

FREEING THE MOST VULNERABLE: Litigation Tools to Reduce the Disabled Prisoner Population

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Hundreds of thousands of men, women, and children with disabilities are incarcerated. They face discrimination and endure conditions that can be life-threatening in prisons and jails that are ill equipped to house and treat them. This Article describes how litigation can be used to divert disabled prisoners from correctional systems via constitutional claims, lawsuits premised on the Americans with Disabilities Act, and innovative post-judgment remedial schemes.

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Introduction

People with disabilities make up a huge proportion of the nation's jail and prison population. Roughly thirty-two percent of prison inmates, and forty percent of jail detainees, self-report at least one disability.¹ The majority of youth involved in the criminal justice system have a diagnosable mental health or substance abuse disorder, and nearly thirty percent of these disorders are so severe that they lead to functional impairments.² Those with serious mental disabilities continue to be jailed more often, and for far longer, than the nondisabled.³ This is true even when community treatment and services would be safe and effective, and far cheaper to administer. In Los Angeles County, the average cost of jailing an individual with serious mental illness exceeds \$48,500 per year. By comparison, the price tag for providing Assertive Community Treatment, or ACT, and supportive housing—one of the most intensive, comprehensive, and successful intervention models in use today—amounts to around \$20,500 annually, less than half the cost of jail.⁴

But the economics of incarceration have not swayed the public or politicians to address how so many disabled men, women, and children end up behind bars. Though the decades-long surge in our prison and jail population has recently come under criticism from across the political spectrum,⁵ the reality is that very little progress has been made to reduce the number of Americans who are locked up. “[O]ur current incarceration rate—seven of every thousand—is the same as in 2002, and four times the level in 1970, when American incarceration rates began to rise.”⁶

Some litigators have tried to reduce the incarceration of the disabled via constitutional challenges, lawsuits premised on the Americans with Disabilities Act (ADA), and less traditional litigation tactics and tools. These lawsuits have resulted in both court-enforceable remedies and specific reform roadmaps to move the disabled away from prisons

1. JENNIFER BRONSON ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *DISABILITIES AMONG PRISON AND JAIL INMATES 2011–12* 1 (2015).
2. Fred Meservey & Kathleen R. Skowrya, *Caring for Youth with Mental Health Needs in the Juvenile Justice System: Improving Knowledge and Skills*, NAT'L CTR. FOR MENTAL HEALTH & JUV. JUST. 1–2 (May 2015), <http://www.ncmhjj.com/wp-content/uploads/2016/02/OJJDPforprinter102815.pdf> [<https://perma.cc/SZ6C-E68B>].
3. KIDEUK KIM ET AL., URBAN INST., *THE PROCESSING AND TREATMENT OF MENTALLY ILL PERSONS IN THE CRIMINAL JUSTICE SYSTEM* 11–12 (2015); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, *MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES* 8 (2006).
4. Rebecca Vallas, *Disabled Behind Bars*, CTR. FOR AM. PROGRESS (July 18, 2016, 12:01 AM), <https://www.americanprogress.org/issues/criminal-justice/reports/2016/07/18/141447/disabled-behind-bars> [<https://perma.cc/9XNW-U7JQ>] (citing AM. CIV. LIBERTIES UNION, *A WAY FORWARD: DIVERTING PEOPLE WITH MENTAL ILLNESS AWAY FROM INHUMANE AND EXPENSIVE JAILS INTO COMMUNITY-BASED TREATMENT THAT WORKS*) (2014)).
5. See Michael Vitiello, *Alternatives to Incarceration: Why Is California Lagging Behind?*, 28 *GEOR. ST. U. L. REV.* 1275, 1281 (2012).
6. Margo Schlanger, *Anti-Incarcerative Remedies for Illegal Conditions of Confinement*, 6 *U. MIAMI RACE & SOC. JUST. L. REV.* 1, 2 (2016).

and jails. This Article explores these cases and describes how the Eighth and Fourteenth Amendments, and the ADA, provide ample authority to divert the disabled from our most brutal and dehumanizing institutions.

These population reduction remedies pale in impact to the broad criminal justice reforms that state and local legislatures can enact and have enacted in recent years. These include changes to bail and parole laws, sentencing reforms, diversion programs, and enhanced police training in de-escalation techniques.⁷ In fact, some jurisdictions have enacted reforms that specifically target those with mental disabilities.⁸

For a number of reasons, the court-ordered reforms described in this Article should still be pursued aggressively. First, they can set the stage for a larger set of legislative reforms through effective public education and advocacy. Second, they can alleviate tremendous suffering endured by disabled persons now housed in correctional facilities that are not equipped to provide them the specialized services they require. Third, disabled prisoners use up a disproportionate amount of prison and jail resources, and moving them out will enable these correctional systems to operate better for all remaining prisoners. Fourth, litigators should use every tool at their disposal to reduce our bloated correctional system. Finally, the remedies described here flow from the most basic protections for the disabled that we find in our Constitution and federal law. To shy away from seeking them ill serves both our clients and our duty to vigorously enforce civil rights laws.

This Article is written for practitioners, to provide them with successful litigation theories and strategies for seeking remedies to reduce the disabled prisoner population. It also sets out some pitfalls to these claims, and how to successfully avoid or combat them. Finally, this Article provides examples of court-ordered diversion remedies. These remedies flow from the particular facts of each case, but they may spur some thoughts on how to structure future settlements or requests for specific remedies following trial. The Article is organized as follows: Part I examines what has been the most effective legal claim for court-ordered population reductions: Fourteenth Amendment challenges to state systems that deny the timely hospitalization of incompetent criminal defendants. Part II examines court orders that reduce the disabled population based in cases challenging unconstitutional conditions of confinement under the Eighth and Fourteenth Amendments. Part III focuses on cases seeking to divert disabled prisoners based on the Americans with Disabilities Act (ADA), an underutilized statute that holds the most promise of all possible claims to redirect those with disabilities from prisons and jails.

7. The Urban Institute has devised a calculator that can project the savings in jail and prison beds from various reforms. See Ryan King et al., *Reducing Mass Incarceration Requires Far-Reaching Reforms*, URBAN INST. (Aug. 2015), <http://webapp.urban.org/reducing-mass-incarceration> [https://perma.cc/YC5P-KLE6].

8. See generally CTR. FOR HEALTH & JUSTICE AT TASC, NO ENTRY: A NATIONAL SURVEY OF CRIMINAL JUSTICE DIVERSION PROGRAMS AND INITIATIVES (2013).

I. Due Process Challenges to Systems for Failing to Hospitalize Incompetent Defendants

Up to sixty thousand criminal defendants each year are evaluated to determine if they are competent to proceed in their criminal cases.⁹ Nearly twenty percent of those tested are deemed incompetent.¹⁰ At any given time, defendants hospitalized for restoration of competency take up more than ten percent of all psychiatric hospital beds in the United States.¹¹ In California, more than twenty percent of all psychiatric beds are filled with incompetent defendants.¹² Typically, criminal defendants who have been deemed incompetent wait in county jails for a bed to open up at a state psychiatric facility. These jails are not equipped to provide the intensive treatment these men and women need both to treat their underlying illness and restore their competency. As discussed on the California Senate floor:

[Incompetent defendants] are the most costly and difficult to manage in the jail. In their acute state they are often violent, noncompliant, a danger to themselves and seriously disruptive to other inmates and staff. Typically they will not voluntarily take prescribed medication, thus are not making progress towards competency to participate in the criminal proceedings [and] . . . defendants usually get worse the longer they wait for admission to a Mental Health hospital.¹³

Over the past decade, a small but robust body of law has developed to speed incompetent defendants' transition from jails to psychiatric hospitals. These cases share some or all of the same hallmarks: (1) seriously mentally ill detainees who receive inadequate mental health treatment and no restorative services while housed at county jails, (2) exposure of these defendants to serious risks of harm (and actual harm) as a result of their jail stays and denial of treatment, (3) long wait times (weeks and months) for a psychiatric bed to open, and (4) delays in the disposition of their criminal cases as a result of these delays. Taken together, this body of case law is a powerful mechanism to secure the release of the most seriously mentally ill prisoners now held in county jails. In some states they number in the hundreds. They truly suffer while incarcerated, their illnesses grow more acute, and their long-term prognosis dims the longer they are denied adequate care.¹⁴ The case law sets forth a clear roadmap to making a viable due process claim, and the underlying facts necessary

9. Hal Wortzel et al., *Crisis in the Treatment of Incompetence to Proceed to Trial: Harbinger of a Systemic Illness*, 35 J. AM. ACAD. PSYCHIATRY & L. 357, 357 (2007) (based on 2001 data assessments).

