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## Therapeutic Jurisprudence: The Impact of Mental Health Courts on the Criminal Justice System

Andrea M. Odegaard

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# THE THERAPEUTIC JURISPRUDENCE: THE IMPACT OF MENTAL HEALTH COURTS ON THE CRIMINAL JUSTICE SYSTEM\*

## I. INTRODUCTION

More than half of the jail and prison inmates in the United States have a mental illness.<sup>1</sup> As a result of the overrepresentation of individuals with mental illness in the criminal justice system, state courts are examining alternative options for meeting the challenges posed by the population of offenders with mental illness.<sup>2</sup> Individuals with mental illnesses are entering the criminal justice system at a disturbing frequency.<sup>3</sup> As a result, the criminal justice system has been forced to become a primary mental health care provider, a function for which these facilities are ill-equipped.<sup>4</sup> As individuals with mental illness continue to flood the courtrooms of America, many jurisdictions are looking at alternatives to provide diversions to incarceration.<sup>5</sup>

This note addresses the evolving area of therapeutic jurisprudence in the context of problem-solving courts and, more specifically, examines the

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1. DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, NO. 213600, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/mhppji.pdf>. More specifically, 705,600 state prison inmates, 78,800 federal prison inmates, and 479,900 local jail inmates have reported a mental health problem. *Id.* Mental health problems reported include major depression and psychotic disorders involving hallucinations and delusions. *Id.* at 2.

2. See DERECK DENCKLA & GREG BERMAN, CTR. FOR CT. INNOVATION, RETHINKING THE REVOLVING DOOR 7 (2001), available at [http://www.courtinnovation.org/\\_uploads/documents/rethinkingtherevolvingdoor.pdf](http://www.courtinnovation.org/_uploads/documents/rethinkingtherevolvingdoor.pdf) (indicating that state courts are realizing that “business as usual” is not working for incarcerated mentally ill offenders).

3. See Mark R. Munetz & Jennifer L.S. Teller, *The Challenges of Cross-Disciplinary Collaborations: Bridging the Mental Health and Criminal Justice Systems*, 32 CAP. U. L. REV. 935, 938-40 (2004) (discussing the prevalence of mental health problems among inmates in prison). “[P]eople with mental illness are falling through the cracks of this country’s social safety net and are landing in the criminal justice system at an alarming rate.” COUNCIL OF STATE GOV'TS, CRIMINAL JUSTICE/MENTAL HEALTH CONSENSUS PROJECT xii (2002), available at [http://consensusproject.org/downloads/Entire\\_report.pdf](http://consensusproject.org/downloads/Entire_report.pdf) [hereinafter CONSENSUS PROJECT].

4. MARCIA K. GOIN, AM. PSYCHIATRIC ASS'N, MENTAL ILLNESS AND THE CRIMINAL JUSTICE SYSTEM: REDIRECTING RESOURCES TOWARD TREATMENT, NOT CONTAINMENT 2 (2004), available at [http://www.psych.org/edu/other\\_res/lib\\_archives/archives/200401.pdf](http://www.psych.org/edu/other_res/lib_archives/archives/200401.pdf).

5. DENCKLA & BERMAN, *supra* note 2, at 6-7; see Christin E. Keele, Note, *Criminalization of the Mentally Ill: The Challenging Role of the Defense Attorney in the Mental Health Court System*, 71 UMKC L. REV. 193, 193 (2002) (explaining that problem-solving courts have gained support from politicians and the public due to the troubling trend of individuals with mental illness in the criminal justice system).

development of mental health courts.<sup>6</sup> Part II defines the concept of therapeutic jurisprudence and problem-solving courts. In addition, Part II examines the origins of the problem-solving court movement. Part III analyzes the proliferation of mental health courts and discusses the structure and function of these unique courts. Part IV provides insight into the complex role of defense attorneys, prosecutors, and judges involved in the mental health court process. Part V explores the implementation of mental health courts across the country, federal legislation relating to these courts, and controversies surrounding the mental health court model. Finally, Part VI examines some of the issues related to mentally ill offenders in North Dakota and the possible impact of creating problem-solving courts.

## II. THERAPEUTIC JURISPRUDENCE AND PROBLEM-SOLVING COURTS: A NEW APPROACH

### A. THERAPEUTIC JURISPRUDENCE

Therapeutic jurisprudence refers to the study of how the law acts as a therapeutic agent.<sup>7</sup> Within this concept, procedures, rules, and the legal roles that lawyers and judges play during the process of adjudication are all social forces that create consequences.<sup>8</sup> The concept of therapeutic jurisprudence suggests that reducing the “anti-therapeutic consequences” created by the law can be accomplished without “subordinating due process

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6. See Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055, 1055-56 (2003) (discussing the development of problem-solving courts). Problem-solving courts are specialized court dockets that focus on addressing problems that lead to criminal justice involvement such as drug abuse, mental illness, or domestic violence. *Id.* Although by nature traditional courts are “problem-solving,” the problems focused on by specialized problem-solving courts address underlying issues such as mental illness, drug abuse, and domestic violence with the goal of preventing the defendant from re-offending. *Id.* at 1055. The traditional court process focuses on the problem of past behavior, the crime that occurred, and punishment of that behavior rather than on addressing how to keep the defendant from re-offending. *Id.* at 1055, 1060. An example of one of the first problem-solving courts is the juvenile court created to address the problem of juvenile delinquency with a rehabilitative approach rather than a punitive approach provided by the traditional adult criminal court. *Id.* at 1056. Mental health courts are specialized court dockets within the problem-solving court model that focus on the mentally-ill offender. DENCKLA & BERMAN, *supra* note 2, at 7.

7. GREG BERMAN & JOHN FEINBLATT, GOOD COURTS: THE CASE FOR PROBLEM-SOLVING JUSTICE 49-50 (2005) [hereinafter BERMAN & FEINBLATT, GOOD COURTS] (citing LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE xvii (David B. Wexler & Bruce J. Winick eds., 1996)). Therapeutic jurisprudence has also been defined as the study of the extent that the law affects the physical and psychological interests of individuals in a community. *Id.* at 50.

8. *Id.* at 49-50; see JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS 7-8 (Bruce J. Winick & David Wexler eds., 2003) (explaining that the “anti-therapeutic consequences” relate to emotional and psychological issues confronted by the court in some cases, and the affect that the court has on these issues).

and other justice values.”<sup>9</sup> The law’s impact on emotional well-being and overall mental health relating to offender’s psychological needs becomes a focus in the study of therapeutic jurisprudence.<sup>10</sup>

Further, therapeutic jurisprudence has been used to analyze how laws and policies reflect attitudes about individuals who become involved in the criminal justice system.<sup>11</sup> For example, the legal and social status of people with mental illness has been influenced by the law, social policy, and societal norms.<sup>12</sup> People with mental illnesses are often thought of as having “incurable medical diseases that make them dangerous to society.”<sup>13</sup> Unfortunately, legal procedure and mechanisms have a direct affect on the autonomy of people with mental illness.<sup>14</sup> New scientific and technological advances in treatment for mental illnesses have provided a means for courts to help facilitate rehabilitation for offenders with mental illness.<sup>15</sup> Because a significant number of people with mental illness are involved in the criminal justice system, it is of paramount importance that the legal system reflects the new advances and incorporates the theoretical concepts of therapeutic jurisprudence.<sup>16</sup>

## B. PROBLEM-SOLVING COURTS

Problem-solving courts are defined as specialized courtrooms “that are working to ensure not just that the punishment fits the crime . . . but that the process fits the problem.”<sup>17</sup> Problem-solving courts not only address issues of disputed fact, but also focus on underlying social or psychological problems responsible for the dispute.<sup>18</sup> Problem-solving courts seek to connect defendants to therapeutic interventions including rehabilitative

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9. BERMAN & FEINBLATT, GOOD COURTS, *supra* note 7, at 49.

10. JUDGING IN A THERAPEUTIC KEY, *supra* note 8, at 7.

11. William Spaulding et al., *Applications of Therapeutic Jurisprudence in Rehabilitation For People with Severe and Disabling Mental Illness*, 17 T.M. COOLEY L. REV. 135, 136 (2000).

12. *Id.* Some laws require a specific diagnosis of a mental illness when determining legal competence, culpability for crimes, or eligibility for public services. *Id.* at 137; *see* 53 AM. JUR. 2D *Mentally Impaired Persons* § 10 (2006) (stating that a showing of mental illness is required for civil commitments).

13. Spaulding et al., *supra* note 11, at 140.

14. *See id.* at 136 (indicating that laws that relate to public safety have been created to directly address problems associated with mental illness).

15. *Id.* at 151-55. “Just as . . . judges dealing with patent cases need to understand basic principles of engineering, judges performing in a problem-solving capacity . . . need to understand . . . the science of human behavior.” JUDGING IN A THERAPEUTIC KEY, *supra* note 8, at 7.

16. *See* Spaulding et al., *supra* note 11, at 170 (suggesting that the therapeutic jurisprudence perspective can help provide more informed decision-making by using advancements in mental health research for better outcomes for both society and the mentally-ill defendant).

17. BERMAN & FEINBLATT, GOOD COURTS, *supra* note 7, at 5.

18. Winick, *supra* note 6, at 1055.

drug treatment and mental health treatment.<sup>19</sup> The focus of these courts have a common underlying premise; courts should recognize and understand the social or psychological problems behind a dispute and solve these problems in a way that ensures that the offender will not return to jail.<sup>20</sup> Doing so will ensure that society is better protected.<sup>21</sup> Drug courts, domestic violence courts, unified family courts, and mental health courts are all examples of problem-solving courts that have been created across the United States.<sup>22</sup>

### C. ORIGIN OF THE PROBLEM-SOLVING MOVEMENT

Before the creation of specialized problem-solving courts, judges and lawyers faced enormous pressure to process cases quickly with little regard for the defendants, communities, or victims involved.<sup>23</sup> As caseloads began to rise, traditional courts began to develop systems that sought to achieve

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19. BERMAN & FEINBLATT, *GOOD COURTS*, *supra* note 7, at 32; see Michael C. Dorf & Jeffrey A. Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501, 1508 (2003) (explaining that a web of “reciprocal accountability” is created between mental health providers, courts, and defendants that reach beyond the conventional adversarial approach).

20. BERMAN & FEINBLATT, *GOOD COURTS*, *supra* note 7, at 32.

21. *Id.*

22. *Id.* at 7-8; see Winick, *supra* note 6, at 1056 (discussing specialized courts established to address specific issues). Drug courts are specialized courts created in response to the failure to address addictive behavior problems when processing drug possession charges that are nonviolent. *Id.* at 1056. As a result, the offenders often resume abusing drugs after release from prison and end up back in court. *Id.* Drug courts emphasize the offender’s rehabilitation, and defendants who agree to participate are monitored with mandatory drug testing. *Id.* at 1057; see generally OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, *DRUG COURTS: THE SECOND DECADE* (2006), available at <http://www.ncjrs.gov/pdffiles1/nij/211081.pdf> (explaining the proliferation and success of drug courts across the United States). Domestic violence courts focus on psychological problems associated with batterers and often require attendance in batterer intervention programs, along with strict monitoring of court orders. BERMAN & FEINBLATT, *GOOD COURTS*, *supra* note 7, at 7-8; see, e.g., Randal B. Fritzler & Leonore M.J. Simon, *The Development of a Specialized Domestic Violence Court in Vancouver, Washington Utilizing Innovative Judicial Paradigms*, 69 UMKC L. REV. 139, 139 (2000) (demonstrating the impact of a domestic violence court as a catalyst for system reform). Unified family courts concentrate on addressing the legal, emotional, and social problems associated with family law cases. Barbara A. Babb & Judith D. Moran, *Substance Abuse, Families, and Unified Family Courts: The Creation of a Caring Justice System*, 3 J. HEALTH CARE L. & POL’Y 1, 3-4 (1999); see also Susan L. Brooks & Dorothy E. Roberts, *Social Justice and Family Court Reform*, 40 FAM. CT. REV. 453, 455 (2002) (noting that unified family courts address all of the family’s issues in one court and use therapeutic jurisprudence to concentrate on the underlying problems occurring within the family).

23. Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, in *JUDGING IN A THERAPEUTIC KEY*, *supra* note 8, at 76; see BERMAN & FEINBLATT, *GOOD COURTS*, *supra* note 7, at 17 (noting that many courts “lack a coherent logic” and few resources are used to address issues such as mental illness and drug abuse which fuel increases in caseloads).

tangible outcomes, such as reduced recidivism.<sup>24</sup> Many judges became frustrated with not having the ability to address the underlying problem even when following appropriate procedures and making certain that the litigant's legal rights were protected.<sup>25</sup> Former Minnesota Chief Justice, Kathleen Blatz, summarized what judges experienced by noting, "You know, I feel like I work for McJustice: we sure aren't good for you, but we are fast."<sup>26</sup>

Traditional courts have not been able to adequately address the underlying problems associated with mentally ill defendants stemming from lack of intervention.<sup>27</sup> The traditional court process has been described as measuring performance by process rather than by outcomes.<sup>28</sup> In many cases, the conventional processing of a case resulting in short-term jail, probation, and "sentences where the offender is basically told to stay out of trouble," fails to address how to prevent the criminal behavior from occurring in the future.<sup>29</sup> Increased recidivism has generated broad effects that strain court resources, overcrowd jails, and result in ineffective treatment.<sup>30</sup> As a result, the problem-solving movement emerged by borrowing strategies from other disciplines such as alternative dispute resolution, therapeutic jurisprudence, and juvenile courts to deal with issues surrounding criminals who are being recycled through the system.<sup>31</sup> Within the problem-solving model, courts focus on valuing emotional well-being and human needs by using therapeutic jurisprudence as a theoretical foundation.<sup>32</sup> Judges and attorneys become problem-solvers rather than

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24. Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, in JUDGING IN A THERAPEUTIC KEY, *supra* note 8, at 79. Recidivism refers to a tendency toward habitual, repeated criminal activity. BLACK'S LAW DICTIONARY 1297 (8th ed. 2004).

25. See Winick, *supra* note 6, at 1060 (explaining that the traditional court model did not address the underlying problem, and it re-emerged requiring further judicial intervention).

26. Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, in JUDGING IN A THERAPEUTIC KEY, *supra* note 8, at 77.

27. See Gregory L. Acquaviva, Comment, *Mental Health Courts: No Longer Experimental*, 36 SETON HALL L. REV. 971, 974 (2006) (noting that judges have become frustrated with the "traditional handling of mentally ill offenders"). The adversarial approach may be effective for some criminal cases, but not for other "minor" cases involving shoplifting or petty drug offenses. BERMAN & FEINBLATT, GOOD COURTS, *supra* note 7, at 4.

28. BERMAN & FEINBLATT, GOOD COURTS, *supra* note 7, at 27.

29. *Id.* at 17.

30. Acquaviva, *supra* note 27, at 975.

31. BERMAN & FEINBLATT, GOOD COURTS, *supra* note 7, at 39.

32. See Cait Clarke & James Neuhard, "From Day One": Who's in Control as Problem Solving and Client-Centered Sentencing Take Center Stage?, 29 N.Y.U. REV. L. & SOC. CHANGE 11, 14 (2004) (explaining that many defense lawyers who use a client-centered advocacy approach are trying to address the underlying problems that brought the defendant into court in the first place); see also James R. Walker, *Getting the Mentally Ill Misdemeanant Out of Jail*, 6 SCHOLAR 371, 392 (2004) (suggesting that a therapeutic justice approach can effectively deal with "chronic, relapse-prone" disorders).

simply “case processors,” and view their cases as more than just matters to be adjudicated.<sup>33</sup>

Today, more than 2000 problem-solving courts exist in the United States.<sup>34</sup> All of these courts share special characteristics relating to the structure and function of processing cases.<sup>35</sup> Problem-solving courts are defining success in innovative ways and are forced to think thoroughly about outcomes of the court process, not only for the defendant, but also for the community.<sup>36</sup> With more involvement of judicial authority, judges stay closely involved in problem-solving courts and promote compliance with orders.<sup>37</sup>

Additionally, problem-solving courts recognize that rising caseloads are part of a larger social problem within a community.<sup>38</sup> For example, drug addiction and mental illness are recognized as social problems that contribute to the rising caseload.<sup>39</sup> Problem-solving courts try to understand what is fueling the caseload and also the underlying problems that brought the person to court in the first place.<sup>40</sup> Furthermore, problem-solving courts bring new tools from a variety of disciplines such as government, non-profit organizations, and human service agencies to achieve their goals.<sup>41</sup> Moreover, existing legal actors take on new roles.<sup>42</sup> Judges in problem-solving courts seek to “resolve both the judicial case and the problem that produced it.”<sup>43</sup> The role of attorneys changes from an adversarial approach to a team approach when working with social workers and other court members to implement a successful plan ensuring that the problem is resolved and the defendant does not have a reoccurrence of the criminal behavior.<sup>44</sup>

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33. BERMAN & FEINBLATT, GOOD COURTS, *supra* note 7, at 5.

34. *Id.* at 9 (“Every state has at least one.”).

35. *Id.* at 34-35.

36. *Id.*

37. *Id.* at 35.

38. *Id.* at 36.

39. *See* Winick, *supra* note 6, at 1060 (explaining that mental illness and drug addiction problems often require “repeated judicial intervention”).

40. BERMAN & FEINBLATT, GOOD COURTS, *supra* note 7, at 36.

41. *Id.* at 36-37. For example, connecting people to community resources, monitoring progress, and ensuring that needed services and treatment are provided are tools developed by other agencies that problem-solving courts apply in the court process. Winick, *supra* note 6, at 1061.

42. BERMAN & FEINBLATT, GOOD COURTS, *supra* note 7, at 37.

43. Winick, *supra* note 6, at 1061.

44. BERMAN & FEINBLATT, GOOD COURTS, *supra* note 7, at 37.

### III. DEVELOPMENT OF MENTAL HEALTH COURTS

Mental health courts (MHCs) are problem-solving courts that use the therapeutic jurisprudence model with collaboration from mental health care professionals to provide mental health treatment to offenders in an attempt to prevent repeated criminal activity.<sup>45</sup> MHCs are created in an effort to divert offenders with mental illness away from jail and prison.<sup>46</sup> Moreover, MHCs were created out of the problem-solving court model to address the underlying problems fueled by caseloads involving mentally ill offenders.<sup>47</sup> Also, the MHCs have been developed in response to the repeated occurrence of problem behavior that requires the court to intervene each time it occurs.<sup>48</sup> In order to examine how MHCs emerged on the American legal landscape, it is necessary to explain how and why mentally ill offenders have become a large segment of the criminal population in courts, jails, and prisons across the country.<sup>49</sup>

#### A. IMPACT OF DEINSTITUTIONALIZATION

Beginning in the 1950s, the need for the institutionalization of the mentally ill began to decrease as a result of more effective treatment options, such as psychiatric medications.<sup>50</sup> In the 1970s, civil commitment statutes were being changed to make it more difficult to commit mentally ill individuals into mental institutions.<sup>51</sup> During the 1970s, legislators and reformers wanted to change policies related to civil commitments to reflect the least restrictive means possible to treat mentally ill patients.<sup>52</sup> The gradual shift of individuals from state-operated mental hospitals to

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45. Acquaviva, *supra* note 27, at 985-86.

46. *Id.* at 985. Mental health courts were created in response to the overrepresentation of individuals with mental illnesses involved in the criminal justice system. COUNCIL OF STATE GOV'TS, BUREAU OF JUSTICE ASSISTANCE, A GUIDE TO MENTAL HEALTH COURT DESIGN AND IMPLEMENTATION 1 (2005), available at <http://consensusproject.org/mhcp/Guide-MHC-Design.pdf> [hereinafter COUNCIL OF STATE GOV'TS]. In comparison to other responses to this problem, the MHC approach involves a court docket that is only composed of defendants with mental illnesses, and there is a team-based monitoring system. *Id.* at 2.

47. COUNCIL OF STATE GOV'TS, *supra* note 46, at 3-4.

48. Acquaviva, *supra* note 27, at 974-75. Traditional interventions have not addressed the underlying problem resulting in a re-emergence of the problem "necessitating repeated judicial intervention." *Id.* at 975.

49. See DENCKLA & BERMAN, *supra* note 2, at 2 (explaining that a variety of causes can be linked to the "phenomenon" of the increasing number of mentally ill offenders in prison).

50. *Id.* at 2. Psychiatric medications created the option of treatment on an outpatient basis for many severe mental disorders. *Id.* at 2. Medications, such as Chlorpromazine, reduced deviant behaviors in patients and allowed them to be treated in the community rather than in an institution. Walker, *supra* note 32, at 378.

51. DENCKLA & BERMAN, *supra* note 2, at 2.

52. *Id.*

community-based treatment is often referred to as “deinstitutionalization.”<sup>53</sup> Deinstitutionalization impacted the number of individuals with mental illness, who were forced out of hospitals and back into the community to receive treatment, because many could be treated on an outpatient basis rather than requiring institutionalization.<sup>54</sup> However, many mentally ill individuals returned to their communities only to find no resources or community-based treatment services available.<sup>55</sup>

#### B. THE COURTS’ ROLE IN DEINSTITUTIONALIZATION

Over time, the courts have had an impact on the deinstitutionalization process.<sup>56</sup> Courts began to intervene and strike down statutes that authorized involuntary hospitalization of those who were non-violent.<sup>57</sup> For example, in *Lessard v. Schmidt*,<sup>58</sup> a federal district court held that a Wisconsin statute relating to civil commitment should be struck down on the basis that it had no connection with the state’s goals in regard to the criminal justice system.<sup>59</sup> The plaintiff in *Lessard* had the right to challenge the involuntary civil commitment order if it could be shown that she was not a danger to society.<sup>60</sup> The state’s interests were not furthered by her commitment.<sup>61</sup> Therefore, the court recognized that the civil commitment procedures did not provide adequate due process.<sup>62</sup>

Additionally, in 1975, the United States Supreme Court held in *O’Connor v. Donaldson*<sup>63</sup> that a state cannot confine an individual who is not a danger to his or her community and who is capable of surviving without assistance.<sup>64</sup> In *O’Connor*, the Supreme Court held that ordering a civil commitment cannot be based on a showing of mental illness alone.<sup>65</sup> If the mentally ill person is not a danger to society, the state cannot confine

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53. *Id.*

54. See GOIN, *supra* note 4, at 2 (explaining that in 1955, the population of mental hospitals was 559,000, and in 1999, it was approximately 80,000).

55. DENCKLA & BERMAN, *supra* note 2, at 3; see GOIN, *supra* note 4, at 2 (suggesting that the integration of people with mental illnesses back into the community was never adequately funded).

56. See LeRoy L. Kondo, *Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders*, 28 AM. J. CRIM. L. 255, 268-69 (2001) (explaining the impact of court intervention on deinstitutionalization).

