria or to refuse to allow a person with a disability the full use of recreation or exercise facilities because of stereotypes about the person's ability to participate.<sup>274</sup>

These illustrations and examples clearly indicate that a public entity, such as a state's judicial system, cannot require an individual with a mental disability to accept diversion into a mental health court if he or she wants to participate in the mainstream state courts, rather than the special mental health court, even though the latter may provide particular services that are better suited to fulfill the needs of that individual.

Two other illustrations from the TAM help clarify when a public entity may create and provide special or separate programs without running afoul of the ADA:

ILLUSTRATION 1: Museums generally do not allow visitors to touch exhibits because handling can cause damage to the objects. A municipal museum may offer a special tour for individuals with vision impairments on which they are permitted to touch and handle specific objects on a limited basis. (It cannot, however, exclude a blind person from the standard museum tour.)

ILLUSTRATION 2: A city recreation department may sponsor a separate basketball league for individuals who use wheelchairs.<sup>275</sup>

It is important to remember that a public entity that creates a special program for persons with disabilities, such as mental health courts, cannot later disproportionately cut all programs for the disabled when there are no

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273. *Id.*

274. NONDISCRIMINATION ON THE BASIS OF DISABILITY, *supra* note 72, at § 35.130.

275. TAM, *supra* note 56, at II-3.4100.



alternative equivalent programs available.<sup>276</sup> If a public entity is going to provide services for individuals who do not have disabilities, then they should also provide some sort of alternative programming for individuals with disabilities.<sup>277</sup> If a state's judicial branch fails to offer persons with mental disabilities access to the state court system by not effectively treating the underlying illness or allowing the individual to sufficiently participate in the judicial system, it seems clear that the state is violating the ADA's mandate to provide readily accessible programs and services.

As discussed above, integration is a key goal of the ADA, and this principle is discernible in all of the aforementioned explanations and illustrations. Clearly the DOJ, in drafting the implementing regulations and the TAM, believed that this principle is crucial to eradicating disability discrimination in American society. While recognizing that the creation of separate or special programs can be beneficial to individuals with disabilities, the ADA mandates that state and local governments cannot create these programs in an attempt to segregate disabled individuals out of regular programs that are designed without consideration of disabilities.<sup>278</sup>

It is important to note that when a public entity's facilities, services, and programs are evaluated for conformity with this standard, compliance is measured by looking at the public entity as a whole.<sup>279</sup> Therefore, a public entity is not necessarily required to make each of their existing facilities, programs, and services accessible to individuals with disabilities.<sup>280</sup> The TAM provides some examples that make this point clearer:

ILLUSTRATION 1: When a city holds a public meeting in an existing building, it must provide ready access to, and use of, the meeting facilities to individuals with disabilities. The city is not required to make all areas in the building accessible, as long as the meeting room is accessible. Accessible telephones and bathrooms should also be provided where these services are available for use of meeting attendees.

ILLUSTRATION 2: D, a defendant in a civil suit, has a respiratory condition that prevents her from climbing steps. Civil suits are routinely heard in a courtroom on the second floor of the courthouse. The courthouse has no elevator or other means of access to the second floor. The public entity must relocate the proceedings to an accessible ground floor courtroom or take alternative steps, including moving the proceedings to another building, in order to allow D to participate in the civil suit.

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276. See *Concerned Parents v. West Palm Beach*, 853 F. Supp. 424, 425-26 (S.D. Fla. 1994) (holding that the city effectively discriminated against individuals based on their disabilities when it ceased providing recreational programs for persons with physical and mental disabilities).

277. *Id.* at 426.

278. See TAM, *supra* note 56, at II-3.4000.

279. *Id.* at II-3.4100, II-5.1000.

280. *Id.* at II-5.1000.

ILLUSTRATION 3: A State provides ten rest areas approximately 50 miles apart along an interstate highway. Program accessibility requires that an accessible toilet room for each sex with at least one accessible stall, or a unisex bathroom, be provided at each rest area.<sup>281</sup>

Again, if regular mainstream state court systems do not meet the basic needs of persons with mental disabilities, then the public entity is likely violating Title II because it is not making its judicial system readily accessible to persons with mental disabilities. Moreover, if mainstream state courts deny individuals with mental disabilities with adequate services or equal opportunities, mental health courts are arguably necessary to bring the state's court system into compliance with the ADA.

#### VI. OHIO'S RESPONSE TO THE MENTAL HEALTH TRENDS

Ohio's experience with offenders with mental disabilities mirrors that of the rest of the nation. Since 1995, Ohio has had community linkage programs in place to provide mental health care to inmates, aid in the transition from prison to the community and vice versa, and maintain continuous treatment.<sup>282</sup> The need for further intervention, however, became apparent. In March of 2000, Ohio prisons housed 6,393 prisoners with mental disabilities, 3,051 of whom were severely mentally disabled.<sup>283</sup> A study of 1998 incarceration rates revealed that 432 of every 100,000 Ohio residents were incarcerated, the thirteenth highest rate in the nation.<sup>284</sup> As with most of the country, Ohio's "community mental health system and the criminal justice system are not equipped to handle the current situation."<sup>285</sup>

In May of 2000, Akron implemented one of the first programs in the state designed to address this issue by developing a Crisis Intervention Team ("CIT").<sup>286</sup> The CIT was established to encourage collaboration between law enforcement and the mental health community by training law enforcement personnel the way to appropriately respond to situations involving individuals

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281. *Id.*

282. *See* Cannon & Nixon-Hughes, *supra* note 258.