10. *Id.*

11. *Id.*

12. See MAC TAYLOR, LEGISLATIVE ANALYST'S OFFICE, AN ALTERNATIVE APPROACH: TREATING THE INCOMPETENT TO STAND TRIAL 5 (2012).

13. CAL. S. RULES COMM., BILL ANALYSIS, S.B. No. 568, 2007–08 Sess. (Apr. 24, 2007) [hereinafter S.B. 568 BILL ANALYSIS].

14. Maude Edwards et al., *Delaying Treatment Leads to Poorer Recovery and Prognosis*, 172 BRITISH J. PSYCHIATRY 107 (1998).

to make a claim are far easier to gather than those necessary for a deliberate indifference claim challenging unlawful prison conditions.

In this regard, it is important to note that a number of the cases described below were brought by protection and advocacy systems (P & A's), organizations authorized under federal law to "pursue . . . legal, and other appropriate remedies to ensure the protection of individuals with mental illness who are receiving care or treatment in the State."¹⁵ These P & A's have the authority to investigate the living conditions of disabled persons,¹⁶ and are exempt from the requirement in the Prison Litigation Reform Act (PLRA) that prisoners exhaust all available administrative remedies at their facility before they can bring suit.¹⁷ Finding a P & A to serve as a client or co-counsel in these cases is invaluable, both to gather the evidence needed to make these claims, and (if the plaintiff) to avoid the morass of PLRA exhaustion.

Although there is no consensus on the amount of time a state can leave an incompetent defendant who needs restoration services in a county jail without violating the Due Process Clause, the cases suggest that even short jail stays can amount to a constitutional violation. This means a remedy can be secured without letting overtly psychotic clients languish indefinitely in county jails. This path to securing a relatively quick remedy is another way in which these due process challenges are superior to conditions of confinement litigation, discussed in the next section.

The two leading cases were decided days apart in 2002, one from Oregon (*OPA v. Mink*), the other from Arkansas (*Terry ex rel. Terry v. Hill*). Both states had similar schemes that were challenged. And in both cases, the factual records relied on by the courts were quite similar. In Sections A and B, I introduce the factual records of these cases. In Section C, I analyze the courts' reasoning and discuss implications for future due process challenges.

A. *The Oregon Competency Restoration Process*

In Oregon, criminal defendants found to be unable to assist or cooperate with defense counsel or participate in their defense as a result of a mental disease or defect¹⁸ were committed to the Oregon State Hos-

15. 42 U.S.C. § 10805(a)(1)(B) (2012).

16. *Id.* § 10803.

17. The statutory language in the PLRA provides that the exhaustion requirement applies only to actions "brought with respect to prison conditions . . . by a prisoner." 42 U.S.C. § 1997e(a) (2012). When the P & A is the plaintiff under the doctrine of associational standing, this is not a lawsuit "by a prisoner." There is a good argument that even when the jailed incompetent defendants are the plaintiffs, these due process lawsuits seeking restoration services are not subject to the exhaustion requirement, since these are not *per se* lawsuits "with respect to prison conditions" as defined by the statute. *See, e.g.,* *Regelman v. Sweber*, No. 10-675, 2011 WL 1085685, at *3 (W.D. Pa. Mar. 21, 2011) (false arrest plaintiff "is complaining about the very fact of confinement, not the conditions of confinement, and the PLRA does not apply to such claims").

18. OR. REV. STAT. § 161.360 (2015).

pital (OSH) for restoration services. Before 2002, the law provided that transport to the state hospital was to be completed within seven days. By 2002, the statute no longer specified how quickly transfer must occur.¹⁹

In 2001 and 2002, at least 105 defendants were found unfit to proceed in their criminal cases throughout the state.²⁰ They spent, on average, over thirty-one days in county jails awaiting transport to OSH, with the longest wait time being 166 days.²¹

While awaiting hospital beds, these defendants were housed in jails that provided “rudimentary” or “limited” mental health services that fell far short of what these patients required given their relative levels of acuity.²² One of the jails cited by the district court in its opinion only had mental health staff on-site once a week, and one provided no on-site mental health services.²³ None of the county jails could administer involuntary medications, except in a life-threatening emergency, even though some prisoners, particularly those with personality disorders, are known to refuse medication or treatment, or to not respond when asked for consent.²⁴ The district court described the population at issue as follows:

People found unfit to proceed are often overtly psychotic and require special housing or segregation. They are unpredictable and disruptive, taking up valuable resources needed for the care of other inmates. If they refuse to take medications, they often decompensate rapidly. They often are confined in their cells for 22 to 23 hours a day because of their behavior. This exacerbates their mental illness.²⁵

Unlike the county jails, OSH provided a full range of mental health services to treat criminal defendants’ underlying illnesses.²⁶ Critically, OSH also had in place an established program to promptly evaluate all new admissions, to restore them to competency, and to report to the courts the patients’ status during treatment, as required under state law.²⁷ Even though these defendants would eventually be hospitalized, even short periods of incarceration for them “can cause cognizable harm.”²⁸

On March 19, 2002, the Oregon Advocacy Center (OAC), the state’s P & A, and the Metropolitan Public Defenders Services, Inc. sued the Oregon Department of Human Services under the Protection and Advocacy for Individuals with Mental Illness (PAIMI) Act.²⁹ They were joined as plaintiffs by A.J. Madison, a criminal defendant charged with

19. Oregon Advocacy Ctr. v. Mink, No. 02-339-PA, 2002 WL 35578910, at *2 (D. Ore. May 10, 2002).

20. *Id.* at *3.

21. *Id.*

22. *Id.* at *2.

23. *Id.* at *4–6.

24. *Id.* at *3.

25. *Id.*

26. *Id.*

27. *Id.* at *3.

28. *Id.* at *6.

29. 42 U.S.C. § 10805 (2011).

assaulting his mother with a sledgehammer.³⁰ Madison had been deemed unfit to proceed, but remained housed at the Multnomah County Jail for twenty-three days while awaiting an open bed at OSH.³¹

B. *The Arkansas Competency Restoration Process*

Like Oregon, Arkansas in 2002 had a comprehensive statutory scheme in place regarding potentially incompetent criminal defendants. The state's trial courts were required to suspend all further proceedings if there was reason to believe a criminal defendant was unfit to proceed.³² The court then would order the defendant be examined by a psychiatrist or psychologist over a thirty-day period.³³ If found incompetent, the defendant would be transferred to the Arkansas State Hospital (ASH) for treatment until restored to competency, or it was determined that the defendant was unrestorable.³⁴

At the time of trial, there were seventy-one defendants awaiting a hospital bed for either restoration or assessment, and their average wait time was almost five months. The primary culprit for these wait times was a lack of available bed space at ASH, which lacked the funds to operate at full capacity.³⁵

These criminal defendants were subjected to substandard treatment and dangerous conditions while housed in county jails awaiting a hospital bed. Jail staff acknowledged at trial that neither their facilities nor their staff "were equipped to deal with mentally ill inmates."³⁶ Jail staff testified about one particular incompetent defendant who "broke a deputy's arm, assaulted inmates and deputies, tore things up, and had to be placed on the restraint list, meaning any time he was out of his cell, he was restrained."³⁷ A forensic psychiatrist who had worked at ASH testified that the delays in hospital admissions for these prisoners made it more difficult to treat them once they were hospitalized.³⁸ However, once admitted to ASH, these men and women did receive adequate care.³⁹

On June 16, 2001, James Terry filed a federal civil rights suit against the Deputy Director of the Arkansas Division of Mental Health Services and the Sheriff of Sebastian County, Ar., alleging that he had been held in the Sebastian County Jail for seven months after being deemed incompetent to proceed and ordered transferred to ASH. In November 2001, Judge Reasoner certified a class in *Terry* that is broader than the incompetent detainees considered in *Mink*, including not only all incompetent

30. *Mink*, 2002 WL 35578910, at *1.

31. *Id.*

32. *Terry ex rel. Terry v. Hill*, 232 F. Supp. 2d 934, 935 (E.D. Ark. 2002).

33. *Id.* at 936.

34. *Id.* at 937.

35. *Id.*

36. *Id.* at 939.

37. *Id.*

38. *Id.* at 940–41.

39. *Id.*

Arkansas criminal defendants ordered committed to ASH for restoration services, but also all defendants ordered to be transferred to ASH for an inpatient mental health evaluation.⁴⁰

C. *The Standard for Due Process Challenges on Behalf of Incompetent Defendants*

1. Substantive Due Process

Mink and *Terry* came down four days apart in May 2002. *Mink* was appealed, and the Ninth Circuit upheld the district court order in 2003. Though the cases did not rely on one another, they applied similar standards, derived from different bodies of case law.

