FROM THE BAZELON CENTER FOR MENTAL HEALTH LAW

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The Role of Mental Health Courts in System Reform [1]

Introduction

In a recent report based on two years of study and meetings of hundreds of individuals involved in criminal justice or mental health systems at the state and local levels, the Council of State and Local Governments ("CSG") found that "people 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."[2] The report noted that many people with mental illnesses are "[o]verlooked, turned away or intimidated by the mental health system" and "end up disconnected from community supports."[3] As a result, and "not surprisingly, officials in the criminal justice system have encountered people with mental illness with increasing frequency."[4]

Contact with the criminal and juvenile justice systems obviously has significant negative consequences for anyone who is subject to arrest, booking and incarceration. It can be doubly traumatic for people with mental illnesses, and the resulting criminal record can impede their later access to housing and mental health services. Their increasing "criminalization" is generating concern among policy-makers, criminal and juvenile justice administrators, families and advocates. A great many of the individuals arrested are charged with only minor offenses for which others are not usually subject to arrest.[5] For most, the underlying issue is their need for basic services and supports that public systems have failed to deliver in meaningful ways.[6] In the past few years, this concern has led a number of communities to establish some form of mental health court to process criminal cases involving people with serious mental illnesses.[7] These specialty courts strive to reduce the incarceration and recidivism of people with mental illnesses by linking them to the mental health services and supports that might have prevented their arrest in the first place.

Mental health courts straddle the two worlds of criminal law and mental health, requiring collaboration and consideration from practitioners in both fields. They typically involve judges, prosecutors, defense attorneys and other court personnel who have expressed an interest in or possess particular mental health expertise. Today there are 25 to 30 of these courts, depending on the definition used, and more are being planned. Congress addressed the issue in 2000, passing America's Law Enforcement and Mental Health Project Act,[8] which makes federal funds available to local jurisdictions seeking to establish or expand mental health specialty courts and diversion programs. This paper examines efforts in a growing number of concerned communities to respond to the immediate problem by establishing mental health courts to promote court-imposed treatment as a substitute for incarceration. It presents issues that arise when a mental health court is being contemplated-issues that apply, for the most part, to *all* courts because all courts share an obligation under the Americans with Disabilities Act ("ADA") to accommodate individuals with mental illnesses.[9]

Part I illustrates the scope of the problem facing courts and communities. Part II describes the Bazelon Center's review of information about 20 of these mental health courts and makes recommendations for improving the functioning of such courts.

I. Scope of the Problem

Policymakers' concern stems from the shockingly high percentage of jail and prison inmates who have mental illnesses, the incarceration of people with mental illnesses typically for much longer periods than other offenders,[10] the fact that while incarcerated these inmates become especially vulnerable to assault and other forms of intimidation by other inmates[11] and the awareness that mental health treatment in prison is rarely successful and usually not even adequate to combat the worsening of psychiatric conditions caused by incarceration itself. The following statistics illustrate the scope of the problem that needs to be addressed:

Approximately a quarter million individuals with severe mental illnesses are incarcerated at any given moment—about half arrested for non-violent offenses, such as trespassing or disorderly conduct." This does not include more than half a million probationers with serious mental illnesses.[12]

Sixteen percent of state and local inmates suffer from a mental illness and most receive no treatment beyond medication."[13]

During street encounters, police officers are almost twice as likely to arrest someone who appears to have a mental illness. A Chicago study of thousands of police encounters found that 47 percent of people with a mental illness were arrested, while only 28 percent of individuals without a mental illness were arrested for the same behavior.[14]

In 1999, in response to requests from state government officials for recommendations to improve the criminal justice system's response to people with mental illnesses, the Council of State Governments (CSG) convened a small, national, bipartisan working group of leading criminal justice and mental health policymakers from across the country. The group identified key issues affecting people with mental illnesses who were involved with the criminal justice system. That meeting was the genesis of the Criminal Justice/Mental Health Consensus Project, a two-year effort to prepare recommendations that local, state and federal policymakers and criminal justice and mental health professionals can use to improve the criminal justice system's response to people with mental illnesses. Guided by a steering committee of six organizations and advised by more than 100 of the most respected criminal justice and mental health practitioners in the United States, the Consensus Project provides concrete practical approaches that can be tailored to the unique needs of communities.

II. Special Courts for Offenders with Mental Illness: The Bazelon Center Review

Under the Americans with Disabilities Act, states and municipalities cannot discriminate against people with disabilities and must make reasonable accommodations in their programs and services.[15] These legal obligations apply to courts as well as to diversion and alternative sentencing programs and practices administered by law enforcement, prosecutors and pretrial services, All jurisdictions have some ability to divert offenders from the criminal justice system, either by exercising discretion not to arrest or prosecute or by providing formal diversion programs or alternative sentencing. However, in practice many courts do not even consider such options for people with mental illnesses. This may occur because of stereotypes about mental illness, such as the erroneous belief that people with mental illnesses are more dangerous than others,[16] or for lack of information about how people with mental illnesses could be successfully accommodated in these programs.