57. *Id.* at 268.

58. 413 F. Supp. 1318 (E.D. Wis. 1976).

59. *Lessard*, 413 F. Supp. at 1320.

60. *Id.*

61. *Id.*

62. *Id.* at 1319.

63. 422 U.S. 563 (1975).

64. *O’Connor*, 422 U.S. at 576.

65. *Id.* at 575.

the individual to a mental hospital.<sup>66</sup> Many states began to amend their statutes relating to civil commitment and individuals with mental illness left the state mental health hospitals to receive community-based treatment.<sup>67</sup> However, community treatment options were not made available, leaving many mentally ill people with no support services.<sup>68</sup> The difficulty in providing access to treatment in the community was an “unintended consequence” of the shift resulting from the change in public policy.<sup>69</sup> In what is often referred to as a “mass exodus,” deinstitutionalization caused a dramatic change in the way communities accommodate individuals with a mental illness.<sup>70</sup> Many communities were not prepared for the impact of deinstitutionalization and are still trying to find resources to provide services for mentally ill persons in the community.<sup>71</sup>

A recent case shows the Supreme Court’s recognition of the importance of community based treatment in providing the least restrictive means of treatment for mentally ill people who do not pose a threat to society.<sup>72</sup> The United States Supreme Court held in *Olmstead v. L.C.*<sup>73</sup> that states must provide community-based treatment when mental health professionals determine that the patient can be better served in the community, rather than in a state mental hospital.<sup>74</sup> The Court based its decision on provisions of the Americans with Disabilities Act (ADA), which impacted anti-discrimination policies relating to individuals with disabilities in public services.<sup>75</sup> Both the *Olmstead* decision and the ADA have corrected discrimination experienced by individuals with mental

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66. *Id.*

67. DENCKLA & BERMAN, *supra* note 2, at 3.

68. *Id.*

69. *Id.*

70. Acquaviva, *supra* note 27, at 980; *see* Walker, *supra* note 32, at 378 (noting that the “mass exodus” describes the dramatic shift of the mentally ill from institutions into the community).

71. *See* DENCKLA & BERMAN, *supra* note 2, at 3 (noting the lack of access to mental health treatment in the community and indicating that “transinstitutionalization” is the term often used to explain the rise of mentally ill offenders in prisons after deinstitutionalization from state mental health facilities began).

72. *See* *Olmstead v. L.C.*, 527 U.S. 581, 587 (1999) (holding that when mental health professionals determine a patient can be accommodated in the community, transfer from an institutional setting to community-based treatment is appropriate).

73. 527 U.S. 581 (1999).

74. *Olmstead*, 527 U.S. at 607.

75. *Id.* at 592. “Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from 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.” Americans with Disabilities Act, 42 U.S.C. § 12132 (2006).

illness.<sup>76</sup> Even though court involvement created many improvements in the well-being of individuals with mental illness, the lack of available community-based treatment options left some individuals receiving no treatment.<sup>77</sup>

### C. THE REVOLVING DOOR

Often referred to as the “revolving door,” mentally ill offenders are repeatedly recycled through the criminal justice system when they return to jail without receiving appropriate treatment for their illness after living in the community.<sup>78</sup> In many cases, the “revolving door” process traps mentally ill offenders.<sup>79</sup> The process often starts with offenders committing a petty crime, such as urinating in public or shoplifting, and, in many situations, the petty crime leads to incarceration, followed by release, and ending in prison for another offense.<sup>80</sup> However, an offender’s mental condition often deteriorates while in jail, and his or her mental decline contributes to an already present mental illness.<sup>81</sup> The problems surrounding offenders trapped in the “revolving door” have forced the criminal justice system to re-examine how to cope with offenders who have serious mental illness.<sup>82</sup>

### D. ILL-EQUIPPED JAILS AND PRISONS

Jails and prisons are often ill-equipped to provide for the needs of mentally ill offenders.<sup>83</sup> Treating such offenders in a prison requires time, which is why many inmates with mental illnesses serve longer sentences than other prisoners who have committed the same crime.<sup>84</sup> “Our jails,

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76. See generally Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes be Undone?*, 8 J.L. & HEALTH 15, 15 (1993-94) (explaining that the ADA is the most far-reaching federal legislation relating to the discrimination of people with disabilities).

77. DENCKLA & BERMAN, *supra* note 2, at 3.

78. Acquaviva, *supra* note 27, at 974-75.

79. Kondo, *supra* note 56, at 257.

80. *Id.* “In Florida, a mentally ill homeless man was arrested for shoplifting a \$1.16 ice cream sandwich. He was imprisoned because he lacked the \$25 bail necessary for release.” *Id.* at 256. Twenty-five percent of state prisoners and jail inmates with mental illness have served an average of three or more previous incarcerations. JAMES & GLAZE, *supra* note 1, at 1.

81. Acquaviva, *supra* note 27, at 979-80.

82. *Id.* at 977.

83. Richard A. Marini, *Mental Health Courts Focus on Treatment; Criminals Often Overlooked in Traditional System are Sentenced to Hospital Care*, in JUDGING IN A THERAPEUTIC KEY, *supra* note 8, at 60.

84. See JAMES & GLAZE, *supra* note 1, at 8 (indicating that state prisoners with mental illnesses serve a reported five months longer than prisoners without mental illnesses); see also PAULA DITTON, U.S. DEP’T OF JUSTICE, NO. 147633, MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS 8 (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/mhtip.pdf> (explaining that mentally ill prison inmates served more time than inmates without mental illness).

whether we like it or not, are becoming [the nation's] largest mental-health facilities."<sup>85</sup> According to the Bureau of Justice Statistics, fifty percent of prison inmates and thirty-four percent of jail inmates report receiving medication to treat mental illness while incarcerated.<sup>86</sup> In many respects, the criminal justice system has become the mental health system for mentally ill offenders who populate jails and prisons.<sup>87</sup> The fact that people with mental illness are overrepresented in jails and prisons across the nation indicates that the public mental health systems are not adequate or accessible to those in need of it.<sup>88</sup>

In addition, many jails and prisons find that they cannot provide the adequate care necessary to treat seriously mentally ill inmates.<sup>89</sup> In *Estelle v. Gamble*,<sup>90</sup> the United States Supreme Court held that when prisoners are subjected to "deliberate indifference" by prison staff providing for the medical needs of the inmate, there is a violation of the Eighth Amendment which involves "unnecessary and wanton infliction of pain."<sup>91</sup> The Court noted that denying medical treatment to prison inmates causes pain and suffering that does not serve a "penological purpose."<sup>92</sup>

For example, in *Coleman v. Wilson*,<sup>93</sup> the federal court for the Eastern District of California held that the Eighth Amendment to the United States Constitution requires states to provide for the "basic human needs of prison inmates."<sup>94</sup> This obligation includes access to appropriate mental health care.<sup>95</sup> The court noted that proving a violation of the right to appropriate care depends on whether the deprivation is "sufficiently serious," or whether it is a serious medical need without which the inmate's condition would deteriorate.<sup>96</sup> Also, there must be "deliberate indifference" by the

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85. Kondo, *supra* note 56, at 257.

86. DITTON, *supra* note 84, at 9.

87. See GOIN, *supra* note 4, at 2 ("Our jails and prisons . . . have become the primary mental health care facilities in the United States today").

88. See DENCKLA & BERMAN, *supra* note 2, at 3 (explaining that many people with mental illness live in their communities with inadequate support services).

89. See Jeff Wellborn, *Responding to Individuals with Mental Illness*, FBI LAW ENFORCEMENT BULL., Nov. 1999, at 6 (noting that law enforcement officers are trained to enforce the law and not necessarily trained to interact with mentally ill persons).

90. 429 U.S. 97 (1976).

91. *Estelle*, 429 U.S. at 104 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)). "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

92. *Estelle*, 429 U.S. at 103.

93. 912 F. Supp. 1282 (E.D. Cal. 1995).

94. *Coleman*, 912 F. Supp. at 1297.

95. *Id.* at 1298 (citing *Doty v. County of Lassen*, 37 F.3d 540, 546 (9th Cir. 1994)).

96. *Id.*; see *Ramos v. Lamm*, 639 F.2d 559, 578 (10th Cir. 1980) (holding that the Eighth Amendment was violated where the lack of mental health care involving a once-per-month visit to

prison staff to provide care to the inmate.<sup>97</sup> However, the court noted that although the inmate might be receiving treatment for his or her mental illness, it might not be adequate.<sup>98</sup> Under those circumstances, an Eighth Amendment claim would not be appropriate unless it was found to be “deliberately indifferent.”<sup>99</sup>

In some cases, jail staff fail to provide adequate treatment necessary for mentally ill inmates.<sup>100</sup> For example, in 1998 the Seventh Circuit decided *Lawson v. Trowbridge*,<sup>101</sup> where an individual with schizophrenia was placed in solitary confinement without receiving the medication he needed.<sup>102</sup> Between November 19, 1993, and March 3, 1994, Lawson did not receive any medication for his mental illness.<sup>103</sup> In a retrial, a jury awarded Lawson four hundred thousand dollars in compensatory damages and five million dollars in punitive damages.<sup>104</sup> *Lawson* provides an example of a situation involving an ill-equipped jail that was not able to provide appropriate treatment for a severely mentally ill inmate.<sup>105</sup>

These cases demonstrate that jails and prisons were never intended to be mental hospitals.<sup>106</sup> Often, inmates leave prison in the same condition they came in as, or worse, they leave prison with a deteriorating mental condition that went untreated while incarcerated.<sup>107</sup> Ill-equipped jails and prisons have contributed to the revolving door process when mentally ill offenders are released and are unable to access community-based treatment.<sup>108</sup> Recognizing this problem, courts have developed innovative approaches to address the complex problems that arise with mentally ill

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the prison from a psychiatrist was found to be “ridiculously pathetic” and not reasonably adequate).

97. *Coleman*, 912 F. Supp at 1298.

98. *Id.*

99. *Id.*

100. See HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 94 (2003), available at <http://www.hrw.org/reports/2003/usa1003/usa1003.pdf> (explaining that many prisons do not provide necessary mental health care to inmates).

101. 153 F.3d 368 (7th Cir. 1998).

102. *Lawson*, 153 F.3d at 371-72.

103. *Id.*

104. JUDGE DAVID L. BAZELON CTR. FOR MENTAL HEALTH LAW, *Federal Jury Awards \$5.4 million in Damages for Solitary Confinement of Prisoner with Schizophrenia*, <http://www.bazelon.org/newsroom/archive/1999/3-10-99lawson.htm> (last visited Jan. 20, 2006).

105. See *id.* (stating that the *Lawson* case is important because it recognized the problem of inadequate mental health treatment in jail).

106. See DENCKLA & BERMAN, *supra* note 2, at 3 (stating that jails and prisons were not intended to be psychiatric institutions).

107. *Id.* at 3-4.