In both cases, the courts rejected applying the more forgiving deliberate indifference standard used for Eighth Amendment claims.⁴¹ Rather, they held that the members of each class, all pretrial detainees, could not legally be subject to punishment under the Due Process Clause of the Fourteenth Amendment.⁴²

In setting its standard in *Mink*, the Ninth Circuit looked at precedent addressing the substantive due process rights of incapacitated criminal defendants. The court concluded that “incapacitated criminal defendants . . . have a liberty interest in receiving restorative treatment.”⁴³ It cited *Jackson v. Indiana*,⁴⁴ a case involving a deaf-mute criminal defendant found incompetent to stand trial, who had been committed to the state hospital, and remained there for three years though he “establishe[d] the lack of a substantial probability that he [would] ever be able to participate fully in a trial.”⁴⁵ In concluding such confinement was unconstitutional, the *Jackson* court recognized, “[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual [is] committed.”⁴⁶

The Ninth Circuit concluded that the principles underlying *Jackson* applied even though that case addressed the hospitalization of an incompetent defendant.⁴⁷ It then set the following standard to assess plaintiffs’ claims: “[w]hether the substantive due process rights of incapacitated criminal defendants have been violated must be determined by balancing their liberty interests in freedom from incarceration and in restorative treatment against the legitimate interests of the state.”⁴⁸

Applying this test, the Ninth Circuit found the state defendants had provided no “legitimate state interest in keeping mentally incapacitated

40. *Id.* at 935.

41. *See Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1120 (9th Cir. 2003); *Terry*, 232 F. Supp. 2d at 941.

42. *Mink*, 322 F.3d at 1120; *Terry*, 232 F. Supp. 2d at 941.

43. *Mink*, 322 F.3d at 1121.

44. 406 U.S. 715 (1972).

45. *Id.* at 738–39.

46. *Id.* at 738.

47. *Mink*, 322 F.3d at 1122.

48. *Id.* at 1121.

criminal defendants locked up in county jails for weeks or months.”⁴⁹ In fact, doing so undermined the state’s legitimate interest in bringing criminal defendants to trial.⁵⁰ It concluded, “[h]olding incapacitated criminal defendants in jail for weeks or months violates their due process rights because the nature and duration of their incarceration bear no reasonable relation to the evaluative and restorative purposes for which courts commit those individuals.”⁵¹

In *Terry*, the district court looked at cases addressing the substantive due process rights of pretrial detainees in setting its standard. Citing *Bell v. Wolfish*,⁵² the court concluded that holding incompetent defendants in jails would be unconstitutional if it were “not reasonably related to a legitimate goal—if it is arbitrary or purposeless” such that “a court permissibly may infer that the purpose of the governmental action is punishment that may not be inflicted upon detainees qua detainees.”⁵³

Applying this standard, Judge Reasoner held:

The lack of inpatient mental health treatment, combined with the long wait in confinement, transgresses the constitution. The lengthy and indefinite periods of incarceration, without any legal adjudication of the crime charged, caused by the lack of space at [the state hospital] is not related to any legitimate goal, is purposeless and cannot be constitutionally inflicted upon the members of the class.⁵⁴

The court found “a veritable cavalcade of human tragedy marched through the record at trial . . . inmates that have been ordered for evaluation of treatment are languishing in jail, causing them to suffer from lack of basic treatment and the severity of that suffering amounts to punishment.”⁵⁵

Both the *Mink* and *Terry* standards provide ample room for litigators to bring successful due process challenges. Both turn on whether the long wait times endured by incompetent defendants serves any legitimate state purpose. In both cases, the courts quite readily decided they did not. Both standards also focus on the harm that befell incompetent defendants who remained jailed. The nature of the evidence relied on in each case was quite similar. In the end, the *Mink* balancing test provides greater protections, since it rests on the affirmative right of incompetent defendants to restorative treatment, which the *Terry* court’s rational relationship test does not. However, there is no reason that litigators should not cite both standards, given that they are easily synthesized.

In fact, this is exactly what was done in the one published decision since *Terry* and *Mink* that has addressed the applicable due process standard. In April 2010, the Advocacy Center of Louisiana, the state’s

49. *Id.*

50. *Id.*

51. *Id.* at 1122.

52. 441 U.S. 520 (1979).

53. *Id.* at 539.

54. *Terry ex rel. Terry v. Hill*, 232 F. Supp. 2d 934, 943–44 (E.D. Ark. 2002).

55. *Id.* at 941.

P & A, and patient W.B.—an incompetent detainee incarcerated at the Orleans Parish Prison for over two-hundred days while awaiting a bed at the state’s lone forensic facility (Feliciana Forensic Facility)—sued the Louisiana Department of Health and Hospitals on behalf of some 130 incompetent detainees throughout the state who were jailed while awaiting a bed for psychiatric restoration services.⁵⁶ The average wait time for incompetent detainees to get a bed at Feliciana was 195 days.⁵⁷

In August 2010, Judge Vance granted in part the plaintiffs’ motion for preliminary injunction. The court first noted that plaintiffs’ claims “implicate several strains of the Supreme Court’s Fourteenth Amendment jurisprudence.”⁵⁸ The court also noted the *Jackson* holding that “due process requires that the nature and duration of commitment bear some reasonable relationship to the purpose for which the individual is committed.”⁵⁹ It then cited the rational relationship test established in *Bell*.⁶⁰ The court finally noted *Youngberg v. Romeo*’s holding that the balancing test required by the Due Process Clause “can be accomplished by making certain that the condition of the inmate’s confinement resulted from the exercise of professional judgment,” as exercised by “a person competent, whether by education, training, or experience, to make the particular decision at issue.”⁶¹

Applying these principles, the court found no rational relationship between keeping incompetent defendants at county jails that were ill equipped to treat them and the state’s interest in restoring them to competency (or determining that they were unrestorable).⁶² Moreover, the court found that the failure to transfer detainees to Feliciana was not the product of any professional judgment, but rather was dictated by the scarcity of state resources.⁶³

Judge Vance’s decision is notable for its detailed comparison between the mental health program provided at Feliciana and the minimal mental health services incompetent defendants receive at the parish jails. Critically, hospitals are therapeutic environments, while jails are not. This is particularly important for incompetent defendants suffering from psychosis, who need to feel safe to voluntarily participate in treatment, take their medications, and clinically improve.⁶⁴ Unlike jails, where prisoners “have large stretches of unoccupied and unproductive time that makes

56. *Advocacy Ctr. for the Elderly & Disabled v. Louisiana Dep’t. of Health & Hosp.*, 731 F. Supp. 2d 603 (E.D. La. 2010); Complaint at 3, *Advocacy Ctr. for the Elderly & Disabled v. Louisiana Dep’t. of Health & Hosp.*, 731 F. Supp. 2d 603 (E.D. La. 2010) (No. 10-1088) [hereinafter *Advocacy Center Complaint*].

57. *See* *Advocacy Center Complaint*, *supra* note 56, at ¶ 4.

58. *Advocacy Ctr.*, 731 F. Supp. at 738.

59. *Id.* at 609 (quoting *Jackson v. Indiana*, 406 U.S. 715, 736 (1972)).

60. *Id.*

61. *Id.* at 609–10 (quoting *Youngberg v. Romeo*, 457 U.S. 307, 323 n.30 (1982)).

62. *Id.* at 610.

63. *Id.*

64. *Id.* at 611.

it difficult to cultivate a therapeutic environment,” hospitals provide a range of pro-social activities administered by trained staff.⁶⁵

Since *Mink* and *Terry*, litigators have sought to expand substantive due process claims to cover defendants who are incompetent by reason of developmental disabilities. On July 29, 2015, the ACLU of Northern and Southern California, along with family members of criminal defendants who were declared incompetent to stand trial, filed a taxpayer-standing⁶⁶ lawsuit alleging violations under Article I, sections seven and fifteen of the California Constitution, as well as the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.⁶⁷ The complaint alleges that there were some 366 incompetent defendants in county jails awaiting placement to a Department of State Hospitals facility.