During the CSG development process, some judges, prosecutors and defense attorneys observed that defendants with mental illnesses are treated more harshly in court-that they are more likely to be remanded without the opportunity to post bail and given harsher sentences. According to the Consensus Project, "the court should never enhance a sentence solely because of the offender's mental illness. Rather, the sentence should be based on the behavior that brought the offender to court."[17]

In 2001, the Bazelon Center for Mental Health Law embarked on a project of assessing the effectiveness of mental health courts as an alternative to criminal courts. The Center, founded in 1972, is the leading national legal-advocacy organization representing people with mental disabilities. Through precedent-setting litigation in the public-policy arena and by assisting legal advocates across the country, it works to define and uphold the rights of adults and children who rely on public services and ensure them equal access to health and mental health care, education, housing and employment.

A. Bazelon Center Review of 20 Mental Health Courts

The Bazelon Center reviewed information relating to 20 mental health courts around the country and, through interviews with judges, public defenders and other stakeholders, studied a dozen more intensively.[18] From the study, the center reached the following conclusions:

- There is no single "model" of a mental health court; each court operates under its own, mostly unwritten, rules and procedures and has its own way of addressing service issues.
- Many of the existing courts include practices that are unnecessarily burdensome to defendants, that make it harder for them to reintegrate into the community and that may compromise their rights.
- Few of the courts are part of any comprehensive plan to address the underlying failure of the service system to reach and effectively address the needs of people at risk of arrest. Substantial numbers of mental health court participants are people who should not have been arrested in the first place. However, some courts are beginning to accept defendants who are more appropriate for such a program, such as people who have committed serious felonies.

Addressing the issues raised by the escalating number of contacts between individuals with serious mental illnesses and the criminal justice system requires a broad and comprehensive approach that should include mechanisms giving all police, prosecutors and judges effective options for alternatives to arrest or incarceration. These options should be available to offenders with mental illnesses just as they are available to all other offenders, with reasonable accommodations provided as necessary to ensure fair access and improve opportunities for their successful completion.

No diversion or alternative disposition program, whether prosecutor-driven, court-based, within law enforcement or jail-based, can be effective unless the services and supports that individuals with serious mental illnesses need to live in the community are available. Moreover, it is critical that these services exist in the community for everyone, not just offenders, and that supports not be withdrawn from others in need and merely redirected to those who have come in contact with the criminal justice system. Additional, specialized resources and programs are needed to reduce the risk of arrest for people with mental illnesses and the recidivism of those who have encountered the criminal justice system.

B. Bazelon Center Analysis and Recommendations

This paper reflects the assessments of the Bazelon Center's study and highlights issues for communities to consider when choosing to implement a mental health court. It also encourages a broader range of diversion programs as alternatives or supplements to mental health courts. These recommendations are designed to ensure that if mental health courts are used, they are part of a broad-based approach and operate with policies and procedures that protect the individual rights of defendants who come before them.

The best approach to the problem of criminalization is to create a comprehensive system of prevention and intervention. Mental health courts may provide immediate relief to criminal justice institutions, but alone they cannot solve the underlying systemic problems that cause people with mental illnesses to be arrested and incarcerated in disproportionate numbers. Furthermore, without careful consideration of several factors discussed in this report, reliance on mental health courts carries significant risks for individuals with mental illnesses.

1. The Role of Mental Health Courts

From the criminal law perspective, two rationales underlie the therapeutic court approach: first, to protect the public by addressing the mental illness that contributed to the criminal act, thereby reducing recidivism, and second, to recognize that criminal sanctions, whether intended as punishments or deterrents, are neither effective nor morally appropriate when mental illness is a significant cause of the criminal act. The goals of mental health courts, then, are: 1) to break the cycle of worsening mental illness and criminal behavior that begins with the failure of the community mental health system and is accelerated by the inadequacy of treatment in prisons and jails; and 2) to provide effective treatment options instead of the usual criminal sanctions for offenders with mental illnesses.

Breaking the cycle of repeated contact with the criminal or juvenile justice systems must start with expanded and more focused community-based services and supports. As currently configured in many communities, public mental health services are substantially targeted at

prioritized populations: people exiting state psychiatric institutions, people regarded as being at risk of admission to these facilities, people in crisis and people whose treatment is governed by court orders. Individuals not falling into a defined priority group may find very limited services available to them. Improving access to meaningful services and supports will inevitably reduce the number of incidents between individuals with mental illnesses and the law enforcement and justice systems. Furthermore, such access is critical to the effectiveness of any diversion program directed toward people who have mental illnesses, including mental health courts.[19]

Communities should ensure that criminal justice systems have a range of choices for diversion and disposition. Effective police diversion programs that prevent arrest for minor offenses and lead instead to services and supports are the first step in such a continuum. Various effective strategies then exist for people who have committed more serious offenses, including programs to reintegrate into the community those who have served time in jail or prison. The proper role of courts in this continuum is to address the needs of those who cannot, because of the nature of their offense, be diverted without arrest or at pre-booking or arraignment, but for whom punishment through incarceration is not appropriate.

While most specialty mental health courts handle only defendants charged with minor offenses, several court-based alternative disposition programs focus on individuals with serious felony charges. Sometimes, individuals who have already received a sentence to jail or prison are offered mental health services as a likely more effective option.

The Bazelon Center strongly believes that all courts, including mental health courts, following the approaches outlined here, can accommodate people with mental illnesses and achieve successful outcomes for them without compromising public safety *if* they function within a broader program of system reform.[20]

2. The Operation of Mental Health Courts

Each mental health court is unique. Some have a single judge who presides over a mental health court held once or twice a week or as often as necessary. Eligible defendants usually include people who appear to have a mental illness; some courts also include people with developmental disabilities or head injuries.[21] The courts typically have special court or pretrial-services personnel who are responsible for developing treatment plans and dedicated probation officers who monitor defendants' compliance with the plans once incorporated into court orders.