108. *Id.* at 4; see, e.g., Alan Feuer, *Out of Jail, Into Temptation: A Day in a Life*, N.Y. TIMES, Feb. 28, 2002, at A1 (providing insight into the life of a released drug offender and the potential likelihood for re-offending).

defendants who commit petty crimes and are recycled through the system.<sup>109</sup> One of these innovations is the development of MHCs.<sup>110</sup>

#### E. THE PROLIFERATION OF MENTAL HEALTH COURTS

Today, there are approximately 150 MHCs across the United States.<sup>111</sup> The structure and process of MHCs requires collaboration between the criminal justice and mental health systems in a community because both systems often collide when people with mental illness end up in jail.<sup>112</sup> The collaboration of the mental health system and criminal justice system to address the needs of the mentally ill offender is a necessary component to the effectiveness of MHCs.<sup>113</sup>

MHCs have been defined as specialized dockets where participants with mental illness voluntarily agree to a treatment program developed by a team comprised of mental health providers and court personnel.<sup>114</sup> MHCs are based on the problem-solving court model, which involves focusing on the underlying problem behind a defendant's introduction to the criminal justice system.<sup>115</sup> Non-adherence to the treatment plan may be sanctioned, while adherence may be rewarded.<sup>116</sup> In some cases, incarceration may be the appropriate option for mentally ill offenders who pose serious threats to public safety.<sup>117</sup> However, for those who do not pose threats to the public nor have violent criminal records, incarceration may not make sense.<sup>118</sup> Because of the alarming rate at which mentally ill offenders are entering the criminal justice system, many states have developed MHCs in an effort to address problems such as overcrowding, recidivism, and strained

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109. JUDGING IN A THERAPEUTIC KEY, *supra* note 8, at 59.

110. *Id.*

111. E-mail from Nesa Wasarhaley, Research Assistant, Council of State Governments (June 22, 2007 16:19:30 CST) (on file with author); see NAT'L ALLIANCE FOR THE MENTALLY ILL, SURVEY OF MENTAL HEALTH COURTS (2005) [hereinafter SURVEY] (indicating that as of December 2005, there were more than 113 MHCs); see also COUNCIL OF STATE GOV'TS, MENTAL HEALTH COURTS: A NATIONAL SNAPSHOT, <http://www.consensusproject.org/mhcourts/national-snapshot.pdf> (indicating that as of June 2005, more than 125 MHCs were implemented in the United States).

112. Munetz & Teller, *supra* note 3, at 935.

113. See *id.* at 937 (explaining that an important step to successful collaboration is the ability of the mental health system and the criminal justice system to work together to find solutions).

114. COUNCIL OF STATE GOV'TS, *supra* note 46, at 2.

115. *Id.* at iv.

116. *Id.* at 2.

117. DENCKLA & BERMAN, *supra* note 2, at 1.

118. See *id.* (noting that the significant costs and the lack of a therapeutic environment in the prison setting are obvious drawbacks to incarcerating mentally ill offenders that do not have violent criminal records).

resources.<sup>119</sup> Also, MHCs are utilized to provide adequate and appropriate treatment, which some offenders might not have had access to otherwise.<sup>120</sup>

According to Judge Randal B. Fritzler, creating a MHC that can be utilized as an instrument of risk management requires restructuring the court process.<sup>121</sup> Judge Fritzler provides ten key components that are necessary in structuring MHCs.<sup>122</sup> First, a specialized team must be created to manage the cases involving offenders who are mentally ill.<sup>123</sup> The team should be comprised of attorneys, mental health workers, and the judge.<sup>124</sup> Second, labeling and stigmatization should not be allowed inside the courtroom.<sup>125</sup> It is important not to label defendants based on their medical diagnoses.<sup>126</sup> Third, sentencing processes should involve an incentive, such as avoiding conviction.<sup>127</sup> Fourth, the least restrictive means should be used to get clients into supportive programs.<sup>128</sup> The means by which this is done should always take into account public safety.<sup>129</sup> Fifth, the court should encourage the welfare of the defendant by promoting the enhancement of basic treatment options available.<sup>130</sup> Next, the sixth component provides that the court should support autonomous decision-making relating to the defendant's mental health issues with suggestions from the mental health team.<sup>131</sup> Also, the seventh component notes that the technical rules of the courtroom should not apply in the MHC environment.<sup>132</sup> This prohibition creates more meaningful participation among legal actors in the courtroom, as opposed to an adversarial approach.<sup>133</sup> The eighth component in structuring a MHC is the drafting of

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119. *Id.* at 7.

120. Ronda Cress et al., *Mental Health Courts and Title II of the ADA: Accessibility to State Court Systems for Individuals with Mental Disabilities and the Need for Diversion*, 25 ST. LOUIS U. PUB. L. REV. 307, 332-33 (2006).

121. Judge Randall B. Fritzler, *10 Key Components of a Criminal Mental Health Court*, in JUDGING IN A THERAPEUTIC KEY, *supra* note 8, at 118.

122. *Id.* at 118-21.

123. *Id.* at 118.

124. *Id.*; see COUNCIL OF STATE GOV'TS, *supra* note 46, at 63 (noting that the mental health court team typically is comprised of a judicial officer and treatment provider, or case manager, who provide direct services to defendants).

125. Judge Randall B. Fritzler, *10 Key Components of a Criminal Mental Health Court*, in JUDGING IN A THERAPEUTIC KEY, *supra* note 8, at 119.

126. See *id.* (noting that labels cause unnecessary stigmatization and feelings of powerlessness).

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 120.

131. *Id.*

132. *Id.*

133. *Id.*

a manual that includes the client's rights and the specific procedures that will be adopted by the court.<sup>134</sup> Ninth, the opportunity to intervene and get treatment for the client should be utilized as soon as the client is arrested.<sup>135</sup> The time soon after the participant is arrested is when the defendant might be more receptive to receiving the help that he or she needs.<sup>136</sup> Finally, a dedicated court team that has a meaningful review process concerning the needs of the client is required in order to structure the MHC in a way that effectively addresses the underlying problem.<sup>137</sup> The court team must consistently reassess the participant's response to treatment in order to provide risk management.<sup>138</sup> The ten components are important because they establish how the MHC should be structured to provide the benefits of a problem-solving court approach.<sup>139</sup>

Also, along with the restructuring of the court process, the MHC approach expands the traditional roles of the judge and attorneys.<sup>140</sup> As the structure and process of the court changes, the defense attorney, prosecutor, and judge play important roles in providing a meaningful review process of the mentally ill defendant in a MHC.<sup>141</sup> The next section will examine how the roles of defense attorneys, prosecutors, and judges are expanded in MHCs.

#### IV. STAKEHOLDERS IN THE MENTAL HEALTH COURT: A NONTRADITIONAL ROLE

The development of problem-solving courts, such as MHCs, requires collaboration with policy-makers and mental health providers to address gaps in the system.<sup>142</sup> Interaction between public health agencies in the community, mental health advocates, and the court system is necessary to ensure that mental health care is accessible and affordable for offenders with mental illness.<sup>143</sup> For these reasons, the legal actors take on new roles

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134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 121.

138. *Id.*

139. *Id.* at 118.

140. COUNCIL OF STATE GOV'TS, *supra* note 46, at 63.

141. *Id.*

142. *Id.* at 61-62; *see* THE PRESIDENT'S NEW FREEDOM COMM'N ON MENTAL HEALTH, ACHIEVING THE PROMISE: TRANSFORMING MENTAL HEALTH CARE IN AMERICA 1 (2003), *available at* <http://www.mentalhealthcommission.gov/reports/FinalReport/downloads/ExecSummary.pdf> (noting the fragmented mental health system is a substantial obstacle for getting effective treatment).

143. COUNCIL OF STATE GOV'TS, *supra* note 46, at 62.

in MHCs.<sup>144</sup> The development of the courtroom team expands the traditional professional roles of attorneys and judges by shifting away from an adversarial approach.<sup>145</sup> Instead, defense attorneys may find themselves trying to extend supervision when necessary.<sup>146</sup> Prosecutors may find themselves working for the best interest of the defendant, and judges may find themselves acting more like probation officers or social workers, rather than “impartial arbiters of fact.”<sup>147</sup>

#### A. DEFENSE ATTORNEYS

The unique role of the defense attorney within the MHC model continues to encompass the traditional role of advocating for the best interests of the client.<sup>148</sup> However, the role of translator and representative becomes even more important for clients with serious mental illnesses.<sup>149</sup> Because budget cuts in social services and deinstitutionalization fuel large workloads, defenders are finding it necessary to re-examine effective strategies for their clients with serious mental illness.<sup>150</sup> Further, where appropriate alternatives are available, defense attorneys can help the client find meaningful, effective treatment.<sup>151</sup>

On the other hand, many defense attorneys have paid little attention to alternatives, innovative diversions, and negotiations for their criminal clients.<sup>152</sup> Examples of these alternatives include community education alternatives, training programs, and treatment programs.<sup>153</sup> Other stakeholders in the criminal justice system view defense attorneys as being too focused on the client instead of on treatment programs and community safety.<sup>154</sup> Moreover, some defenders avoid the problem-solving model

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144. JUDGING IN A THERAPEUTIC KEY, *supra* note 8, at 5.

145. COUNCIL OF STATE GOV'TS, *supra* note 46, at 63.

146. *Id.*

147. *Id.*

148. CONSENSUS PROJECT, *supra* note 3, at 75. Counsel should be appointed as soon as possible when a person enters the system because there are “critical stages” that occur prior to trial. ABA STANDARDS FOR CRIMINAL JUSTICE PROVIDING DEFENSE SERVICES 77-78 (3d ed. 1992).

149. CONSENSUS PROJECT, *supra* note 3, at 74.

150. Clarke & Neuhard, *supra* note 32, at 18-19.

151. CONSENSUS PROJECT, *supra* note 3, at 74. “[A]ttorneys have a responsibility to know about the mental health resources in the community—both their quality and their availability—that might be appropriate for clients with mental health issues . . .” *Id.* Also, pretrial services agencies or programs can identify individuals who might need special treatment before trial. NAT'L ASS'N OF PRETRIAL SERVICES, NAPSA RELEASE STANDARDS AND COMMENTARY 55 (2004), available at <http://www.dcjs.virginia.gov/corrections/pretrial/napsaStandards2004.pdf>.

152. Clarke & Neuhard, *supra* note 32, at 13-14.

153. *Id.* at 22.

154. *Id.* at 13-14.

because they fear that it compromises their ethical conduct in advocating zealously for their client.<sup>155</sup> As traditional roles change, new ethical questions arise.<sup>156</sup> However, it has always been the role of defense attorneys to protect fairness in the system and the dignity of an accused client in the process.<sup>157</sup> Defense attorneys should embrace the development of alternatives such as MHCs in providing effective services for clients.<sup>158</sup>

When a case is heard using the problem-solving court model, the defense attorney focuses on the sentencing and treatment stages, rather than on the culpability stage.<sup>159</sup> “Winning” a case has a new meaning within the problem-solving court model.<sup>160</sup> “Winning means preserving human dignity and helping clients become productive and peaceful members of a community.”<sup>161</sup> As defenders become part of the solution, effective advocacy provides better outcomes for the client and community.<sup>162</sup>

When defense attorneys look to alternative approaches for mentally ill clients, they should look for opportunities that will meet the needs of the mentally ill client and opportunities that will serve justice at the same time.<sup>163</sup> One of the first steps for defense attorneys is to identify those clients who have mental illnesses.<sup>164</sup> By identifying a client who has a serious mental illness, the defense attorney can ensure the identification of appropriate alternatives.<sup>165</sup> Also, the defender can help clients’ families navigate the criminal justice system to ensure successful outcomes.<sup>166</sup> Although some defense attorneys are uncomfortable with this non-traditional approach, advocating for the best possible choice for the client

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155. *Id.*

156. *Id.* at 14.

157. *Id.* at 19.

158. *See id.* at 19 (explaining that defense counsel should take the initiative “to stake out the parameters of their ethical duties” as responsibilities shift beyond sentencing).

159. *Id.* at 23.

160. *Id.* at 22-23.

161. *Id.* at 23.