Plaintiffs allege that some individuals with mental disorders had been waiting for transfer for up to 258 days. Delays were even longer for those defendants with developmental disabilities. State agencies reported that there were fifty-two such individuals awaiting placement, eleven of whom had been waiting more than nine months following their commitment.⁶⁸ The case remains pending.⁶⁹

2. Procedural Due Process

Litigators should strongly consider pleading a procedural due process claim along with a substantive due process claim on behalf of incompetent defendants housed in county jails. A procedural due process claim requires very little additional evidence. In *Mink*, the sum total of the district court’s findings for a procedural due process violation was that incompetent defendants “suffer delays in receiving restorative treatment, which delays their return to competency, prolonging their criminal cases . . . [and] delay[ing] the statutorily mandated competency review.”⁷⁰ The real value of bringing a procedural due process claim is that it supports a more exacting injunction than if just a substantive due process claim is brought, as was the case in *Mink*.⁷¹

3. The Remedy

The *Mink* court ordered by far the most stringent remedy of any case addressing delays in restoration services. It required that criminal defendants deemed unfit to proceed under state law have a right to “reasonably timely” admission to a treatment facility, which must be

65. *Id.* at 611–12.

66. This is pursuant to CAL. CIV. PROC. CODE § 526a (West 2010).

67. Complaint at 55, *Stiavetti v. Ahlin*, No. RG15779731 at ¶¶ 56, 60, 64 (Alameda Sup. Ct. July 29, 2015) [hereinafter *Stiavetti Complaint*].

68. See *Stiavetti Complaint*, *supra* note 67, at ¶ 42–43.

69. Docket, *Stiavetti v. Ahlin*, No. RG15779731 (Alameda Sup. Ct.), <https://www.clearinghouse.net/chDocs/public/MH-CA-0006-9000.pdf>.

70. *Oregon Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1119 n.10 (9th Cir. 2003).

71. *Id.* (“These procedural due process violations further support the district court’s injunction.”).

completed within seven days of a court order declaring them unfit to stand trial.⁷² In contrast, the court in *Terry* approved a settlement that established priority levels for the initiation of restoration services and treatment based on the acuity of the detainee, but in no instance could hospitalization be delayed by more than 45 days.⁷³ The *Advocacy Center* court approved a similar scheme.⁷⁴

Mink's seven-day deadline is not really explained in either the district court or Ninth Circuit decisions. It was presumably taken from the superseded Oregon state statute, but this is not made explicit in either decision. It also just applies to restoration services, and not to competency evaluations, which were not at issue in *Mink*.

Notably, after *Mink*, the Ninth Circuit declined to extend a seven-day time limit to the completion of competency evaluations.⁷⁵ While recognizing that “the framework set out in *Jackson*, and applied to restorative competency services in *Mink*, is equally applicable to individual awaiting competency evaluations,”⁷⁶ the Ninth Circuit overturned the district court’s imposition of a seven-day deadline, since it failed to consider whether the existing fourteen-day deadline for evaluations bore a reasonable relationship to legitimate government goals, and it failed to balance the parties’ competing interests in evaluations.⁷⁷

But the remedies that litigators should consider in these due process challenges should not be limited to strict timelines for hospitalization. A recent Pennsylvania case led to remedies that include expanded resources that can divert the seriously mentally ill from the criminal justice system altogether. In October 2015, incompetent Pennsylvania defendants filed a lawsuit claiming their due process rights had been violated by the state’s failure to timely transfer them from county jails to one of the two state forensic hospitals.⁷⁸ They alleged that the state had allotted only

72. *Id.* at 1119.

73. See Settlement Agreement at 2, *Terry v. Hill*, No. 4:01-cv-00458-BRW (E.D. Ark. Sept. 17, 2002).

74. Judge Vance ordered the state to provide restorative treatment to all such prisoners, requiring them to be transferred to Feliciana within 21 days of their detention. *Advocacy Ctr. for the Elderly & Disabled v. Louisiana Dep’t. of Health & Hosp.*, 731 F. Supp. 2d 603, 627 (E.D. La. 2010). While the defendants’ appeal was pending, the parties reached a comprehensive consent decree in April 2011. The decree set different deadlines for admission to the hospital based on the detainee’s acuity. The decree provides that individuals who met either of two criteria (based on their score on a behavioral assessment or the determination of doctor) must be admitted to Feliciana within two working days of having a behavioral assessment, and in no case shall hospitalization be delayed more than 30 days following an order for inpatient treatment. See Consent Decree, *Advocacy Ctr. for the Elderly & Disabled v. Louisiana Dep’t. of Health & Hosp.*, 731 F. Supp. 2d 603 (E.D. La. 2010) (No. 10-1088).

75. *Trueblood v. Wash. State Dep’t of Soc. & Health Servs.*, 822 F.3d 1037 (9th Cir. 2016).

76. *Id.* at 1043.

77. *Id.* at 1044–45.

78. Complaint, *J.H. v. Dallas*, No. 1:15-cv-02057-SHR (M.D. Pa. Oct. 22, 2015), ECF

237 beds for restoration services and that there were 200 incompetent detainees who were on a waiting list for those beds.⁷⁹ The last 25 incompetent defendants from Philadelphia County who were admitted to the state hospital waited on average 391 days before securing a bed.⁸⁰

On January 27, 2016, the parties filed a settlement agreement with the court. Under the agreement, the state agreed to create at least 120 new placement options, including hospital beds and community-based settings; to allocate at least \$1 million to create supportive housing options in Philadelphia for incompetent defendants; and to assess every person either undergoing restoration services at a state hospital or awaiting restoration services, so as to determine their least restrictive placement.⁸¹ Though this was a settlement, and not a litigated judgment, the remedies secured here should be considered in future cases.

II. Diversion Remedies Emanating from Conditions Lawsuits

A second, though more difficult, path to securing the diversion of disabled prisoners from incarceration is via lawsuits challenging conditions of confinement. The diversion remedies may be either court-ordered, or emanate from broader criminal justice assessments developed under the auspices of a conditions case.

There have been a handful of federal lawsuits that have resulted in court-enforceable remedies that require jails and prisons to transfer prisoners out when they suffer from mental disabilities that are too acute to be treated adequately inside prison walls. These remedies flow from the affirmative duty of prison officials to provide adequate treatment for prisoners' serious healthcare needs under the Eighth Amendment (for sentenced prisoners) and the Fourteenth Amendment (for pretrial detainees).

A. *Constitutional Standards for Conditions Claims*

Pretrial detainees are protected from punishment by the Due Process provisions of the Fifth and Fourteenth Amendments.⁸² The “determination [of whether a particular condition or restriction imposes punishment in the constitutional sense] will ‘turn on whether an alternative purpose . . . is assignable.’”⁸³ Even when limitations on a pretrial detainee's freedom are rationally related to a legitimate non-punitive

No. 1. Plaintiffs sought certification of two classes: those deemed incompetent and awaiting placement at one of the state-run forensic hospitals (denoted in the complaint as Class A), and those currently at those hospitals receiving restoration services who have been deemed as likely unrestorable (Class B). *Id.* ¶¶ 2–3.

79. *Id.* ¶¶ 2, 46.

80. *Id.* ¶ 1.

81. Settlement Agreement, *J.H. v. Dallas*, No. 1:15-cv-02057-SHR (M.D. Pa. Jan. 27, 2016), ECF No. 35.

82. *Bell v. Wolfish*, 441 U.S. 520, 535–36 & n.16 (1979).

83. *Id.* at 538.

government purpose, they will amount to punishment if “they appear excessive in relation to that purpose.”⁸⁴

This standard for pretrial detainees differs significantly from the standard for convicted prisoners, who may be subject to punishment as long as that punishment does not violate the Eighth Amendment’s ban on cruel and unusual punishment.⁸⁵ Nevertheless, courts evaluating the claims of pretrial detainees under the Fourteenth Amendment have used the Eighth Amendment’s analytical framework of deliberate indifference to analyze conditions claims other than excessive force claims.⁸⁶

Underlying the Eighth Amendment is the fundamental premise that prisoners are not to be treated as less than human beings.⁸⁷ Prisoners prove an Eighth Amendment violation by showing that they are incarcerated under conditions posing a substantial risk of serious harm to their health or safety and that officials acted with deliberate indifference—that is, with conscious disregard for that risk.⁸⁸ Prison officials may not “ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year” merely because no harm has yet occurred, and a “remedy for unsafe conditions need not await a tragic event.”⁸⁹

“[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.”⁹⁰ When the State fails to provide an individual’s basic human needs—food, clothing, shelter, medical care and reasonable safety—“it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.”⁹¹

84. *Id.* at 561.

85. *Pierce v. Cty. of Orange*, 526 F.3d 1190, 1205 (9th Cir. 2008).