From the earliest stages of its development and continuing through implementation, a mental health court must coordinate not only with police, sheriff and prosecutors but also with state and local service systems. Only thus can a comprehensive and realistic picture be developed of how and why people with mental illnesses fall through the cracks, come in contact with law enforcement and get processed through the criminal justice system. Understanding the gaps and the reasons for these individuals' behaviors can lead to better targeted alternatives. In this regard, the participation of mental health consumers is critical. People who have "been there" can offer the most relevant perspective on how systems fail and what meaningful alternative(s) should be in place.

Of particular note to jurisdictions planning to apply for federal funds, Congress viewed coordination of services as crucial to the success of any mental health court. Specifically, Congress required both initial consultation and ongoing coordination during implementation with "all affected agencies... including the State mental health authority."[22]

Three critical elements are needed in communities considering the establishment of mental health courts:

(1) treatment and service resources in the programs to which offenders will be referred;

(2) alternatives to arrest and diversion programs at the time of arrest, at jail before booking and at arraignment, to keep the court from being overwhelmed by individuals whose offenses are minor and to prevent its becoming a routine point of entry to mental health services for individuals whose real problem is the limited availability of help through more appropriate channels; and

(3) court procedures that do not have the effect of making a mental health court more coercive than a standard criminal court or more damaging to a defendant's-future prospects for housing, employment and healthcare.

3. Mental Health Court Procedures

Mental health courts have a separate docket with a judge, prosecutors and defense attorneys who all have training in dealing with defendants with mental illnesses, who are familiar with existing service resources, and who are willing to work together with defendants and service providers to get the proper services for each defendant. Beyond these basic principles, every mental health court needs to put a number of procedures in place to ensure a fair balance between defendants' constitutional rights to trial and legal counsel and the protection of public safety and public health. Even existing mental health courts are not static; procedures and practices tend to be modified over time. While the small number of mental health courts and their evolving nature preclude definitive conclusions, the Bazelon Center's review does provide a glimpse of significant factors and trends relating to important procedural issues that any community will need to address if it chooses to establish a mental health court:

Voluntary Transfer into the Mental Health Court

It is crucial from the outset that transfer to the mental health court be entirely voluntary. Otherwise, singling out defendants with mental illnesses for separate and different treatment by the courts would violate the equal protection guarantee of the 14th Amendment and would likely violate the 6th Amendment right to a trial by jury and the prohibition against discrimination by a state program found in the Americans with Disabilities Act.

Truly voluntary transfers to mental health courts entail much more than a simple declaration by the defendant. On its face, a defendant's selection of a therapeutic court over one structured around determining guilt and meting out punishment would appear an obvious choice. In fact, as explained below, mental health courts have their own risks, sometimes subtle, that a defendant needs to understand in order to make an informed decision. According to the CSG report, "Defense attorneys should present all possible consequences to their clients when discussing options for the resolution of the case."[23]

For example, a mental health court may function as a coercive agent in many ways similar to the controversial intervention of outpatient commitment, compelling an individual to participate in treatment under threat of court sanctions. However, the services available to the individual may be only those offered by a system that has already failed to help. Too many public mental health systems offer little more than medication and very occasional therapy. As with outpatient commitment, almost all mental health court orders require the individual to "follow the treatment plan." That plan may include little beyond medication and do nothing to address the factors

associated with the criminal contact or the individual's need for housing or other healthcare or vocational services. Obviously, a defendant should be fully informed of such factors and, in the alternative, of the potential outcomes of a conventional criminal hearing.

Some defendants, and their attorneys, may feel it would be more in the person's interest to go before a conventional criminal hearing. These situations should be assessed on an individual basis. According to the CSG report: "On the one hand, the attorney has an obligation to reduce the defendant's possible exposure to sanctioning by the criminal justice system by removing him or her as quickly as possible from its jurisdiction. On the other hand, the attorney may recognize that the defendant will continue to be rearrested if his or her mental health needs are not addressed."[24]

Further complicating the voluntary election of mental health court involvement is the fact that such decisions are made when the defendant is likely to be under considerable stress, having been arrested and taken into custody, and perhaps having spent some time in a jail cell, often without treatment of any kind.

Right to Withdraw

Defendants in mental health courts have come to the attention of the legal system because they have been charged with criminal conduct, not because they have met criteria for involuntary treatment. To ensure that mental health courts and the services they may initiate are truly voluntary, it is important for defendants to be allowed to withdraw and have their cases heard in criminal court without prejudice. In some courts, a defendant pleading guilty knows ahead of time what his or her sentence would be before choosing whether to participate in a mental health court. While the defendant's decision to opt for a hearing in a mental health court, as described above, is more complex than might first appear and has some attendant risks, *56* percent of the courts providing the Bazelon Center with information on this factor do not allow a defendant to reverse his or her decision and to withdraw from the mental health court program without prejudice. Of the courts that do permit this option, about half impose some restriction-for example, making withdrawal without prejudice available only with a 30-day time limit or only when program participation is not a condition of probation. The other half employ an approach supported by the Bazelon Center; they provide an unrestricted right for defendants to have their cases re-heard in criminal court without prejudice. It has also been suggested that people who voluntarily withdraw or "fail" in treatment monitored by mental health courts should be given credit for time "served" in the mental health court program;[25] no court in the survey reported that it was utilizing this approach.