162. *Id.* at 21-22. New models of defense lawyering offer the chance for defenders to be “part of the solution, improving the community as a whole.” *Id.* at 22. When defense attorneys help clients get into programs, such as specialty courts, the potential for repeating the offense is reduced resulting in a better outcome for the community. *Id.* Also, helping the client get treatment for drug abuse or find employment is an important objective in defining the meaning of “winning” in a problem-solving court. *Id.* at 23.

163. CONSENSUS PROJECT, *supra* note 3, at 72.

164. *Id.* at 74.

165. *Id.* at 75.

166. *Id.* at 76. For example, the Urban Justice Center provides families with a handbook detailing the criminal justice process and advice for working with defense attorneys. *Id.*

and contesting the merits of the case are still encompassed within the problem-solving approach.<sup>167</sup>

## B. PROSECUTORS

In concurrence with the nontraditional role that defense counsel assumes in the MHC model, prosecutors' roles also expand when maximizing the use of alternatives through pretrial diversion.<sup>168</sup> While changes occur within this role, there are also important traditional goals that must be retained by the prosecutor.<sup>169</sup> Preserving the best interests of justice remains an important consideration.<sup>170</sup> Within the traditional framework of judicial process, offering a defendant the opportunity to participate in a MHC program can also serve the best interests of justice.<sup>171</sup>

When confronted with an offender with a mental illness, the prosecutor's chief concern is public safety.<sup>172</sup> Because prosecutors often view mentally ill offenders as being recycled through the criminal justice system, many prosecutors are now considering alternatives with the hope of reducing recidivism.<sup>173</sup> By focusing on risk assessment and case targeting alternatives, such as MHCs, prosecutors remain committed to general societal welfare.<sup>174</sup>

In traditional cases, prosecutors rely on criteria such as an offender's criminal record, danger to society, the nature of the offense, and the wishes of the victim in deciding whether the individual should be offered an alternative to the traditional criminal proceedings.<sup>175</sup> When the offender is mentally ill, a prosecutor should also consider whether the individual was receiving treatment in the community for a mental condition.<sup>176</sup> Also, prosecutors should consider the relationship between the mental illness and the behavior that resulted in arrest.<sup>177</sup> This approach is different from the

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167. BERMAN & FEINBLATT, *GOOD COURTS*, *supra* note 7, at 116-17.

168. CONSENSUS PROJECT, *supra* note 3, at 82.

169. *Id.* at 82 n.7.

170. *Id.* "The prosecutor plays an important role in the diversion process—he initiates the movement into diversion, and he must judge the efficaciousness of diversionary treatment." NAT'L PROSECUTION STANDARDS, No. 11.8 cmt. at 154 (Nat'l Dist. Att'ys Ass'n 1977). The prosecutor must keep "the rights of society in a paramount position." *Id.* at 9.

171. *See* CONSENSUS PROJECT, *supra* note 3, at 82 (explaining that the "best interests of justice" can be served by addressing the underlying problem that led to an offense).

172. DENCKLA & BERMAN, *supra* note 2, at 19.

173. *Id.* at 20.

174. *See id.* (explaining that case targeting focused on defining eligibility for those who do not pose a serious threat of violence is crucial to the prosecutor's priorities).

175. CONSENSUS PROJECT, *supra* note 3, at 82.

176. *Id.*

177. *Id.*

traditional judicial practice because it involves considering what would be the best outcome for the defendant.<sup>178</sup>

Furthermore, in the nontraditional approach, the collaboration between the defense and prosecution continues past the planning stage and into the implementation of the treatment program.<sup>179</sup> The prosecutor, along with the defense counsel should encourage the offender to succeed in the program.<sup>180</sup> In order to maintain effective collaboration, prosecutors in the MHC should respond to probation violations with adjustments to treatment programs, rather than imposing punishment.<sup>181</sup>

### C. THE JUDGE

By applying a collaborative approach in the problem-solving framework, the judge takes on a leading role.<sup>182</sup> The judge provides motivation, inspiration, and direction to decide how the legal actors in the courtroom will play their parts.<sup>183</sup> The collaborative philosophy puts the judge's focus on "solving problems" and not just "deciding cases."<sup>184</sup> In the context of problem-solving courts, such as MHCs, the judge's role is more proactive, and the judge explores a larger range of solutions.<sup>185</sup> Judges in problem-solving courts often "think outside the box" to create better alternatives that solve the underlying problem.<sup>186</sup>

Generally, the role of the judge in a conventional court involves the judge in an authoritative, formal position, looking primarily at prior precedent and focusing on past behavior or conduct.<sup>187</sup> However, in problem-solving courts, the judge acts as a coach providing effective collaboration to provide a common sense plan for the defendant to stay out of jail.<sup>188</sup> This nontraditional approach is more "people-oriented" rather than "claim or

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178. COUNCIL OF STATE GOV'TS, *supra* note 46, at 63.

179. BERMAN & FEINBLATT, *GOOD COURTS*, *supra* note 7, at 37.

180. *See id.* at 37 (indicating that attorneys work together in implementing a treatment plan to encourage success in the program).

181. COUNCIL OF STATE GOV'TS, *supra* note 46, at 63.

182. *See* JUDGING IN A THERAPEUTIC KEY, *supra* note 8, at 5 (suggesting that judges take a lead role in coordinating what happens in a problem-solving court).

183. *Id.*

184. Donald J. Farole Jr. et al., *Applying Problem-Solving Principles in Mainstream Courts: Lessons for State Courts*, 26 JUST. SYS. J. 57, 68 (2005).

185. *See id.* at 62-63 (indicating that judges determined that the problem-solving role allows them to provide individualized court orders which is helpful in negotiation situations).

186. *Id.* at 63.

187. JUDGING IN A THERAPEUTIC KEY, *supra* note 8, at 6 (citing Judge Roger K. Warren). "Tradition dictates that judges serve as neutral arbiters and that their work focus on process and penalties." BERMAN & FEINBLATT, *GOOD COURTS*, *supra* note 7, at 105.

188. JUDGING IN A THERAPEUTIC KEY, *supra* note 8, at 6 (citing Judge Roger K. Warren).

case-oriented.”<sup>189</sup> Moreover, the judge’s interaction with a defendant does not end when a final decision has been reached.<sup>190</sup> Instead, defendants are required to report back to judges regarding their progress.<sup>191</sup> Often, judges learn about the defendant’s personal problems and family life.<sup>192</sup> For example, a judge in Los Angeles County explained that he encourages defendants to speak about their treatment needs and side effects from medications, and the judge orders regular progress reports from physicians.<sup>193</sup> This direct interaction between the defendant and judge can motivate offenders to make progress.<sup>194</sup> In this role, judges “[treat] defendants with respect, [show] compassion, hav[e] faith in their ability to improve, and [see] them as potential law-abiding citizens.”<sup>195</sup>

Skeptics suggest that judges using this new approach focus on rehabilitation instead of individual responsibility.<sup>196</sup> However, the requirements of treatment plans in problem-solving courts make it necessary for defendants to do more in regard to hours of treatment, attendance in court sessions, and responsibility than is required in other conventional courts.<sup>197</sup> The judge remains the final link in a chain of supervision composed of the mental health and criminal justice staff.<sup>198</sup>

Another problem that judges face with MHCs is limited time and resources.<sup>199</sup> The lack of time and money for these types of courts and the pressure to “move cases along” has been noted as one of the most significant barriers to the judicial role.<sup>200</sup> Furthermore, judges often have to deal with attorneys who are not familiar with the problem-solving approach adopted by MHCs.<sup>201</sup>

The collaborative philosophy of the MHC model requires the legal actors to take on new roles.<sup>202</sup> Defense attorneys, prosecutors, and judges must collaborate with the mental health and criminal justice communities to

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189. *Id.*

190. *Id.*

191. BERMAN & FEINBLATT, GOOD COURTS, *supra* note 7, at 109.

192. *Id.*

193. Kondo, *supra* note 56, at 291.

194. Farole et al., *supra* note 184, at 63.

195. *Id.*

196. BERMAN & FEINBLATT, GOOD COURTS, *supra* note 7, at 98.

197. *Id.* at 108.

198. COUNCIL OF STATE GOV’TS, *supra* note 46, at 67.

199. Farole et al., *supra* note 184, at 66-67.

200. *Id.*

201. *Id.*

202. See BERMAN & FEINBLATT, GOOD COURTS, *supra* note 7, at 115 (acknowledging that in the problem-solving court model, judges, prosecutors and defense attorneys collaborate as a team).

provide effective advocacy.<sup>203</sup> Along with traditional goals, such as providing the best interests of justice and protection of public safety, the nontraditional goals, such as providing effective treatment, should also be considered when advocating for the best outcome for mentally ill offenders in the problem-solving court environment.<sup>204</sup>

## V. IMPLEMENTATION OF MENTAL HEALTH COURTS

The application of therapeutic jurisprudence in the courtroom led to the development of MHCs across the United States.<sup>205</sup> MHCs have implemented a non-adversarial approach with the judge eliciting collaboration from the mental health team.<sup>206</sup> All states that have implemented MHCs share the common goal of diverting mentally ill offenders away from “the criminal process to the treatment in the community that they need.”<sup>207</sup> This section will provide examples of MHCs that have been created in Florida and Minnesota and explain the response of Congress in relation to the positive outcomes of MHCs.<sup>208</sup> Further, the controversy surrounding the implementation of MHCs will be examined through perspectives of both proponents and critics of MHCs.<sup>209</sup>

### A. BROWARD COUNTY MENTAL HEALTH COURT

In 1997, the first MHC was created in Broward County, Florida.<sup>210</sup> Judge Ginger Lerner-Wren explained that the court was created “out of desperation.”<sup>211</sup> This desperation was the result of too many mentally ill offenders being recycled through the criminal justice system.<sup>212</sup> The MHC

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203. See COUNCIL OF STATE GOV'TS, *supra* note 46, at 52 (understanding basic information about mental illness is necessary for court practitioners in a MHC).

204. *Id.*

205. *Id.* at 5.

206. Kondo, *supra* note 56, at 291.

207. JUDGING IN A THERAPEUTIC KEY, *supra* note 8, at 59.

208. See SURVEY, *supra* note 111, at 14, 25 (providing descriptions of the Broward and Hennepin County MHCs).

209. See Susan Stefan & Bruce J. Winick, *A Dialogue on Mental Health Courts*, 11 PSYCHOL. PUB. POL'Y & L. 507, 507-08 (2005) (noting the arguments of those who support and oppose the implementation of MHCs).