86. *See Simmons v. Navajo Cty.*, 609 F.3d 1011, 1017 (9th Cir. 2010) (quoting *Clouthier v. Cty. of Contra Costa*, 591 F.3d 1232, 1244 (9th Cir. 2010)). *See also Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2472–73 (2015) (holding the deliberate indifference standard is inapplicable to excessive force claims brought by prisoners and applying the objective standard to excessive force claims). The Ninth Circuit recently held that an objective standard also applies to pretrial detainees’ failure-to-protect claims. *Castro v. County of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016). The Second Circuit also recently held that an objective standard applies to evaluating pretrial detainees’ conditions of confinement challenges. *Darnell v. Prieto*, 849 F.3d 17 (2d Cir. 2017).

87. *Spain v. Procunier*, 600 F.2d 189, 200 (9th Cir. 1979) (citing *Furman v. Georgia*, 408 U.S. 238, 271–73 (1972) (Brennan, J. concurring)) (“The [Eighth] [A]mendment is phrased in general terms rather than specific ones so that while the underlying principle remains constant in its essentials, the precise standards by which we measure compliance with it do not.”).

88. *Farmer v. Brennan*, 511 U.S. 825, 834, 839–40 (1994).

89. *Helling v. McKinney*, 509 U.S. 25, 33 (1993); *accord Farmer*, 511 U.S. at 845.

90. *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 199–200 (1989).

91. *Id.* at 200.

Moreover, prisoners have a right to adequate care for serious medical and mental health needs.⁹² A failure to timely transfer prisoners to a hospital for medical or mental health treatment when jail staff cannot adequately diagnose or treat a serious condition amounts to deliberate indifference.⁹³

B. Court-Ordered Diversion Remedies for Disabled Prisoners

Under these constitutional standards, courts have found corrections officials liable for failing to transfer disabled prisoners to other facilities better equipped to house and treat them. In a small handful of cases, courts have gone on to order government officials to hospitalize prisoners with serious mental illness. Others have gone further, ordering the expansion of available hospital beds dedicated to seriously mentally ill prisoners. Examples are set out below.

Securing a diversion remedy has been difficult and rare. The legal standard for liability, requiring plaintiffs to prove that officials acted with a culpable state of mind, is a high bar. Courts defer to corrections administrators in the running of prison and jail systems,⁹⁴ and this deference has made them leery of ordering prisoners transferred out of corrections systems. Ingrained in the legal standard is the principle that a difference of opinion between a corrections physician and an outside expert over the proper course of care for an ill prisoner does not amount to constitutional liability.⁹⁵ So, where a prison psychiatrist testifies that a seriously mentally ill prisoner can be adequately treated at a correctional facility, courts are loathe to second guess them. Even where liability is found, it is the defendant corrections officials who have the first opportunity to

92. See *Estelle v. Gamble*, 429 U.S. 97, 103 (1976); see also *Doty v. Cty. of Lassen*, 37 F.3d 540, 546 (9th Cir. 1994) (“In accordance with the other courts of appeals that have examined this issue, we now hold that the requirements for mental health care are the same as those for physical health care needs.”) (citing *Torralco v. Maloney*, 923 F.2d 231, 234 (1st Cir. 1991); *Bowring v. Godwin*, 551 F.2d 44, 47 (4th Cir. 1977); *Smith v. Jenkins*, 919 F.2d 90, 93 (8th Cir. 1990); and *Greason v. Kemp*, 891 F.2d 829, 834 (11th Cir. 1990)); see also *Partridge v. Two Unknown Police Officers*, 791 F.2d 1182, 1187 (5th Cir. 1986) (“A serious medical need may exist for psychological or psychiatric treatment, just as it may exist for physical illness.”).

93. *Hoptowitz v. Ray*, 682 F.2d 1237, 1253 (9th Cir. 1982) (“Such referrals may be to other physicians within the prison, or to physicians or facilities outside the prison if there is reasonably speedy access to these other physicians or facilities.”); *Kaminsky v. Rosenblum*, 929 F.2d 922, 927 (2nd Cir. 1991) (failure to act on recommendation for immediate hospitalization); *Miltier v. Bourne*, 896 F.2d 848, 853 (4th Cir. 1990) (failure to transfer to a cardiology unit); *Washington v. Dugger*, 860 F.2d 1018, 1021 (11th Cir. 1988) (failure to return patient to VA hospital for treatment of Agent Orange exposure); *West v. Keve*, 571 F.2d 158, 162 (3d Cir. 1978) (reversing dismissal where prison refused to transfer inmate to hospital to get surgery that prison was not equipped to perform).

94. See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 544 (1979) (courts should not “second-guess the expert administrators on matters on which they are better informed” (quoting *Wolfish v. Levi*, 573 F.2d 118, 124–25 (2d Cir. 1978))).

95. *Estelle*, 429 U.S. at 105.

propose a remedy.⁹⁶ Given how expensive it is to secure a hospital bed, prison officials will rarely jump to this as a remedy, though they may very well want to move this population out of their systems.

As the cases described below show, a hospitalization remedy has been secured only where a number of factors have aligned: a dangerously substandard mental health system, a court willing to find liability and order hospitalization, or a defendant willing to concede that more hospital beds are necessary. Of these, the first factor is the most important: the more dangerous a plaintiff's lawyer can show a jail or prison is for those suffering with serious mental illness, the stronger the odds that a hospitalization remedy can be secured. Those dangers flow not just from substandard mental health treatment, but also from hazardous conditions that expose the mentally ill prisoners to harm, particularly violence at the hands of fellow prisoners and staff.

Though rare, hospitalization remedies are essential to ensure that the most seriously mentally ill prisoners receive the treatment they need. Jails are not hospitals. They are not therapeutic settings. They are, in many cases, anti-therapeutic. In order to build the record necessary to secure hospitalization, a litigator must not only show that prisoners with serious mental illness are unnecessarily suffering, but that adequate treatment can only be provided via a hospital transfer, and that corrections systems around the country have put in place procedures to do so.

One of the earliest cases to order a hospitalization remedy was *Inmates of Allegheny County v. Pierce*,⁹⁷ decided in 1980. There were two key findings underpinning the remedy: First, there were deficiencies throughout the jail's mental health care system (from booking to discharge) that made it impossible to adequately treat the most ill prisoners.⁹⁸ These included inadequate intake screening, insufficient staff, unsafe housing, overuse of isolation and punitive lockdown on seriously mentally ill prisoners, inadequate treatment, and long delays in transferring prisoners who had been committed to psychiatric hospitals.⁹⁹

Second, the court found that keeping these men at the jail created security hazards for them, fellow prisoners, and staff.¹⁰⁰ The court held, "[t]he deficiencies in immediate care result[ed] in physical danger to the ill inmates and to others, create[d] security problems at the jail, aggravate[d]—rather than alleviate[d]—the conditions of many of the most seriously ill, and contribute[d] to the chaotic environment in the jail."¹⁰¹ The court ordered that "appropriate proceedings . . . be instituted within

96. *Lewis v. Casey*, 518 U.S. 343, 362 ("[C]onsiderations of comity . . . require giving the States the first opportunity to correct the errors made in the internal administration of their prisons." (quoting *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973))).

97. 487 F. Supp. 638 (W. D. Pa. 1980).

98. *Id.* at 642.

99. *Id.*

100. *Id.* at 643.

101. *Id.*

72 hours” of jail health care staff determining that a prisoner should be transferred to a psychiatric facility.¹⁰² The court further ordered that the jail employ two psychiatrists who would be responsible for, among other duties, “mak[ing] recommendations to the jail on the appropriate placement of inmates within or outside the jail.”¹⁰³

The particularly damaging effects of isolation on the mentally ill have also spurred courts to order hospitalization. In *Casey v. Lewis*,¹⁰⁴ the court found, among numerous systemic problems with Arizona prisons’ mental health care system, that “[i]nmates experience delays [in] assessment, treatment and in commitment to mental hospitals.”¹⁰⁵ The parties later stipulated to a settlement for court-enforceable remedies that required the Arizona Department of Corrections (ADOC) to develop and implement policies and procedures designed to transfer prisoners housed in isolation cells who exhibit symptoms of serious mental illness to a mental health facility. The *Casey* decree also included a novel remedy flowing from the more limited access female prisoners had to hospitalization than male prisoners. The decree ordered defendants to ensure “that seriously mentally ill female prisoners . . . are transferred to a facility for involuntary commitment commensurate to the level of mental health care” provided to involuntarily committed men.¹⁰⁶

Like *Casey*, the court in *Arnold ex rel. H.B. v. Lewis*,¹⁰⁷ also focused on the effect of lockdown in ordering improved hospital access. There, the court held ADOC officials liable for failing to timely transfer to the Arizona State Hospital Ms. H.B., a schizophrenic inmate who could not be adequately treated at the prison.¹⁰⁸ Ms. H.B. had been repeatedly transferred to the state hospital for short stays, then moved back to the prison, where she often ended up in lockdown units, which resulted in her clinical deterioration.¹⁰⁹ The court also made a point of differentiating the environment of a hospital versus a prison, concluding “because of her mental illness, [Ms. H.B.] needs the therapeutic environment of a mental health treatment facility; however, such environment has not been provided by the [A]DOC for nearly ten years.”¹¹⁰ The court ordered Ms. H.B. moved to the Arizona State Hospital “[i]f necessary to ensure adequate treatment.”¹¹¹

But some courts have still been reluctant to specifically order hospitalization even in the face of overwhelming evidence of the damage

102. *Id.* at 644.