Appointment of Counsel

As a practical matter, mental health courts provide a form of pretrial diversion, most likely at or soon after the arraignment stage. A defendant who accepts transfer into a mental health court will be effectively waiving the right to a trial. It is the court's responsibility to ensure that the waiver of such a basic right is both voluntary and chosen with a realistic understanding of the legal consequences of the decision. The most reliable way to ensure that the waiver is both voluntary and informed is to provide defense counsel as soon as the defendant is identified as a candidate for the mental health court. The American Bar Association Standards Relating to Providing Defense Services state that "[c]ounsel should be provided to the accused as soon as feasible and, in any event, after custody begins, at appearance before a committing magistrate, or when charges are filed, whichever occurs earliest."[26]

It is particularly important for an individual with a mental illness to have access to an advocate. Knowing that his or her advocate is participating in each step of the legal process can significantly improve the defendant's understanding of the process and the chance of success in the diversion program. The presence of defense counsel also helps with a number of court procedures, including obtaining authorization from the defendant to make available privileged information that may be used for a more positive outcome and limiting disclosure of private treatment information about the defendant. All of the courts on which the Bazelon Center has information provide for defense counsel, and at least one of the courts ensures that trained clinicians from the public defenders office assess offenders at the time of the bail hearing to determine whether they should be considered for the mental health court. For representation to be meaningful, defense counsel must have a background in mental health issues and in communicating with individuals who may be in crisis, an understanding of how the jurisdiction's public mental health system operates, resources that enable the attorney to actively participate in or challenge development of a treatment plan, and enough time to spend with the defendant for adequate representation.

Plea Requirement

Of the courts studied, approximately half require guilty or no contest pleas as a condition of participation. Some courts utilize a pre-adjudication model whereby charges are suspended or held in abeyance as the individual participates in treatment. More than a third of the courts surveyed allow for dismissal of the charges or expungement after successful completion of treatment. In most cases, dismissal of charges is not automatic and an individual must request expungement of the record, which is at best a cumbersome and difficult process. Furthermore, it is unclear what "successful completion of treatment" means, given that serious mental illnesses, by definition, are long term and often require many years of services and supports. Moreover, several courts retain participants' records of conviction.

The argument put forward by those who favor requiring a plea is that it is an effective form of coercion to increase treatment compliance. Beyond the irony of requiring an individual to follow a treatment plan developed by a mental health system with its own history of failures and which indeed may have placed the individual at risk of arrest in the first place, there are important reasons not to require a guilty plea:

- A guilty plea adds a conviction to the individual's record, making it harder to get or keep the housing and employment that are so crucial to effective mental health treatment, community tenure and management of a long-term psychiatric disability.[27] One out of four of the courts surveyed report that the individual will have a record of conviction even if the course of court supervision is successfully completed.
- Pressuring a defendant with a mental illness into a guilty plea continues (and even exacerbates) the existing disparities between arrest rates and subsequent jail time for individuals with mental illnesses compared to other defendants.
- If a defendant without a mental illness would typically have charges dismissed, it is discriminatory to require a person with a mental illness to plead guilty in order to access services and supports.

Mental health courts are intended as an alternative to a traditional trial, but they should not be

more punitive. If a guilty plea is required, a defendant should be given information that would allow him or her to weigh the likely jail or prison time associated with a conviction against the scope and duration of treatment that would be monitored by a mental health court. For individuals opting for mental health court, a guilty plea should be dismissed upon successful completion of a defined period of monitoring by the court.

Types of Offenses Covered

Half of all arrests of people with mental illnesses are for nonviolent crimes such as trespassing or disorderly conduct.[28] While it would appear reasonable and fair to divert the least serious offenses before reaching the court, most of the early mental health courts focus primarily on misdemeanor cases.[29] It is important to divert such cases, both to avoid overwhelming the criminal justice system and to prevent use of the court as a pathway to services,[30] for example, for people who are homeless or temporarily incapacitated and in need of treatment.

Mental health courts should focus their resources on individuals who are not considered appropriate for other types of diversion, either pre-booking or at arraignment.

Of the courts studied, half limit eligibility to defendants with misdemeanor charges and half accept people charged with felonies, at least under certain circumstances.

Eighty percent of the courts allow for cases involving violent acts, although 40 percent require some special process before these cases are accepted—for example, the victim's consent or a review of the specific charges.

Twenty percent of the courts studied apply a blanket exclusion of defendants who have a history of violent behavior.

Based on Bazelon Center interviews with court personnel, mental health courts appear to be gradually expanding their jurisdiction to accept people charged with more serious offenses. This is a positive trend, reflecting the most appropriate use of mental health courts. Individuals with mental illnesses who are charged with more serious offenses are likely to be the least suited to the

The Bazelon Center recommends pre-booking diversion programs as companions to mental health courts. To avoid becoming the entry point for people abandoned by the mental health system, mental health courts should close their doors to people charged with minor misdemeanors, as does the Brooklyn Mental Health Court, which handles only felonies.