210. Acquaviva, *supra* note 27, at 983; see JUDGE GINGER LERNER-WREN, NAT'L CTR. FOR STATE CTS., BROWARD'S MENTAL HEALTH COURT: AN INNOVATIVE APPROACH TO THE MENTALLY DISABLED IN THE CRIMINAL JUSTICE SYSTEM 2 (2000), available at [http://www.ncsconline.org/WC/Publications/KIS\\_ProSol\\_Trends99-00\\_FlaMentalPub.pdf](http://www.ncsconline.org/WC/Publications/KIS_ProSol_Trends99-00_FlaMentalPub.pdf). “The mission of the Mental Health Court is to better address the unique and complex needs of the mentally disabled misdemeanant defendant arrested for nonviolent offenses.” *Id.*

211. Acquaviva, *supra* note 27, at 984-85.

212. See *id.* (stating that Broward County received a report concerning the “severe shortfalls” in the mental health system).

in Broward County operated under the therapeutic jurisprudential framework, where the court acted as more than an adjudicator by taking an active role in finding effective treatment for offenders with mental illness.<sup>213</sup>

An example of a typical case coming before the Broward County MHC involves a person who is charged with loitering in front of a convenience store.<sup>214</sup> When brought to court, the person is often visibly agitated and fighting off the escorts who brought the person into the room.<sup>215</sup> To a conventional court, this behavior might appear to threaten public safety.<sup>216</sup> However, after considering the defendant's past record and mental condition, Judge Lerner-Wren may conclude that the person's conduct was a result of mental illness, and not the result of having a "criminal mind."<sup>217</sup>

To be eligible to participate in the MHC in Broward County, the offender must have an Axis I serious mental illness, brain impairment, or developmental disability.<sup>218</sup> Candidates for the court are typically identified by jail staff who are involved with the intake of the offender.<sup>219</sup> Also, offenses that qualify for the MHC include all misdemeanors except domestic violence and DUI.<sup>220</sup> If the eligibility requirements are met, the alternative that offenders are offered in Broward County is a supervised treatment plan for one year while charges are temporarily set aside.<sup>221</sup> In serious cases, a guilty plea may be required with credit for time served.<sup>222</sup> If a defendant does not adhere to the treatment plan, the sanctions include incarceration, change in treatment, and a hearing before the judge.<sup>223</sup> An evaluation of the Broward MHC found that most participants appearing before the court perceived that it provided an "opportunity to have their

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213. Kondo, *supra* note 56, at 287.

214. *Id.* at 286.

215. *Id.*

216. *Id.*

217. *Id.* at 287.

218. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 28 (4th ed. 2000) [hereinafter DSM IV] (indicating that Axis I disorders include severe depression and anxiety disorders); SURVEY, *supra* note 111, at 14 (explaining the criteria for eligibility in the Broward County MHC).

219. DENCKLA & BERMAN, *supra* note 2, at 8.

220. SURVEY, *supra* note 111, at 14. If the charge is battery, the victim's consent is required for the case to be transferred to the MHC. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

voice[s] heard.”<sup>224</sup> Moreover, the participants indicated that they did not perceive the experience to be coercive.<sup>225</sup>

#### B. HENNEPIN COUNTY MENTAL HEALTH COURT

After the Broward County MHC opened the door to a new court model, many counties began to plan and implement MHCs.<sup>226</sup> In 2003, Hennepin County, Minnesota, established a MHC.<sup>227</sup> The Hennepin County MHC has approximately 100 participants per year and is funded by the Bureau of Justice Assistance along with funding from the county.<sup>228</sup> The court team is composed of a mental health screener from the county human services agency, a probation officer, a judge, and two attorneys.<sup>229</sup> For offenders to be considered for participation in the MHC, a mental health screener will make an initial decision on eligibility.<sup>230</sup> Participants must have either an Axis I<sup>231</sup> or Axis II<sup>232</sup> mental illness and the offense must be a non-violent felony or misdemeanor.<sup>233</sup> The program also accepts offenders who have a co-occurring substance abuse problem.<sup>234</sup> The final decision on eligibility for the MHC remains with the judge, defense attorney, and prosecutor.<sup>235</sup> In order to qualify, the judge will require a guilty plea, and the offender will be placed on probation.<sup>236</sup> If a participant successfully completes the program, the case can be dismissed or the charge

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224. Louis de la Parte Fla. Mental Health Inst., Univ. of S. Fla., *The Effectiveness of the Broward Mental Health Court: An Evaluation*, POLICY BRIEF, Nov. 2002 at 2, available at <http://www.fmhi.usf.edu/institute/pubs/newsletters/policybriefs/issue016.pdf>.

225. *Id.* Results from an evaluation of the Broward County MHC indicated that:

The issue of coercion and its use permeates mental health law and policy, particularly though not exclusively with the on-going debate over civil commitment laws. Whether individuals *perceive* a particular intervention as coercive is important in assessing how coercive a particular intervention might be. The mental health court is perceived by those enrolled in the study as very non-coercive.

*Id.* at 2 (emphasis in original).

226. *See generally* SURVEY, *supra* note 111, at intro (indicating that in 2005, there were approximately 113 MHCs across the United States).

227. *Id.* at 26.

228. *Id.*

229. *Id.*

230. *Id.*

231. DSM IV, *supra* note 218, at 27-28. Axis I mental illnesses include major mental disorders, learning disabilities, and developmental disabilities. *Id.* at 28. Some examples of Axis I mental disorders include anxiety disorders, bipolar disorder, and schizophrenia. *Id.*

232. *Id.* at 28-29. Axis II mental illnesses include pervasive personality conditions and mental retardation. *Id.* at 29. Some examples of Axis II mental disorders include borderline personality disorder, antisocial personality disorder, and narcissistic personality disorder. *Id.*

233. SURVEY, *supra* note 111, at 26.

234. *Id.*

235. *Id.*

236. *Id.*

and sentence may be reduced.<sup>237</sup> If the participant does not successfully complete the program, the case is returned to the conventional criminal court to be processed as a traditional criminal case.<sup>238</sup>

The implementation of MHCs has resulted in positive reports of placing non-violent mentally ill offenders in judicially monitored treatment programs.<sup>239</sup> With the positive results from successful MHCs, Congress recognized the need for better alternatives for mentally ill offenders.<sup>240</sup> As a result of the implementation of MHCs, funding to create more innovative alternatives to incarceration for mentally ill offenders was initiated by the United States Congress.<sup>241</sup>

### C. FEDERAL LEGISLATION

As a result of the increased awareness of alternatives to incarceration for mentally ill offenders, Congress enacted the Mentally Ill Offender Treatment and Crime Reduction Act of 2004.<sup>242</sup> The purpose of the Act was to increase collaboration between the criminal justice system and the mental health system in order to facilitate public safety and provide treatment options for mentally ill offenders.<sup>243</sup> Another purpose of the Act was to increase communication between professionals and elected officials about the problems surrounding mentally ill offenders.<sup>244</sup>

Prior to the Act, Congress authorized monetary grants to states, state courts, local courts, units of local government, and Indian tribal governments for the development of MHCs.<sup>245</sup> The Mentally Ill Offender Treatment and Crime Reduction Act (MIOTCRA) funded the Justice and Mental Health Collaboration Program, which is administered by the Bureau of Justice Assistance (BJA).<sup>246</sup> In response to the overwhelming number of offenders with mental illnesses, Congress further examined how resources can be used more effectively to deal with the population of offenders.<sup>247</sup> Congressman Ted Strickland stated that “[i]nmates, families, correctional

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237. *Id.*

238. *Id.*

239. *See* America’s Law Enforcement and Mental Health Project, Pub. L. No. 106-515 § 2(5), 114 Stat. 2399, 2399 (2000) (finding positive results from the implementation of MHCs).

240. *Id.*

241. *Id.*

242. 42 U.S.C. § 3797aa (2006).

243. 150 CONG. REC. S11261 (Oct. 11, 2004).

244. *Id.*

245. 42 U.S.C. § 3796ii (2006).

246. BUREAU OF JUSTICE ASSISTANCE, MENTAL HEALTH COURTS PROGRAM, <http://www.ojp.usdoj.gov/BJA/grant/mentalhealth.html> (last visited June 18, 2007).

247. *See id.* (indicating that the MHC program seeks to implement and mobilize communities to find effective treatment for offenders with mental disabilities).

officers, judges, prosecutors and police are in unique agreement that our broken system of punting the most seriously mentally ill to the criminal justice system must be fixed.”<sup>248</sup>

Funding from the Act can be used to develop MHCs or other programs providing alternatives to jail that meet requirements established by the United States Attorney General.<sup>249</sup> Testimony given in support of the Act provided evidence of the concern that both mental health providers and criminal justice officials are confronted with an overwhelming number of mentally ill offenders entering prisons, jails, and courtrooms across the country.<sup>250</sup> Congress did not mandate a “one size fits all” approach.<sup>251</sup> The MIOTCRA permits communities to find appropriate alternatives that provide better mental health treatment, whether via MHCs, or other programs within the community, such as training for personnel in the system or other court-based programs.<sup>252</sup>

The MIOTCRA of 2004, and America’s Law Enforcement and Mental Health Project, fund the Mental Health Courts Program conducted by the BJA.<sup>253</sup> Reducing the amount of contact that mentally ill offenders have with the criminal justice system is a focus of the grant program provided by the BJA.<sup>254</sup> The grant program provides funds to programs that connect clients with housing, treatment, employment, and adequate support services.<sup>255</sup> Also, the program supports projects that emphasize judicial supervision that continues while the individual is in the program.<sup>256</sup> In addition, projects that stress intensive collaboration between mental health providers, case managers, and criminal justice personnel are necessary to receive grants from the BJA.<sup>257</sup> Qualified offenders for the programs

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248. *Impact of Mentally Ill Offenders on the Criminal Justice System: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 106th Cong. 21 (Sept. 21, 2000) (statement of Rep. Ted Strickland).

249. 42 U.S.C. § 3797aa (b)(5)(I)(i).

250. See, e.g., *Reauthorization of the Substance Abuse and Mental Health Services Administration: Hearing on S. 1194 Before the Subcomm. on Substance Abuse and Mental Health Services of the S. Comm. on Health, Education, Labor, and Pensions*, 108th Cong. 41 (2003) (statement of Gloria Walker, National Alliance for the Mentally Ill ) (explaining that people with mental illness are “over-represented . . . in local jails and prisons.”); see also *Fiscal 2005 Appropriations: Hearing on S. 1194 Before the Comm. on Appropriations and Subcomm. on Labor, HHS, and Education* (2004) (statement of Dr. Marcia Kraft Goin, President of the American Psychiatric Association) (explaining the problem of the alarming rate at which individuals with mental illness are entering the criminal justice system).

251. 150 CONG. REC. S11263 (Oct. 11, 2004) (statement of Sen. Patrick Leahy).

252. *Id.*

253. BUREAU OF JUSTICE ASSISTANCE, *supra* note 246.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

funded by the BJA include those charged with misdemeanors and non-violent offenses.<sup>258</sup> Also, voluntary treatment in the “least restrictive manner,” and the reduction in the number of sentences or types of charges are necessary components when establishing a MHC with funding from the BJA.<sup>259</sup>

#### D. CONTROVERSY SURROUNDING THE MHC MODEL

The implementation of MHCs has provoked controversy and new questions relating to the effectiveness of the MHC approach.<sup>260</sup> The civil rights implications and the criminalization of those with mental illnesses are additional issues in which both proponents and critics demand responses.<sup>261</sup> Also, since mental illness is at issue, critics and proponents of MHCs have different perspectives relating to how participants in a MHC understand the consequences of the decision to participate in the MHC program.<sup>262</sup> Finally, controversy surrounds the due process concerns relating to the ordered treatment and its appropriateness to the defendant’s illness.<sup>263</sup> The responses that proponents and critics of MHCs have about the appropriateness of this new approach provide insight into the controversy surrounding this evolving area of the law.<sup>264</sup>

##### 1. *Proponents’ Arguments*

Proponents of MHCs argue that processing individuals with mental illness through a specialized court is a more appropriate way to provide the services mentally ill offenders need than processing these offenders through the conventional court system.<sup>265</sup> Moreover, proponents claim that the MHC is a pragmatic solution to dealing with social and medical problems underlying cases that involve mentally ill offenders.<sup>266</sup> Also, proponents assert that providing a broad range of continuing treatment options can act

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258. *Id.*

259. *Id.*

260. *See generally* Stefan & Winick, *supra* note 209, at 507-08 (noting that controversies have been provoked by the inception of the MHC model relating to the effectiveness and value of this new approach).