103. *Id.*

104. 834 F. Supp. 1477 (D. Ariz. 1993).

105. *Id.* at 1548.

106. Parties’ Stipulated Joint Proposal for Injunctive Relief for Mental Health at 10, *Casey v. Lewis*, 834 F. Supp. 1477 (D. Ariz. 1993) (No. CIV 90-0054 PHX CAM).

107. 803 F. Supp. 246 (D. Ariz. 1992).

108. *Id.* at 258.

109. *Id.* at 249, 253.

110. *Id.* at 256.

111. *Id.* at 258.

extreme isolation does to those with mental illness. In *Jones-El v. Berge*,¹¹² prisoners at a super maximum security facility in Wisconsin sued over the conditions of their confinement. Prisoners at custody level one spent all but four hours a week confined to their single cells—units designed to cut off all human contact.¹¹³ In granting a preliminary injunction, the court found, “for seriously mentally ill inmates, the conditions can be devastating. Lacking physical and social points of reference to ground them in reality, seriously mentally ill inmates run a high risk of breaking down and attempting suicide.”¹¹⁴ The court held that all prisoners at the facility “who exhibit some indication of a serious mental illness should be evaluated and transferred to a treatment facility,” and ordered that these evaluations be performed by “mental health professionals not employed by the Department of Corrections.”¹¹⁵ Though the court was “convinced” that a maximum security treatment facility it identified that was administered by the Wisconsin Department of Health Services “is capable of securing mentally ill inmates and treating their illnesses simultaneously,”¹¹⁶ it did not order that seriously mentally ill inmates be transferred there, only that they no longer be housed at the super maximum facility.¹¹⁷

Recently, a new threat to the path to hospitalization has emerged. While most states and counties have chosen to provide competency restoration services at hospitals, some have moved to providing these services at local jails. As a result, incompetent defendants—who usually are among the most ill in the prisoner population—remain jailed, exposed to health care systems not equipped to treat them. Maricopa County, Arizona adopted such a jail-based restoration-to-competency (RTC) program system and it is now subject to a legal challenge in *Graves v. Arpaio*.¹¹⁸

112. 164 F. Supp. 2d 1096, 1098 (W.D. Wis. 2001).

113. The district court described the conditions as follows:

The “boxcar” style door on the cell is solid except for a shutter and a trap door that opens into the dead space of a vestibule through which a guard may transfer items to the inmate without interacting with him. The cells are illuminated 24 hours a day. Inmates receive no outdoor exercise. Their personal possessions are severely restricted: one religious text, one box of legal materials and 25 personal letters. They are permitted no clocks, radios, watches, cassette players or televisions. The temperature fluctuates wildly, reaching extremely high and low temperatures depending on the season. A video camera rather than a human eye monitors the inmate’s movements. Visits other than with lawyers are conducted through video screens.

Id. at 1098.

114. *Id.*

115. *Id.* at 1124, 1126.

116. *Id.* at 1125. The facility the court identified was the Wisconsin Resource Center, a specialized mental health facility run by DHS designated as a prison under Wisconsin law. See *Wisconsin Resource Center*, WIS. DEP’T OF HEALTH SERVS., <https://www.dhs.wisconsin.gov/wrc/index.htm> [<https://perma.cc/6TPB-PPLE>].

117. *Jones-El*, 164 F. Supp. 2d at 1126.

118. *Graves v. Arpaio*, No. CV77-0479-PHX-NVW, 2008 WL 4699770 (D. Ariz. Oct. 22, 2008).

There, the court in 2008 ordered the defendants, Maricopa County and the Sheriff, to provide “ready access to care to meet [prisoners’] serious medical and mental health needs,” and the court ordered that “[w]hen necessary, pretrial detainees confined in jail facilities which lack such services shall be transferred to another jail or other location where such services or health care facilities can be provided.”¹¹⁹ In 2016, the *Graves* plaintiffs filed a motion to enforce that remedy on behalf of incompetent defendants enrolled in the RTC program and other prisoners in need of hospitalization.

In support of their motion, plaintiffs presented evidence of the harm that incompetent defendants suffer while enrolled in the jail’s RTC program: of incompetent prisoners refusing medications, growing more psychotic, isolating themselves, engaging in self-harm behavior, and enduring long periods of isolation in the jail’s disciplinary and segregation units.¹²⁰ Though many of these incompetent defendants were eventually deemed unrestorable and then hospitalized after their criminal cases were dismissed, the plaintiffs presented expert testimony that the delay in their hospitalization had devastating consequences for their long-term prognosis: their response to hospital-level care was less robust and they may have reached such a regressed state that they could not recover.¹²¹

Importantly, the plaintiffs also provided evidence to the court that other systems around the country do not operate this way. They either transfer their incompetent defendants to a hospital for restoration services, or they make other arrangements to ensure timely hospitalization of prisoners who cannot be adequately treated while jailed. Rikers Island in New York, for example, has a jail unit at Bellevue Hospital for prisoners in need of a hospital level of care.¹²² The jail in Franklin County, Ohio, transfers such patients into a forensic unit at the state psychiatric hospital.¹²³ The prisoners remain in the custody of the sheriff while they are hospitalized.¹²⁴ In San Francisco, county officials likewise created a jail unit at the county hospital for seriously mentally ill prisoners, one

119. *Id.* at *31.

120. *See* Plaintiffs’ Motion to Enforce Fourth Amended Judgment & for Additional Relief at 6–12, *Graves v. Arpaio*, 633 F. Supp. 2d 834 (D. Ariz. 2016) (No. CV77-0479-PHX-NVW).

121. The court’s own psychiatric expert noted in a report to the court, “studies have demonstrated that delays in providing treatment result in slower and less complete or robust responses to treatment when it is eventually provided.” Ninth Report of Kathryn A. Burns, MD, MPH on Correctional Health Services Compliance with Second Amended Judgment at 13, *Graves v. Arpaio*, 633 F. Supp. 2d 834 (D. Ariz. 2016) (No. CV 77-0479-PHX-NVW).

122. Expert Report of Pablo Stewart at 123, *Graves v. Arpaio*, 633 F. Supp. 2d 834 (D. Ariz. 2016) (No. CV 77-0479-PHX-NVW) (citing trial transcript from Mar. 5, 2014, testimony of Kathryn Burns at 34:8-11).

123. *Id.* (citing trial transcript from Mar. 5, 2014, testimony of Kathryn Burns at 34:11–16).

124. *Id.* at 124 (citing trial transcript from Mar. 5, 2014, testimony of Kathryn Burns at 65:14–16).

that was staffed by sheriff's deputies to ensure security.¹²⁵ Given the deference courts show to corrections officials, showing that there are viable alternatives that other systems have adopted is crucial.¹²⁶ Plaintiffs asked the court to enter more specific relief that would require the defendants to use the memorandum of understanding they have with the Arizona State Hospital to accept detainees in need of inpatient care, or to execute contracts with other psychiatric facilities to accept detainees who cannot be adequately treated at the jail.¹²⁷

The *Graves* defendants opposed the motion. They argued they were hamstrung by Arizona state law, the local courts, and the independent operations of the two viable hospitals in the state that can provide restoration services.¹²⁸

This argument is particularly attractive for jail officials, who may not have authority over hospital officials to force admission of detainees in their custody. One simple solution to this problem is to name as defendants the county or state officials who do have the power over hospital admissions.

Regardless, government officials may not shirk their constitutional obligations, or ignore orders of federal courts, on the grounds that other state actors stand in their way. In *Cooper v. Aaron*,¹²⁹ the Little Rock School Board moved to postpone desegregation efforts because the actions of the Arkansas state government made it almost impossible, and in some instances dangerous, to implement those efforts. While recognizing the serious impediments created by the state government that the Board did not control, the Supreme Court nevertheless held that the Board had to move forward with its efforts:

[W]e have accepted without reservation the position of the School Board, the Superintendent of Schools, and their counsel that they displayed entire good faith in the conduct of these proceedings We likewise have accepted . . . that the educational progress of all the students, white and colored, of that school has suffered and will continue to suffer if the conditions which prevailed last year are permitted to continue. . . . [T]he record before us clearly establishes that the growth of the Board's difficulties to a magnitude beyond its unaided power to control is the product of state action. Those difficulties . . . can also be brought under control by state action. . . . The prohibitions of the Fourteenth Amendment extend to all action

125. *Id.* at 123 (citing trial transcript from Mar. 6, 2014, testimony of Pablo Stewart at 53:2–13).