Avoiding Court Involvement Through Services

Many encounters between people with serious mental illnesses and the police should not result in arrest, let alone court appearance and detention. For example, homeless people engaging in minor "crimes of survival" associated with living on the streets should not be arrested. According to the CSG report, "It is particularly important . . . that mental illness itself not be used as a reason to detain a defendant in a case where a defendant with no mental illness facing similar charges and with a similar criminal record would likely be released."[31] Accomplishing this will require collaboration between law enforcement and the mental health system. A far more effective solution for many is a law enforcement diversion program, using trained officers backed up by readily accessible mental health services and coupled with a deliberate effort to address mental health system reform. However, 50 percent of the courts included in the Bazelon Center survey operate in isolation without any defined pre-booking diversion program.

The CSG report includes examples of post-booking diversion programs and practices that do not utilize the mental health court model:[32]

The Mental Health Diversion Program, Jefferson County, Kentucky, serves nonviolent defendants charged with either misdemeanors or felonies who suffer from chronic mental illnesses and have a history of treatment for mental illness. Defendants who are placed in pretrial diversion undergo intensive treatment for a period of six months to one year. Upon successful completion, the charges are dismissed.

In the Lane County, Oregon drug court, a mental health specialist trained to deal with co-occurring disorders is assigned to the drug court in the dual role of case manager and court liaison to assist with defendants who have co-occurring disorders.

Project Link, Monroe County, New York, has developed a close working relationship with the probation department to identify offenders most in need of mental health services. It has a mobile treatment team consisting of a psychiatrist, nurse practitioner and five culturally diverse case workers who are available 24 hours a day to focus on 40 of the most serious cases.

The Nathaniel Project in New York, New York, run by the Center for Alternative Sentencing and Employment Services, has established a dispositional alternative for people charged with serious offenses. The project is a two-year intensive case management and community supervision alternative-to-incarceration program for prison-bound defendants with serious mental illnesses. It targets defendants who have been indicted on a felony charge, including violent offenses, most of whom are homeless and suffer from co-occurring substance abuse disorders. Forensic Clinical Coordinators, who are masters-level mental health professionals and have expertise in negotiating the criminal justice system, create a comprehensive plan for community treatment. Starting work with participants prior to release, the project creates a seamless transition to community care. Once released, program participants are closely monitored and engaged in appropriate supervised community-based housing and treatment. Participants are required to attend periodic court progress dates. Charges are dismissed upon successful completion of the program.

The Nathaniel Project has also developed a program that seeks to prevent a probation revocation by offering intensive treatment rather than incarceration for those who violate probation conditions. It targets offenders with mental illnesses who have violated conditions of probation. Case managers are clinically trained professionals with caseloads of only 10. Staff assist participants in obtaining medication, housing and other services, including day treatment, psychosocial clubhouse, vocational training and job placement.

Scope and Length of Judicial Supervision

One of the fundamental aspects of a mental health court **is** that the court maintains jurisdiction over the defendant while in services. Usually, mental health courts require the individual to "complete" a period of treatment. The Bazelon Center study found that the scope and duration of mental health courts' supervision varied from court to court. Even within a court, though, there may be significant variation.[33]

Most courts lack any written procedures, so uncertainty is great and the outcome depends on

the judge's decision. In several courts the length of supervision is not specified, but is decided on a case-by-case basis. However, several courts place specific limits, generally from one to two years.

In at least 40 percent of the courts reporting, the limits of court supervision significantly exceed the possible length of incarceration or probation for the offense. Such policies likely discourage many individuals with mental illnesses from transferring their cases to the mental health courts.

The duration of the court's supervision of treatment should be based on the individual's treatment plan, but should never exceed the typical sentence and probationary period for the underlying criminal charge. To do so would compound the discriminatory inequities people with mental illnesses already face in the criminal justice system. While individuals with mental illnesses may require long-term services and supports, it is unnecessary and inappropriate for the court to continue to supervise such services beyond the typical period of court supervision for the underlying offense. It is the task of the mental health system to engage its clients in needed service programs, not to cede this function to criminal courts.

Accordingly, the court should carefully limit the scope and duration of its supervision. Conditions of release should be individualized, the least restrictive necessary and reasonably calculated to accomplish the court's goal, which is to reduce the likelihood that the person will recidivate. It is inappropriate and demeaning for the court to maintain protracted supervision based on the individual's mental illness, not on alleged criminal activity.

Sanctions for Non-Compliance

The performance standards of the National Association of Pretrial Services Agencies state that diversion conditions should be clearly written in a service plan signed by the defendant.[34] This plan should detail what action could be taken in response to the individual's failure to comply with conditions, so that individuals know exactly what is expected of them. At the same time, the plan must consider the nature of serious mental illnesses. According to the CSG report, "it must be recognized that decompensation and other setbacks are common occurrences for people under treatment for mental illness as the attending mental health clinician seeks the most appropriate treatment."[35] Moreover, "overburdening defendants with mental illness with extraneous conditions of release raises the possibility that they will be unable to handle them and will fail to meet their requirements."[36] The Bazelon Center found that courts use an array of mechanisms as sanctions for non-compliance with a service plan:

Thirty-six percent of the courts reported that non-compliance is handled via adjustments in services.

At least 27 percent try lectures, more frequent court appearances and increased judicial persuasion.

Sixty-four percent[37] of mental health courts reporting, however, use jail time as a sanction and 18 percent reported that the individual may be dropped from the program, actions that may be particularly unhelpful if the issue is one of normal relapse and the ups and downs of recovery from mental illness.