283. *What is a CIT? Why Do You Need One in Your Community?*, Interview by Justice Evelyn Lundberg Stratton with Dr. Mark R. Munetz, Chief Clinical Officer, Summit County ADM Board & Coordinating Center of Excellence in Jail Diversion, Northeastern Ohio Universities College of Medicine, THE SUP. CT. OF OHIO ADVISORY COMM. ON MENTALLY ILL IN THE CTS. ARTICLE SERIES 1 (May 5, 2003), *available at* <http://www.sconet.state.oh.us/ACMIC> (last visited Apr. 5, 2006) [hereinafter "Munetz Interview"].

284. Jo Ann Harris, *What's a CCOE?*, THE SUP. CT. OF OHIO ADVISORY COMM. ON MENTALLY ILL IN THE CTS. ARTICLE SERIES, 2 (Jan. 2002), *available at* <http://www.sconet.state.oh.us/ACMIC> (last visited Apr. 5, 2006).

285. *Id.*

286. Munetz Interview, *supra* note 283, at 1, 3.

with mental disabilities.<sup>287</sup> Officers must apply for the CIT training, and the training is provided to law enforcement personnel for free.<sup>288</sup> As of January 2002, Akron's CIT program had been relatively successful at diverting persons with mental disabilities from the criminal justice system.<sup>289</sup> Forty-five percent of the first 483 law enforcement encounters with individuals with mental disabilities "resulted in referral to the county's psychiatric emergency facility and another 37% were referred to hospital emergency departments."<sup>290</sup> Only six percent ended in arrest.<sup>291</sup>

Butler County, Ohio became the first county in Ohio to begin inquiring about the possibility of a mental health court when it held the Southwest Ohio Regional Forum on Mental Health Courts and the Mentally Ill Offender in November of 1999.<sup>292</sup> Judge Speiser from the Broward County Mental Health Court and Judge Cayce from the King County Mental Health Court spoke at the forum about the development of mental health courts in their respective jurisdictions.<sup>293</sup> In 2001, Ohio Supreme Court Justice Evelyn Lundberg Stratton, a major advocate of alternatives for offenders with mental disabilities in Ohio, created the Ohio Supreme Court Advisory Committee on Mentally Ill in the Courts.<sup>294</sup> This committee is comprised of various individuals and entities, such as the state departments of Mental Health, Alcohol, and Drug Addiction Services, Rehabilitation and Correction, and Criminal Justice Services, numerous judges and law enforcement officials, housing and treatment providers, consumer advocacy and legal rights groups, and others.<sup>295</sup>

Also in 2000, the Ohio Department of Mental Health ("ODMH") gave grants to the following thirteen counties to develop jail diversion programs: Athens, Clark, Clermont, Columbiana, Fairfield, Franklin, Gallia, Lake, Licking/Knox, Lucas, Montgomery, Tuscarawas, and Washington.<sup>296</sup> These counties established various programs such as CIT, pre and post-booking programs with follow-up after release, case management programs incorporating housing and vocational components, and referral programs.<sup>297</sup>

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287. *Id.* at 1.

288. *Id.* at 2.

289. *Id.* at 4.

290. *Id.*

291. *Id.* at 4.

292. Rogers, *supra* note 175, at 3-4.

293. *Id.* at 4.

294. *Id.*

295. *Id.*

296. Sandra F. Cannon & Joseph Krake, *Mental Health Division Alternatives to Jail: Thirteen Pilot Programs Funded by ODMH in April 2000 – Where are They Now and What Have We Learned?*, THE SUP. CT. OF OHIO ADVISORY COMM. ON MENTALLY ILL IN THE CTS. ARTICLE SERIES 1-4 (May 2002), available at <http://www.sconet.state.oh.us/ACMIC> (last visited Apr. 5, 2006).