261. *See id.* at 508-11 (indicating that critics of MHCs view them as coercive and violative of due process, whereas proponents view MHCs as “pragmatic solution[s]” for getting treatment to those who are in need of it and preventing them from going to jail).

262. *See id.* (discussing different viewpoints concerning MHCs).

263. Amy Watson et al., *Mental Health Courts and the Complex Issue of Mentally Ill Offenders*, 52 *PSYCHIATRIC SERVICES* 477, 480-81 (2001).

264. *See* Stefan & Winick, *supra* note 209, at 507-08 (discussing the value and implications of MHCs from the perspective of both proponents and critics).

265. *Id.* at 511.

266. *Id.* at 510.

as a diversion to further criminal behavior.<sup>267</sup> Proponents offer statistics indicating a reduction in recidivism as evidence of the effectiveness of this model.<sup>268</sup> For example, the Broward County MHC indicated that only twenty-seven percent of participants were rearrested, which suggested significant improvement relating to “revolving door” issues.<sup>269</sup>

Further, proponents contend that the offense is often a result of the mental illness, rather than of criminality.<sup>270</sup> Proponents maintain that many offenders with mental illness do not belong in the criminal justice system.<sup>271</sup> Those who support MHCs assert that MHCs are not discriminating in the adjudication of charges brought against mentally ill offenders.<sup>272</sup> Proponents contend that the MHCs were developed to provide a separate option for those eligible for a MHC program.<sup>273</sup> In response to questions relating to due process rights of the defendant in a MHC, proponents point to the legal requirement that deciding to participate in a MHC must be voluntary, and the decision must not involve coercive efforts to get the defendant into treatment.<sup>274</sup>

Moreover, proponents of MHCs suggest that this approach is an effective method of diverting individuals with mental illness away from jails and prisons.<sup>275</sup> Proponents assert that MHCs are not established to discriminate against those mentally ill offenders who come and go through

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267. See PAMELA M. CASEY & DAVID B. ROTTMAN, NAT'L CTR. FOR STATE CTS., PROBLEM-SOLVING COURTS: MODELS AND TRENDS 9 (2003), available at [http://www.ncsconline.org/WC/Publications/COMM\\_ProSolProbSolvCtsPub.pdf](http://www.ncsconline.org/WC/Publications/COMM_ProSolProbSolvCtsPub.pdf) (explaining that participants receive more treatment in problem-solving courts, and criminal activity decreases once enrolled).

268. See Acquaviva, *supra* note 27, at 991 (explaining the reduction in the rate of recidivism for participants, such as a seventy-five percent decrease for successful participants in King County, Washington).

269. *Id.* at 990-91.

270. See Jaime Levy Pessin, *Stopping the Revolving Door: New Court Seeks New Ways to Provide Justice to the Mentally Ill*, CHI. LAW., Mar. 2005, at 8 (noting a Cook County Judge's opinion that some people are in jail because of mental illness rather than criminality); see also Ellen Hochstedler Steury, *Specifying 'Criminalization' of the Mentally Disordered Misdemeanant*, 82 J. CRIM. L. & CRIMINOLOGY 334, 345 (1991) (indicating that in a study composed of misdemeanants, the group with psychiatric problems had more extensive criminal records than the group that did not have psychiatric problems).

271. Stefan & Winick, *supra* note 209, at 514.

272. *Id.*

273. *Id.*

274. *Id.* at 516. In a successful MHC, “[i]f the judge and defense attorney play their roles appropriately . . . the defendant will be given an informed and voluntary choice concerning whether to participate or to opt for routine criminal court processing.” *Id.* at 519-20; see Tammy Seltzer, *A Misguided Attempt to Address the Criminal Justice System's Unfair Treatment of People with Mental Illness*, 11 PSYCHOL. PUB. POL'Y & L. 570, 574 (2005) (explaining that the Fourteenth Amendment's Equal Protection Clause under the U.S. Constitution, and the Sixth Amendment's right to trial by jury, require that the option be voluntary).

275. Stefan & Winick, *supra* note 209, 514.

the criminal justice system.<sup>276</sup> As one advocate explained, “[t]he criminal justice system is not singling out people with mental illness and arresting them for conduct that others would not be arrested for.”<sup>277</sup> If a defendant wants to have his or her case processed through the traditional criminal court process, he or she may do so.<sup>278</sup> Additionally, supporters of MHCs contend that defense counsel provide a meaningful presence when deciding solutions to due process concerns by making sure that the options offered to the defendant are reasonable.<sup>279</sup> This advocacy typically occurs as part of the planning process.<sup>280</sup>

## 2. *Opponents’ Arguments*

Despite the argument that MHCs are an effective alternative because they reduce recidivism in the population of mentally ill offenders, opponents argue that MHCs simply create more problems and divert resources from more effective solutions.<sup>281</sup> According to Susan Stefan, a public interest attorney specializing in disability law, “[t]he creation of mental health courts to solve the problems represented by people with psychiatric disabilities in the criminal justice system is similar to an unhappy teenager deciding to have a child to solve her problems.”<sup>282</sup> Opponents of MHCs, such as Stefan, assert that MHCs are just a way to provide individuals an opportunity to avoid facing their problems.<sup>283</sup> Similarly, those challenging the effectiveness of MHCs contend that treatment plans do nothing more than offer medication and do not offer support in other areas such as finding housing or employment, which is a significant component in reducing recidivism among mentally ill offenders.<sup>284</sup>

Furthermore, opponents of MHCs maintain that the criminal justice system is not the appropriate way to provide access to mental health care.<sup>285</sup> Also, because MHCs are a recent development and continually evolving, opponents point out that there are no set standards to establish a definition

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276. *Id.*

277. *Id.*

278. *Id.*

279. BERMAN & FEINBLATT, GOOD COURTS, *supra* note 7, at 176-77.

280. *Id.* at 177. When problem-solving courts are implemented correctly, the courts can improve the quality and value of sentencing while maintaining fairness in case processing. *Id.* at 188.

281. Stefan & Winick, *supra* note 209, at 510-11 (indicating that making mental health care more accessible and providing better social services are more effective than specialized courts, such as MHCs).

282. *Id.*

283. *Id.*

284. Seltzer, *supra* note 274, at 583.

285. *Id.*

of a MHC.<sup>286</sup> The policy considerations surrounding MHCs raise questions on whether there actually has been an increase in access to mental health care for offenders with mental illness.<sup>287</sup> Opponents assert that MHCs provide a way to move “a particular group of people to the head of the line” leaving others in need of services at the end of the line.<sup>288</sup>

Moreover, those opposed to the establishment of MHCs are critical of the procedural concerns presented.<sup>289</sup> Critics suggest that with the proliferation of these courts “a number of procedures [must be put] in place to ensure a fairer balance between defendants’ constitutional rights to trial and legal counsel and the protection of public safety and public health.”<sup>290</sup> Opponents question whether mentally ill offenders are competent to make a voluntary choice.<sup>291</sup>

Furthermore, the nontraditional role of the defense attorney in the MHC model has been viewed as controversial.<sup>292</sup> Critics of MHCs assert that attorneys take on a passive role and forget their responsibilities to advocate for their clients.<sup>293</sup> These procedural differences have given rise to questions relating to whether the constitutional rights of participants in the MHC are violated.<sup>294</sup> As a Minnesota public defender noted, “I’m concerned about the impact of telling the judge, the prosecutor and the defender that they are all in this little boat together and they have to get along out there on the ocean[.]”<sup>295</sup>

Critics argue that MHCs segregate people based on psychiatric disability.<sup>296</sup> In analyzing the use of sanctions in MHCs, opponents find it difficult to accept the use of incarceration as punishment for noncompliance of a treatment plan.<sup>297</sup> Criminalization of individuals with mental illness is

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286. Henry J. Steadman et al., *Mental Health Courts: Their Promise and Unanswered Questions*, 52 *PSYCHIATRIC SERVICES* 457, 458 (2001).

287. *Id.*

288. *Id.*

289. Seltzer, *supra* note 274, at 573-75.

290. *Id.* at 574.

291. *Id.*

292. *See id.* at 575 (suggesting that mentally ill offenders need strong advocacy by defense counsel to guide them through the process).

293. *Id.*; *see* BERMAN & FEINBLATT, *GOOD COURTS*, *supra* note 7, at 180 (explaining that critics question the “culture of team collaboration . . . [as] hav[ing] an insidious effect on attorneys’ ability to engage in zealous advocacy”).

294. *See* DENCKLA & BERMAN, *supra* note 2, at 19 (explaining that some defenders see a potential due process violation when treatment is mandated). Critics also point out that when a judge has control over the type of treatment that a person receives, separation of power may be violated. Stefan & Winick, *supra* note 209, at 513.

295. BERMAN & FEINBLATT, *GOOD COURTS*, *supra* note 7, at 180.

296. Stefan & Winick, *supra* note 209, at 512.

297. Seltzer, *supra* note 274, at 579.

a concern to critics who note that MHCs are more punitive in nature rather than serving as an alternative to incarceration.<sup>298</sup> Some critics have suggested that individuals with mental illnesses are arrested and detained when other individuals without mental illnesses would not normally be arrested for the same crime.<sup>299</sup> Finally, opponents argue that if the court supervision over the treatment plan exceeds what would be given during a conventional court process, this results in “discriminatory inequities.”<sup>300</sup>

The controversy surrounding the MHC model has brought a range of questions for which both proponents and opponents believe they have answers.<sup>301</sup> Despite the contrasting views, both critics and supporters acknowledge the need to provide alternatives so that individuals with mental illness are not recycled through the criminal justice system or warehoused in prisons.<sup>302</sup> Moreover, both proponents and critics recognize that individuals with mental illnesses are often disconnected from mental health support systems and encounter the criminal justice system at an increasing rate.<sup>303</sup>

## VI. IMPACT ON NORTH DAKOTA

In many respects, North Dakota is confronting issues surrounding mentally ill offenders in communities across the state and those located in the state penitentiary.<sup>304</sup> Overcrowding in the state prison, treating mental illness for jail inmates, and finding effective community alternatives are issues that leaders across the state examine.<sup>305</sup> This section will provide insight into the issues in North Dakota relating to mentally ill offenders and discuss the impact of problem-solving courts, such as MHCs, in the state.

According to the North Dakota Department of Corrections and Rehabilitation (DOCR), the growth in prison population resulted in sending

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298. 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, 154-55 (2002).

299. *Id.* at 155.

300. *Id.* at 157. When determining the duration of court supervision, consideration should be given to the treatment plan and “should never exceed the typical sentence and probationary period for the underlying criminal charge.” *Id.*

301. *See generally* Stefan & Winick, *supra* note 209, at 510-24 (providing arguments for and against the implementation of MHCs).

302. *See generally id.* (discussing the importance of finding alternatives to incarceration for mentally ill offenders).

303. Bernstein & Seltzer, *supra* note 298, at 143.

304. *See* N.D. LEGIS. COUNCIL, MINUTES OF COMM’N ON ALTERNATIVES TO INCARCERATION, at 1-3 (Mar. 21-22, 2006), *available at* <http://www.legis.nd.gov/assembly/59-2005/interim-info/minutes/ca032106minutes.pdf> [hereinafter ALTERNATIVES, March 2006] (discussing the rise in inmate population at the state prison and the rise in mentally ill offenders in jail).