If the goal is to lessen the incarceration of people with mental illnesses, then using incarceration as punishment is a perversion of the whole idea of mental health courts. According to the ***CSG***

report: "Before imposing punitive sanctions for non-compliance, the court should conclude that the defendant was capable of complying but chose not to."[38] This finding requires careful investigation. Mental health treatment is much more difficult to quantify than drug abuse treatment, which has easily defined measures of compliance and where non-compliance it- self is a crime. The success of mental health services is gauged in outcomes, not adherence to a specific plan of care. Setbacks may have no relation to the individual's desire to comply with court orders or adherence with a treatment program. In fact, for many individuals with mental illnesses, various treatment and service options must be tried before an appropriate and effective service plan is established. In fact, "the key . . . is to identify first the offender's individual needs and then identify the services in the community that can meet those needs."[39]

When individuals run into difficulties while in a services program operating in collaboration with the court, the court should explore the causes. Noncompliance should be assessed in order to determine "whether any noncompliance with diversion conditions . . . was willful, was a symptom of the mental health illness or was an indication of the need to change the treatment plan."[40] These factors should be carefully considered before any sanctions are contemplated. Often, "a more appropriate response would be to modify the treatment plan rather than to seek the revocation of (diversion)."[41]

Case managers or social workers can be particularly helpful in monitoring treatment and coordinating services across various providers and systems, especially if they take a proactive approach, rather than just reacting to compliance problems.

Accountability of Mental Health Providers

Too often, the criminalization of defendants with mental illnesses begins with the failure of mental health programs to meet these individuals' needs or to accept them into services because they have difficult problems (such as co-occurring substance abuse) or because they already have a criminal record. Solving the problem, in the context of a mental health court, should begin with service providers' active participation in the mental health court plan and in the processing of individual cases moving through the court. This should include conducting assessments, designing person-centered service plans that seek to engage people in treatment that encompasses their own life goals (e.g., employment), and accepting responsibility for implementing the plan, in collaboration with the individual, once the defendant is referred by the court.

If the court is to be responsible for continuing supervision of the offender, including the possibility of applying sanctions for any type of noncompliance with the service plan, the court must also have the power to ensure that service providers are delivering appropriate services to defendants who are making a genuine effort to participate in their service plan. However, 63 percent of the courts reporting indicated that they have no authority to hold mental health providers accountable. The best ways to exercise this authority will depend on local circumstances, but may include the court's contempt powers, writs of mandamus or control over funds targeted toward service diversion plans.

Seventy percent of the courts reporting indicated that they have access to some, albeit limited, services beyond what the mental health system customarily offers. Vastly preferable would be better services integrated in the mainstream mental health system, rather than court oversight of a parallel system for offenders.[42] Mental health systems should not be allowed to abdicate their role and their responsibilities on behalf of people with mental health care needs.

Medical Privacy

To work effectively, mental health courts often require medical and psychiatric treatment information about defendants, both as part of the disposition of a case and for ongoing monitoring. All of the courts surveyed reported some provisions to safeguard the privacy of information about defendants, for example, limiting discussion of clinical information in open court or delegating maintenance of clinical information to case managers and keeping the court record to a minimum. Use of treatment information in a criminal proceeding raises questions of doctor-patient privilege, and disclosing medical information in open court raises serious privacy concerns. Ensuring the early appointment of defense counsel can help to solve some of these problems by using defense counsel as a filter or reporting point for any potentially privileged treatment information. Mental health courts can address the privacy concern with rules that keep the medical information out of the public record of the proceedings and through sidebar or chamber conversations for sensitive discussions. They can also protect individual privacy with rules that limit judges' and prosecutors' access to the specific information they need to know to make their decisions.

Intended and Unintended Consequences

Typically, the genesis of mental health courts can be traced to concerns by local judges, attorneys and criminal justice personnel that people with mental illnesses were being wrongly subjected to arrest and incarceration. Their goal is to ensure not only that these individuals are diverted from the correctional system, but also that beneficial services are made available. Mental health courts should be evaluated carefully to determine whether these objectives are, in fact, being met. For example, courts should ascertain whether individuals under their supervision are being rearrested and whether services are working to improve the individual's quality of life. Furthermore, given that mental health courts are largely reactive to failing mental health systems, the evaluation should also consider whether reform efforts are underway by the public mental health system toward identifying and making services available to people with mental illnesses who are at risk of arrest. There is an inherent risk that any court-based diversion program, if not accompanied by such reforms and an effective pre-booking diversion program, might lead law enforcement officers to arrest someone with a mental illness in the expectation that this will lead to the provision of services. However, as stated above (and by the CSG),[43] individuals with mental illnesses should not be arrested in situations where someone without a mental illness would not be. It is therefore important to also include arrest data in these evaluations. Finally, the court should create a mechanism for stakeholders, including people with mental illnesses, to have a say about its operations and to play an active role in the evaluation process.

No rational purpose is served by the current system. Public safety is not protected when people who have mental illnesses are needlessly arrested for nuisance crimes or when the mental illness at the root of a criminal act is exacerbated by a system designed for punishment, not treatment.[44] Individual rights are violated when people with mental illnesses are denied treatment and subjected to more frequent arrests and harsher sentences than other offenders. And beyond the trauma of arrest and incarceration are the unintended collateral consequences, such as social stigmatization based on a criminal record and the resulting denial of housing or employment or treatment services, even if charges are dropped.[45]

The criminal and juvenile justice systems are not the appropriate "front door" to access mental health care. The factors that determine whether someone who has demonstrated problematic

behavior enters the criminal justice system or the mental health system are often capricious rather than objective. For example, police officers may find it easier to process someone through the criminal justice system than to navigate the hurdles that mental health consumers routinely face to obtain services through the public mental health system. Ironically, community mental health programs often refuse to serve the very individuals who are most likely to benefit from their intervention and who are least appropriate for prosecution: those who have engaged in misdemeanors and who have low priority within mental health systems because they are not at risk of involuntary psychiatric hospitalization.