126. Plaintiffs' Motion to Enforce Fourth Amended Judgment and for Additional Relief, *Graves v. Arpaio*, 633 F. Supp. 2d 834 (D. Ariz. 2016) (No. CV 77-0479-PHX-NVW).

127. *Id.* at 16–17.

128. See Defendants Joseph Arpaio, Denny Barney, Steve Churchi, Andrew Kunasek, Clint Huckman, and May Rose Wilcox's Reply in Support of Notice of Compliance, *Graves v. Arpaio*, 633 F. Supp. 2d 834 (D. Ariz. 2016) (No. CV77-0479-PHX-NVW).

129. 358 U.S. 1 (1958).

of the State denying equal protection of the laws; whatever the agency of the State taking the action, or whatever the guise in which it is taken.¹³⁰

A party's constitutional rights "are not to be sacrificed or yielded" due to state encumbrances.¹³¹

Similar objections to a hospitalization remedy were raised in *Carty v. Mapp*.¹³² There, the court approved a consent decree requiring Virgin Islands officials to make available beds at the St. Thomas Hospital "for inmates requiring hospitalization."¹³³ Since the decree was approved, defendants have been held in contempt of the hospitalization provision multiple times.¹³⁴ In 2001, the court rejected the defendants' claim that they could not comply with the hospitalization remedy, since the hospital refused to accept prisoners, reasoning:

Under the statutory scheme governing health care in the Virgin Islands, Defendants clearly exercise some control over St. Thomas Hospital and other medical facilities. . . .¹³⁵ The Government has the

130. *Id.* at 14–17.

131. *Id.* at 16. See also *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971) ("[S]tate policy must give way when it operates to hinder vindication of federal constitutional guarantees."). In a more closely related context, the Ninth Circuit held in *Hook v. Arizona Department of Corrections*, 107 F.3d 1397, 1402–03 (9th Cir. 1997), that the Arizona Department of Corrections could not be relieved of its obligations under several injunctions and consent decrees on the basis of a newly enacted state law that conflicted with the remedial provisions. *Id.* As the court noted, "otherwise valid state laws . . . cannot stand in the way of a federal court's remedial scheme if the action is essential to enforce the scheme." *Id.* at 1402. Because the injunctive relief in question "was necessary to vindicate the prisoners' constitutional rights," the Supremacy Clause "preclude[d] the application of [state law] to defeat them." *Id.* at 1403. See also *Valdivia v. Schwarzenegger*, 599 F.3d 984, 995 (9th Cir. 2010) (holding where injunctive relief has been found necessary to remedy a constitutional violation, such relief cannot be defanged by a conflicting state law); *Coleman v. Brown*, 952 F. Supp. 2d 901, 931 (E.D. Cal. 2013) (waiving sections of California Penal Code "to the extent necessary" to implement population reduction plan); cf. 18 U.S.C. § 3626(a)(1)(B) (2012) (permitting courts to order prospective relief requiring or permitting government officials to exceed authority under State or local law where federal law requires the relief, the relief is necessary to correct the violation, and no other relief will correct the violation).

132. Settlement Agreement, *Carty v. Farrelly*, 957 F. Supp. 727 (D.V.I. 1997) (No. 94-78).

133. *Id.* at 34.

134. See, e.g., *Carty*, 957 F. Supp. at 739 n.20 ("Inmates are not transferred to local hospitals in emergency situations [and] mental health beds at the local hospital are unavailable for the sole use of inmates.").

135. Earlier in its opinion, the court found that the hospital was not a private entity over which the government had no control. Rather:

the hospitals receive Government funding and fall under the jurisdiction of the Virgin Islands Government Hospitals and Health Facilities Corporation ("Health Facilities Corporation"), which is a "public entity of the Government of the Virgin Islands." The Health Facilities Corporation has the power to "manage, operate, superintend, control, and maintain the hospitals and health facilities of the Government." The

power, through legislative appropriations and the governor's board appointments, to encourage, if not direct, the expansion of mental health care services in the Virgin Islands. Second, even if the board of the Health Facilities Corporation proved recalcitrant, the Government would still have the option of contracting with an existing facility or constructing a new one to house mentally ill inmates.¹³⁶

In 2013, the parties entered into a new settlement agreement, requiring the defendants to implement a “memoranda of understanding to ensure the timely transfers of seriously mentally ill prisoners in need of inpatient or intermediate care, or those in need of acute stabilization, to an appropriate hospital or mental health facility.”¹³⁷ This remedy—specific in scope, and targeting those prisoners most in need of hospitalization—is the most effective model. The plaintiffs here have used this remedy to leverage a commitment from the Virgin Islands Department of Health to revise its existing memorandum of understanding with the territory's Bureau of Correction to accept on its caseload those men and women in need of long-term psychiatric treatment now housed at the local jail.

Focusing on the plight of incompetent defendants has been an effective strategy to secure hospitalization in conditions of confinement cases. The court in *Terry* not only found that the failure to hospitalize incompetent defendants violated the punishment standard from *Bell*; the court went on to find that the government officials' actions also showed deliberate indifference to the needs of the pretrial detainees. The court found that the failure to provide inpatient care to the detainees “increase[d] the risk that they will harm themselves or others or will suffer harm from other inmates.”¹³⁸ The court further found that the defendants had consciously disregarded these risks, and had “known for at least five years of the serious mental health needs of class members and [had] been aware that the failure to provide inpatient care to class members violated state circuit court rules . . . [and] ha[d] a duty to care for the mentally ill in Arkansas jails and kn[ew] that it ha[d] not done so.”¹³⁹

The *Terry* court also rejected as a defense the lack of funds allocated to the state's mental health department to provide inpatient services in the local jails for detainees awaiting hospital beds. The court held that “limited resources cannot be considered an excuse for not maintaining the [department] according to at least minimum constitutional standards.”¹⁴⁰ The court concluded, “[n]o matter who is at fault, the State of

directors of the corporation are appointed by the governor, a defendant in *Carty*.

Carty v. Turnbull, 144 F. Supp. 2d 395, 408 (D.V.I. 2001).

136. *Id.* at 417.

137. Settlement Agreement, *Carty v. de Jongh*, No. 94-78 (D.V.I. May 13, 2014).

138. *Terry v. Hill*, 232 F. Supp. 2d 934, 944 (E.D. Ark. 2002).

139. *Id.*

140. *Id.*

Arkansas must address the mental health needs of the class members in this case.”¹⁴¹

C. *Court-Ordered Criminal Justice Reform Plans*

In a handful of other conditions cases, the court has ordered the defendants to submit to a comprehensive criminal justice assessment to identify potential reforms that could reduce the incarcerated population. These assessments typically have been ordered in cases where overcrowding has been or remains an issue in the case. Though the reforms in the resulting assessments are not court-enforceable, they can still be used as the centerpiece of non-litigation advocacy to reduce that particular system’s population. Because disabled persons are overrepresented in prisons and jails, any reforms that reduce populations will likely disproportionately benefit them.

In the two cases described below, the courts appointed a criminal justice expert to complete assessments under Federal Rule of Evidence 706, and the court’s inherent powers to enforce its earlier injunctions.¹⁴² There have been a number of institutional civil rights cases where courts have appointed monitors or experts to assist in implementing remedies, and to report on compliance efforts.¹⁴³ All these appointments were based on there being an existing remedy, which limits the circumstances in which these appointments can be sought.

Carruthers v. Israel is a longstanding lawsuit addressing conditions at the Broward County Jail.¹⁴⁴ The case began primarily as an overcrowding case, and population caps were ordered to ease overcrowding.¹⁴⁵

141. *Id.* at 945.

142. “[A]n injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief.” Sys. Fed’n No. 91, Ry. Emps.’ Dep’t, AFL-CIO v. Wright, 364 U.S. 642, 647 (1961).