305. *Id.* at 1-2.

inmates to be housed in jails or other private prison facilities.<sup>306</sup> North Dakota had the highest increase in prison growth in the nation during 2003.<sup>307</sup> In April 2005, the state prison experienced an all time high of 1386 inmates.<sup>308</sup> Approximately thirty-seven percent of the inmate population in North Dakota have an Axis I mental disorder.<sup>309</sup> In response to these statistics, the prison system has begun to examine ways to reduce the increase in inmate population.<sup>310</sup>

The Field Services Department of the North Dakota Department of Corrections has worked to develop strategies and create diversions to prison incarceration.<sup>311</sup> Programs such as the Last Chance Program and the Halfway House are examples of programs established to confront the issues relating to offenders within the community.<sup>312</sup> The Last Chance Program offers a drug treatment program to offenders who have “violated the conditions of supervision by using drugs or alcohol.”<sup>313</sup> By choosing to participate in the program, offenders who successfully complete the program can avoid incarceration.<sup>314</sup> Also, the Halfway House program places offenders in a halfway house as an intermediate sanction or for parole and probation purposes and provides specialized treatment programs.<sup>315</sup> The Drug Court Program was also established to provide a diversion to prison incarceration for offenders with drug and substance abuse problems.<sup>316</sup> Drug courts are problem-solving courts with similar

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306. N.D. DEP’T. OF CORR. & REHAB., BIENNIAL REPORT TO THE GOVERNOR OF NORTH DAKOTA 2003-05, § PRISONS DIV. REPORT at 6 (2005), *available at* <http://www.state.nd.us/docr/docr/BiennialReport03-05.pdf> [hereinafter DOCR].

307. *Id.* at 9. The inmate population was increased by approximately eleven percent in 2003. *Id.* With expectations of further population growth, the prison officials are concerned about the need for more prison cells. *Id.*

308. *Id.* at 6.

309. E-mail from Leann K. Bertsch, Dir. of N.D. Dep’t of Corrections, to Andrea M. Odegaard (Oct. 2, 2006, 11:29:30 CST) (on file with author); *see* DSM IV, *supra* note 218 and accompanying text (indicating that Axis I mental illnesses include major mental disorders, learning disabilities, and developmental disabilities).

310. *See* ALTERNATIVES, March 2006, *supra* note 304, at 1. “Although the increasing need for prison beds is widespread throughout the country, . . . alternative programs that provide treatment and rehabilitation are a good alternative to incarcerating certain prisoners in high security prisons and ultimately lead to cost-savings.” *Id.*

311. DOCR, *supra* note 306, § Field Services Div. Report at 5. “Alternatives to incarceration programs serve as cost-effective measures in lieu of incarceration to promote pro-social change in offender behavior while holding the offender accountable to their community.” *Id.*

312. *Id.* at 7-8.

313. *Id.* at 8.

314. *Id.*

315. *Id.* at 7

316. *Id.* at 8.

features to those of MHCs.<sup>317</sup> However, drug courts focus on offenders charged with drug or alcohol related crimes.<sup>318</sup>

In addition to the problem of overcrowding in the prison, county jails across the state are concerned with mentally ill offenders trapped in the “revolving door” process.<sup>319</sup> The treatment of mentally ill offenders in jail can be expensive.<sup>320</sup> For example, the Cass County Jail in Fargo, North Dakota spends an average of eight thousand dollars per month for offenders in the jail with mental illness.<sup>321</sup> Generally, the money spent on inmates with mental illnesses comes from the jail budget.<sup>322</sup> In a typical week at the Cass County Jail, one-fifth to a one-third of the inmates is on medication for mental illnesses.<sup>323</sup> In addition, these offenders create a majority of the work for jail staff.<sup>324</sup> Even when the mentally ill inmates are in the minority of the jail population, the jail staff spends the majority of their time working with the mentally ill inmates.<sup>325</sup> With an increase in mentally ill jail inmates, the Cass County Jail has examined options to reduce the incarceration of these individuals and provide options for receiving treatment in the community.<sup>326</sup>

In April 2005, the North Dakota Legislature created a commission on alternatives to incarceration.<sup>327</sup> The purpose of the commission was to “study sentencing alternatives, mandatory sentences, treatment options, the expanded use of problem-solving courts, home monitoring, and other related issues.”<sup>328</sup> The North Dakota Legislature created the commission to

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317. COUNCIL OF STATE GOV'TS, *supra* note 46, at 6. Both courts use team approaches and include professionals from different disciplines, such as mental health or addiction counselors. *Id.*

318. *Id.* at 7. Monitoring in drug courts typically involves drug testing, whereas MHCs do not have a specific test to determine whether the participant is adhering to the treatment plan. *Id.*

319. Tom Pantera, *County Jailers Do What They Can*, THE FARGO FORUM (N.D.), May 5, 2006, at A1, A10. Often, individuals go back to jail as a result of failing to take medications for their mental illness and self-medicating themselves with drugs and alcohol which, in turn, influences their likelihood of committing crimes. *Id.* at A10.

320. *Id.*

321. *Id.*

322. *Id.*

323. *See id.* (“The most common psychiatric disorders among inmates are antisocial personality disorder . . . and depression and anxiety.”).

324. *Id.*; *see Budget Blamed for Failure to Treat Mentally Ill*, CORRECTIONS PROF., Aug. 11, 2003, at 21 (indicating that a jail in South Carolina began putting mentally ill inmates on a waiting list to receive treatment).

325. Pantera, *supra* note 319, at A10. Often referred to as the 20-80 rule, when twenty percent of the jail population is comprised of people who are mentally ill, eighty percent of the jail staff's time is spent working with those inmates. *Id.*

326. ALTERNATIVES, March 2006, *supra* note 304, at 2 (discussing the establishment of the Jail Intervention Coordinating Committee in Cass County as a way to identify what can be done to provide a diversion from incarceration for mentally ill individuals).

327. N.D. CENT. CODE § 54-35-24 (2005).

328. *Id.*

provide “information and recommendations for the governor’s consideration in time for inclusion of the recommendations in the biennial executive budget.”<sup>329</sup> In March 2006, the commission heard about the possibility of a jail-based diversion project introduced by the Jail Intervention Coordinating Committee of Cass County (JICC).<sup>330</sup> The JICC studied effective ways to reduce the number of incarcerations of offenders with mental illness.<sup>331</sup> The project proposed involved a program focused on mentally ill individuals booked for a crime in which the “behavior can be addressed without incarceration.”<sup>332</sup> The JICC recognized that the proposed project was similar to a MHC.<sup>333</sup> However, the project is jail-based, rather than court-based like a MHC.<sup>334</sup> The JICC submitted an application to receive a federal grant for the program from the Bureau of Justice.<sup>335</sup> In September 2006, the Commission on Alternatives to Incarceration recommended to Governor Hoeven that the inclusion of \$582,000 in the executive budget should be used in assisting the JICC in implementing its project.<sup>336</sup> The receipt of these funds would be contingent on receiving the federal grant for the project.<sup>337</sup>

In addition to concerns raised by officials within the North Dakota prison and jail systems, the judiciary also voiced concerns about the influx of mentally ill offenders appearing before the courts across the state.<sup>338</sup> Former North Dakota Supreme Court Justice, William A. Neumann, commented that therapeutic justice and “problem-solving courts” have proliferated with a “more proactive role for courts in dealing with underlying

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329. *Id.*

330. ALTERNATIVES, March 2006, *supra* note 304, at 1-2. The JICC is composed of mental health professionals, criminal justice officials, and legislators who are interested in reducing incarceration of individuals with mental illness. *Id.* at 2.

331. *Id.* at 2.

332. *Id.*

333. *Id.* (testimony from the JICC at 5-6).

334. *Id.*

335. N.D. LEGIS. COUNCIL, MINUTES OF COMM’N ON ALTERNATIVES TO INCARCERATION, at 1 (June 20, 2006) (testimony from the JICC at 1), *available at* <http://www.legis.nd.gov/assembly/59-2005/interim-info/minutes/ca062006minutes.pdf>.

336. N.D. LEGIS. COUNCIL, MINUTES OF COMM’N ON ALTERNATIVES TO INCARCERATION, at 5 (Sept. 6, 2006), *available at* <http://www.legis.nd.gov/assembly/59-2005/interim-info/minutes/ca090606minutes.pdf> [hereinafter ALTERNATIVES, Sept. 2006]. Senator Robinson indicated that “it is clear that there are too few individuals in treatment and too many incarcerated . . . something must be done to provide flexibility for admitting an individual for treatment rather than incarcerating the individual.” *Id.* at 4.

337. *Id.* at 5.

338. *See* N.D. SUPREME CT., JUDICIAL PLANNING COMM., MEETING MINUTES (Apr. 26, 2002), [http://www.court.state.nd.us/\\_court/committees/jud\\_plan/minutesapr2002.htm](http://www.court.state.nd.us/_court/committees/jud_plan/minutesapr2002.htm) (noting that there is an increasing interest in problem-solving courts to address underlying problems with cases).

problems associated with cases.”<sup>339</sup> Further, analyzing the appropriateness of specific programs involving therapeutic justice is necessary to measure the impact it could have on the judicial system.<sup>340</sup> Chief Justice Gerald VandeWalle voiced concern about taking on additional workloads involved in specialized courts.<sup>341</sup> Since problem-solving courts are “heavy users of judicial time,” it would be necessary to provide more judges to effectively operate these types of courts.<sup>342</sup> Without sufficient resources, the effectiveness of problem-solving courts would be undermined.<sup>343</sup>

## VII. CONCLUSION

Because mentally ill offenders are entering the criminal justice system at an alarming rate, courts are considering alternative approaches to adjudicate cases where the underlying problem is mental illness.<sup>344</sup> Therapeutic jurisprudence and problem-solving courts provide examples of how court structures and judicial practices have been redesigned to support a restorative and rehabilitative system.<sup>345</sup> With collaboration from mental health and criminal justice systems, the legal process that mentally ill offenders confront can be designed to prevent further judicial intervention and provide offenders with an opportunity to be productive members of society.<sup>346</sup> The establishment of MHCs is one way that therapeutic jurisprudence has expanded the role of courts to include a rehabilitative process.<sup>347</sup> Moreover, like many parts of the country, North Dakota is addressing the issue of mentally ill offenders who are trapped in the “revolving door.”<sup>348</sup> By examining why this problem has occurred, what states are doing about it, and how the courts have evolved as a result, states can decide whether the value and impact of these innovative courts is an

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339. *Id.*

340. *Id.*

341. N.D. SUPREME CT., STATE OF THE JUDICIARY MESSAGE (2002), [http://www.court.state.nd.us/\\_court/news/barjudiciary2002.htm](http://www.court.state.nd.us/_court/news/barjudiciary2002.htm).

342. *Id.*

343. *Id.*

344. DENCKLA & BERMAN, *supra* note 2, at 7.

345. Winick, *supra* note 6, at 1090.

346. *Id.* at 1060-61.

347. See COUNCIL OF STATE GOV'TS, *supra* note 46, at 1 (noting that MHCs are a response to a “broad systemic problem” created by the overwhelming amount of individuals with mental illness in the criminal justice system).

348. See ALTERNATIVES, Sept. 2006, *supra* note 336 and accompanying text (explaining the problem of individuals with mental illness in jail and prison).

effective approach to dealing with issues relating to offenders who are mentally ill.<sup>349</sup>

*Andrea M. Odegaard\**

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349. See DENCKLA & BERMAN, *supra* note 2, at 7 (discussing the development of specialized courts to address problems concerning offenders with mental illness).

\*J.D. candidate at the University of North Dakota School of Law. Special thanks to my husband, Ryan Frieler, and my family for their support and encouragement.