Perversely, the drift of people with mental illnesses into the criminal justice system has benefited public mental health systems by shifting their financial burden for "hard to serve" groups to the budgets of state corrections departments. As a result, taxpayers' resources are wasted on expensive and counter-productive incarceration instead of financing more appropriate and effective community mental health and supportive services. Police, court and jail personnel are forced to devote inordinate amounts of time to arresting, processing and incarcerating individuals with mental illnesses, a process that also diverts their attention from more serious crimes, defendants and inmates.

To eliminate the unnecessary and harmful criminalization of people with mental illnesses, communities must address the causes of the problem, not just its symptoms. The substantial gaps in effective community services are the root of the problem and addressing them must be the first step toward its solution. Training court personnel and law enforcement officers to enable them to make better informed decisions about people with mental illnesses and about new and existing treatment resources is also critical. Both of these steps can have a major impact on the presence of people with mental illnesses in the criminal justice system, even without creating a formal mental health court. Communities looking to create or expand court-based diversion programs should consider the wide range of existing programs, such as the examples listed above. Jurisdictions that do create specialized mental health courts will have far more success and will better serve the cause of justice if they include treatment and diversion programs as part of a broad package of systemic reform.

If communities do choose to set up mental health courts, they should be aware of the need to focus on the final outcome, successful reintegration into the community and reduced recidivism. These outcomes are more likely to be achieved if the court focuses on ensuring the success of community services and avoids actions that hinder reintegration, such as insisting on guilty pleas that lead to denial of housing or employment.

Conclusion

This article described the Bazelon Center's study review of mental health court and its recommendation for reform. It analyzed the potential problems and benefits posed by these alternative courts and concluded that they should be used, if at all, with great caution for individual rights and only when defendants face significant jail or prison sentences and when part of a broad reform of the community mental health system. Specialty mental health courts, when used for more serious offenses and responsive to the issues raised in this paper, can play a productive role in a comprehensive strategy to break the cycle of poor treatment, worsening mental illness, escalating criminal behavior and increasing arrest and incarceration. But court-based diversion, whether through specialty mental health courts or through regular criminal courts, is not a panacea for addressing the needs of the growing number of people with mental illnesses who come in contact with the criminal justice system. Rather, it should be seen as but one part of the solution.

Certainly, not every crime committed by an individual diagnosed with a mental illness is attributable to disability or to the failure of public mental health. But homelessness, unemployment and a lack of access to meaningful treatment services have clearly put many people with mental illnesses at risk of arrest. The Bazelon Center for Mental Health Law strongly endorses efforts to address these root causes of criminalization, recognizing at the same time that this will require a fundamental change in the mental health systems that have so tragically deviated from their goal of promoting community living with dignity. Yet in large measure the reforms proposed to date come from the criminal justice sector, which finds itself both ill-equipped to address the needs of people with mental illnesses and alarmed about the *de facto* role of jails and prisons as today's psychiatric institutions. Mental health systems, even while attempting to address the criminalization of the populations they are charged with serving, have not typically originated reform efforts. For this reason, it is important to build any reforms in such a way as not to bypass the mental health and other service systems or allow them to shirk their responsibilities. Every effort should be made to assist people with serious mental illnesses before they come to the attention of law enforcement and to identify and address system failures that result in their inappropriate arrest or incarceration for minor offenses.

Innovation and, above all, a dedication to reform are necessary to address the growing problem of criminalization from both a public safety and a public health point of view. Communities that are committed to change, where mental health and criminal justice interests work collaboratively on solutions, can find cost-effective and just ways to reverse the present trend of neglected lives and wasted resources.

Notes

[1] This article was first published in the University of the District of Columbia Law Review

[2] COUNCIL OF STATE GOVERNMENTS, CRIMINAL JUSTICE / MENTAL HEALTH CONSENSUS PROJECT xii (June 2002).

[3] *Id.* at xiii.

[4] *Id.*

[5] BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUB. No. N U 174463, MENTAL HEALTH TREATMENT OF INMATES AND PROBATIONERS 1 (July 1999). Over one-quarter of the inmates with mental illnesses in local jails were incarcerated for a public order offense. *Id.* at 4.

[6] *Id.* at 7-9.

[7] Bazelon Center study (on file with author).

[8] Pub. L. No. 106-515, 114 Stat. 2399 (2000) (codified as amended in scattered sections of 42

[9] Americans with Disabilities Act of 1990, 42 U.S.C.A. §§ 12101 et seq. *See, e.g.,* Lane v. Tennessee, 315 F.3d 680, 682-83 (6th Cir. 2003) (affirming denial of defendant's motion to dismiss, concluding that "it was reasonable for Congress to conclude that it needed to enact legislation to prevent states from unduly burdening constitutional rights, including the right of access to the courts"); Gregory v. Administrative Office of the Courts of New Jersey, 168 F. Supp. 2d 319 (D.N.J. 2001) (holding that Eleventh Amendment did not preclude ADA claim against the court for failing to provide special translation for hearing impaired plaintiff).