297. *Id.*

In 2001, the ODMH also awarded a grant to the Summit County Alcohol, Drug, and Mental Health Services Board to create a Coordinating Center of Excellence (“CCOE”) to research and support jail diversion alternatives.<sup>298</sup> Furthermore, community-based correctional facilities (“CBCF”) also provide another diversion option for qualifying offenders. CBCF’s are “residential programs that provide comprehensive treatment for offenders on felony probation. They provide an in-house alternative to jail or prison.”<sup>299</sup> Seventeen CBCF’s were operating in Ohio as of September 2002 and had diverted 4,617 offenders from the state prison system in 2001.<sup>300</sup>

As of May 2002, challenges had cropped up, including identifying housing and employment, integrating multiple local systems and entities, and encouraging offenders to voluntarily participate.<sup>301</sup>

In 2002, the Ohio Department of Rehabilitation and Correction funded two pilot projects in Hamilton and Cuyahoga Counties to implement Assertive Community Treatment (“ACT”) programs.<sup>302</sup> These programs provide comprehensive services to severely mentally disabled inmates after their release in an effort to prevent recidivism.<sup>303</sup> Preliminary data evaluations indicate “decreased usage of jail, prison and psychiatric bed days” as of June 2003.<sup>304</sup> Additionally, Hamilton County also operates a juvenile mental health court,<sup>305</sup> as well as an intervention program specifically for women offenders suffering from mental illness and/or substance abuse.<sup>306</sup> As of November 2003, the women’s program had tremendous clinical success: 94% of the women had reduced their level of symptom distress; 100% of the women improved their substance abuse behavior, while 94% reduced their substance abuse attitudes and feelings; 81% of the women improved their overall level of

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298. Harris, *supra* note 284, at 1.

299. Jake E. Jones, *Treating the Dual Diagnosed Offender in Your CBCF*, THE SUP. CT. OF OHIO ADVISORY COMM. ON MENTALLY ILL IN THE CTS. ARTICLE SERIES, 1 (Sept. 2002), available at <http://www.sconet.state.oh.us/ACMIC> (last visited Apr. 5, 2006).

300. *Id.*

301. Cannon & Krake, *supra* note 296, at 4-5.

302. Katherine A. Brown, *Assertive Community Treatment: A Reentry Model for Seriously Mentally Ill Offenders*, THE SUP. CT. OF OHIO ADVISORY COMM. ON MENTALLY ILL IN THE CTS. ARTICLE SERIES, 2 (June 2003), available at <http://www.sconmet.state.oh.us/ACMIC> (last visited Apr. 5, 2006).

303. *Id.* at 1-2.

304. *Id.* at 3.

305. Sharon Coolidge, *Mental Health Court Helping Kids: While Costly Now, It Might Pay Off for Taxpayers Too*, THE KY. ENQUIRER, July 6, 2004, at A1.

306. Mary Grace & Mary Carol Melton, *Alternative Interventions for Women: A Community Partnership Serving Women with Co-occurring Mental Health and Substance Abuse Disorders in the Criminal Justice System in Hamilton County, Ohio*, THE SUP. CT. OF OHIO ADVISORY COMM. ON MENTALLY ILL IN THE CTS. ARTICLE SERIES, 1 (Nov. 2003), available at <http://www.sconet.state.oh.us/ACMIC> (last visited Apr. 5, 2006).

functioning; 100% of the graduates had safe and adequate child care; 67% of the women have safe, adequate, and permanent housing; 47% of the women had adequate work and attachment to the labor force; and only 13% of those women who had graduated were convicted of a new crime since completing the program.<sup>307</sup>

Currently, mental health dockets exist in Butler, Cuyahoga, Hamilton, Mahoning, Montgomery, Richland, and Summit Counties.<sup>308</sup> Five other counties have mental health/criminal justice programs, and 14 counties are currently planning similar initiatives.<sup>309</sup> Ohio has also established model jail standards to deal with offenders with mental disabilities in jail.<sup>310</sup> Clearly, Ohio has put forth tremendous effort to reverse the “revolving door” problem whereby “[j]ails and prisons have become the de facto mental health system of our day”<sup>311</sup> and to combat the challenges that accompany these innovative solutions.

## VII. CONCLUSION

Title II mandates that state and local judicial facilities be accessible to individuals with disabilities. The increasing number of offenders with mental disabilities, who are often substance abusers, cycling through criminal justice systems across the country reveals that meaningful access to the courts is not occurring. Recent shifts in paradigmatic approaches to special populations such as drug offenders and offenders with mental disabilities, along with the advent of specialty drug courts, have led to the creation of mental health courts specifically designed to address the needs of the persons with mental disabilities in order to avoid incarceration. These relatively new interventions still have flaws that require improvement, but early outcomes in states like Ohio suggest mental health courts may better serve the purposes of Title II and, more importantly, the needs of individuals with serious mental disabilities. Jurisdictions considering implementation of mental health courts, as well as those jurisdictions that already have them, should take caution to ensure that personnel are well-trained to recognize and interact with persons with mental disabilities and that alternative programs truly are voluntary to avoid violation of Title II.

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307. *Id.* at 4-5.

308. Kristina L. Hawk, *The Supreme Court of Ohio Advisory Committee on Mentally Ill in the Courts: A Catalyst for Change*, THE SUP. CT. OF OHIO ADVISORY COMM. ON MENTALLY ILL IN THE CTS. ARTICLE SERIES 2 (Feb. 2004), available at <http://www.sconet.state.oh.us/ACMIC> (last visited Apr. 5, 2006).

309. *Id.*

310. *Id.* at 3.

311. Rogers, *supra* note 175, at 1 (quoting Justice Evelyn Lundberg Stratton).