[10] COUNCIL OF STATE GOVERNMENTS, *supra* note 1, at 9.

[11] *Id.* at 5 (citing testimony of Reginald Wilkinson, then Vice President, Association of State

Correctional Administrators and Director, Ohio Department of Rehabilitation and Correction, before the House Judiciary Committee, Subcommittee on Crime, Terrorism and Homeland Security, oversight hearing on "The Impact of the Mentally Ill on the Criminal Justice System," Sept. 21,2000).

[12] BUREAU OF JUSTICE STATISTICS, *supra* note 4, at 1.

[13] BUREAU OF JUSTICE STATISTICS, *supra* note 4, at 1.

[14] Linda A. Teplin, *Keeping the Peace: Police Discretion and Mentally Ill Persons*, NATIONAL

INST. OF JUST. J., July 2000, at 12.

[15] 42 U.S.C. §§ 12131-12134.

[16] People diagnosed with mental illnesses, as a class, are no more violent than the general society. "There was no significant difference between the prevalence of violence by patients without symptoms of substance abuse and the prevalence of violence by others living in the same neighborhoods who were also without symptoms of substance abuse. Substance abuse significantly raised the rate of violence in both. . . ." MacArthur Foundation, *Violence Risk Assessment Study, 55* ARCHIVES OF GENERAL PSYCHIATRY 393 (1998).

[17] COUNCIL OF STATE GOVERNMENTS, *supra* note 1, at 116.

[18] Bazelon Center study (on file with author).

[19] Eric Trupin, et al., *King County District Court Mental Health Court Phase I Process Evaluation Report* (undated) (on file at The Washington Institute for Mental Illness Research & Training, University of Washington).

[20] *See* Bazelon Center for Mental Health Law, *A New Vision* of *Public Mental Health,* including the model law, An Act Providing Recovery-Oriented Mental Health Services and

Supports (2002).

[21] Not all courts require proof that the person has been diagnosed with a mental illness. See, *e.g.,* King County District Court, Washington. For some people, the first time a mental illness is recognized by the family or the individual is when the person is arrested for bizarre or unusual behavior.

[22] 42 U.S.C.A. *§* 3796ii-2(d)(5).

[23] COUNCIL OF STATE GOVERNMENTS, supra note 1, at *16.*

[24] Id.

[25] CENTER FOR COURT INNOVATION, RETHINKING THE REVOLVING DOOR: A LOOK AT MENTAL ILLNESS IN THE COURTS (2001).

[26] American Bar Association, *ABA Standards for Criminal Justice: Providing Defense Services,* Standard *5-6.1,* Initial Provision of Counsel (1992) at http://www.abanet.org/crimjust/standards/defsvcs-blk.html.

[27] The National Center on Institutions and Alternatives, *The Mark of Cain: The Collateral Consequences of an Individual Arrested or Convicted in the United States* (visited Feb. 19, 2003) at http://www.ncianet.orgkonsequences.html. In public housing, for example, the "One Strike and You're Out" policy provides that "any criminal activity that threatens the health, safety, or right to peaceful enjoyment-of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be the cause of the termination of tenancy." 42 U.S.C. §1437d(1)(6) as amended (2000), upheld by *Department of Housing and Urban Development v. Rucker*, 535 U.S. 125 (2002). See also Jane Fritsch and David Rohde, *For New York City's Poor, A Lawyer with 1,600 Clients*, NEW YORK TIMES, Apr. 9, 2001 ("For indigent defendants, even those charged with the least serious transgressions, the stakes are growing. New laws have made criminal convictions grounds for denying people jobs, evicting them from city-owned housing, denying college financial aid and cutting off welfare benefits.").

[28] BUREAU OF JUSTICE STATISTICS, *supra* note 4, at 1.

[29] Patricia A. Griffin et al., *The Use* of *Criminal Charges and Sanctions in Mental Health Courts,* 53 PSYCHIATRIC SERVICES 1285,1285 (2002).

[30] John Petrila et al., Preliminary Observations From an Evaluation of the Broward County, Florida Mental Health Court 2, 23 (undated) (on file with author).

[31] COUNCIL OF STATE GOVERNMENTS, *supra* note 1, at 90.

[32] For detailed program descriptions and contact information, see **http://www.consensusproject.org/programs/**

[33] See, e.g., Eric Trupin et al., Mental Health Court Evaluation Report, City of Seattle Municipal Court 41 (Sept. 5,2001) (on file with author) (finding length of participation ranged from 4 to 424 days).

[34] NATIONAL ASSOCIATION OF PRETRIAL SERVICES AGENCIES, PERFORMANCE STANDARDS AND GOALS FOR PRETRIAL RELEASE 22-23 *(1998).*

[35] COUNCIL OF STATE GOVERNMENTS, *supra* note 1, at *89*.

[36] Id. at *91*.

[37] Numbers exceed 100 percent because several courts reported more than one strategy.

[38] COUNCIL OF STATE GOVERNMENTS, supra note 1, at 100.

[39] Id. at 120-21.

[40] Id. at 88-89.

[41] Id. at 123.

[42] See Bazelon Center for Mental Health Law, *supra* note 19.

[43] COUNCIL OF STATE GOVERNMENTS, *supra* note 1, at 44.

[44] CENTER FOR COURT INNOVATION, *supra* note 24.

[45] *See supra* note 26.