143. Ruiz v. Estelle, 679 F.2d 1115, 1161–62 (5th Cir. 1982) (upholding appointment of a court monitor to oversee implementation of a prison conditions decree under the court’s inherent powers); United States v. Michigan, 680 F. Supp. 928, 962 (W.D. Mich. 1987) (appointing an independent expert pursuant to Fed. R. Evid. 706 to oversee implementation of a prison conditions consent decree); Morales Feliciano v. Romero Barcelo, 672 F. Supp. 591, 622–23 (D.P.R. 1986) (appointing a court monitor to oversee implementation of a consent decree addressing Puerto Rico prison conditions, noting the court’s “inherent equitable power to appoint a person . . . to assist in administering in a remedy” (quoting *Estelle*, 679 F.2d at 1161)); cf. Halderman v. Pennhurst State Sch. & Hosp., 612 F.2d 84, 111 (3d Cir. 1982) (upholding appointment of a special master to implement a state hospital consent decree which likely would be “a complex and lengthy process, probably involving monitoring, dispute resolution, and the development of detailed enforcement mechanisms”).

144. Order Dissolving Consent Decree as to County, Carruthers v. Israel, No. 76-6086 (S.D. Fla. Oct. 17, 2016) (original opinion: Jonas v. Stack, 758 F.2d 567 (11th Cir. 1985)).

145. See, e.g., Amended Order Setting Population Cap, Carruthers v. Navarro, No. 76-6086-CIV-WMH (S.D. Fla. Aug. 8, 1986).

In 2009, the jail closed one of its five facilities, taking over 700 beds offline, and in 2010, the jail's population surged.¹⁴⁶ As a result, the jail was again plagued by serious overcrowding, which, as the Sheriff acknowledged, increased security risks to the prisoner population.¹⁴⁷

In September 2010, Plaintiffs sought the appointment of Dr. James Austin as the court's population management expert. Dr. Austin had worked with jurisdictions around the country to help them reduce their prison and jail populations through reliance on community-based alternatives to incarceration, and Dr. Austin was a principal expert relied on by the three-judge panel in *Coleman v. Schwarzenegger*¹⁴⁸ and *Plata v. Schwarzenegger*¹⁴⁹ to determine whether and how California could safely reduce prison overcrowding via those consolidated cases.¹⁵⁰

The court appointed Dr. Austin, who produced his most recent assessment in October 2016.¹⁵¹ A number of the recommendations Dr. Austin made to reduce the jail population either target disabled persons or would result in their diversion from the jail. Though specific to Broward, these recommendations are applicable to counties around the country. For example, Dr. Austin recommended expansion of community-based beds to accommodate defendants who had been deemed incompetent to proceed but who did not need to be hospitalized to be restored, thereby "reduc[ing] the stress on the corrections and mental health resources at the jail, while helping to ensure these patients receive the level of care they need."¹⁵² Dr. Austin projected that thirty-five incompetent detainees could be diverted from the jail via this reform.¹⁵³ He also recommended creation of a wing at the Atlantic Shores Hospital in Ft. Lauderdale to accept patients who, under Florida law, can be arrested and detained at the jail as a danger to themselves or others. Finally, Dr. Austin found on average the jail held 263 prisoners on any given day who were incarcerated so they could complete court-ordered treatment programs (including substance abuse programs), which are now only offered at the jail.¹⁵⁴ Dr. Austin recommended these programs be "provided in the community without having to be incarcerated," and he noted that

146. Status Report and Impact Statement, *Carruthers v. Lamberti*, No. 76-cv-06086-DMM (S.D. Fla. Aug. 9, 2010).

147. *Id.*

148. 922 F. Supp.2d 882, 970–1002 (E.D. Cal. 2009), *stay denied sub nom.* *Schwarzenegger v. Coleman*, 557 U.S. 963 (2009).

149. 2009 WL 2851846 (E.D. Cal., Sept. 03, 2009), *stay denied sub nom.* *Schwarzenegger v. Coleman*, 557 U.S. 963 (2009).

150. *See, e.g.*, Decl. of James Austin in Support of Plaintiffs' Response to Defendants' Population Reduction Plan, *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882 (E.D. Cal. 2009) (Nos. Civ S 90-0520 LKK-JFM P, C01-1351 TEH), 2013 WL 5964550.

151. James Austin, Evaluation of Broward County Jail Population, *Carruthers v. Lamberti*, No. 76-cv-06086-DMM (S.D. Fla. Sept. 30, 2016).

152. *Id.* at 25.

153. *Id.* at 26, tbl. 15.

154. *Id.* at 15, tbl. 10.

research has shown that community-based treatment “is at least as effective if delivered in the community as opposed to the jail or prison.”¹⁵⁵ As alcoholism and substance abuse are both recognized disabilities under federal law, moving these programs to the community would result in potentially hundreds of disabled men and women being diverted out of the jail.

In *Carty*, the Virgin Islands case discussed earlier, the court also appointed Dr. Austin as its population management expert. That case, too, began as an overcrowding case, though at the time of Dr. Austin’s appointment, overcrowding was no longer a leading issue in the case, as the defendants had consistently maintained compliance with the population cap.¹⁵⁶

Instead, Dr. Austin’s appointment was premised on the necessity of reducing the prisoner population because the defendants had proven themselves incapable of safely managing the jail. The case for Dr. Austin’s appointment was strengthened by two factors. First, both the 1994 and 2013 settlement agreements in the case had, as the first listed remedy, a provision requiring the defendants to reduce their incarcerated population.¹⁵⁷ Therefore, it was clear that population reduction was the foundation for the substantive remedies in the agreement that followed.

Second, Dr. Austin’s appointment was sought on the heels of two damning reports by the court-appointed corrections and mental health experts who documented a raft of hazards showing how dangerous and mismanaged the jail remained. The facilities were dangerously understaffed.¹⁵⁸ Contraband, including weapons and drugs, was readily available.¹⁵⁹ Prisoner-on-prisoner assaults occurred regularly.¹⁶⁰ Instances

155. *Id.* at 16.

156. See Defendant Opposition to Motion to Enforce Court’s Order Appointing Dr. James Austin to Conduct a Population Management Assessment, *Carty v. Farelly*, 957 F. Supp. 727 (D.V.I. 1997) (No. 94-78).

157. See Settlement Agreement, *Carty v. Farelly*, 957 F. Supp. 727 (D.V.I. 1997) (No. 94-78) (March 24, 2015) (requiring defendants to “seek[] pretrial detention alternatives and reduced bails, and offer[] sentences of time served for prisoners charged with misdemeanor and non-violent offenses”).

158. Plaintiff Motion to Enforce Court’s Order Appointing Dr. James Austin to Conduct a Population Management Assessment at 1–3, *Carty v. Farelly*, 957 F. Supp. 727 (D.V.I. 1997) (No. 94-78) [hereinafter Enforcement Motion]. Mental health expert Kathryn Burns, MD, MPH, wrote, “Insufficient staffing levels of both treatment and custody staff continue endangering the lives and safety of inmates and staff.” First Report of Kathryn Burns, MD, MPH on Compliance with Mental Health Provisions of the Settlement Agreement at 1, *Carty v. Farelly*, 957 F. Supp. 727 (D.V.I. 1997) (No. 94-78) [hereinafter Burns Report].

159. Enforcement Motion, *supra* note 158, at 2 n.2. Incident reports from Cluster 1, the mental health cluster, describe inmate-on-inmate assaults that “involve the use of shanks and other weapons.” Burns Report, *supra* note 158, at 19.

160. Corrections expert David Bogard documented more than 100 inmate/inmate assaults and disturbances that occurred at the Jail from 2012 until April 2014. During that period there were very few formal administrative investigations despite many or most of those 100 violent events involving a use of force. Enforcement Motion, *supra* note 3, at 2.

of potential excessive uses of force went uninvestigated.¹⁶¹ Staff were woefully undertrained.¹⁶² Prisoner supervision was often nonexistent.¹⁶³ Security practices were lax and, at times, dangerous.¹⁶⁴ The seriously mentally ill were left to languish essentially untreated, and were often victimized by fellow prisoners and staff.¹⁶⁵ In this context, making the argument that reducing the number of men and women who would be daily exposed to these hazards was much easier.

Dr. Austin was tasked with the following duties:

- (1) analyze the Territory's criminal justice processes and policies that affect the population level at the Criminal Justice Complex (CJC) and CJC Annex [collectively, "the Jail"],
- (2) include strategies and remedies to address those processes and policies so that the population level at the Jail can be reduced without significantly affecting public safety,
- (3) include a baseline population forecast that would advise the territory on the impact of current criminal justice trends,
- (4) identify realistic options that have been successfully implemented in other jurisdictions that will reduce the need for future beds, and
- (5) assess the existing classification and disciplinary systems at the Jail and provides technical assistance to Defendants so they can make the best use of existing bed space to safely and appropriately house the prisoner population.¹⁶⁶

Dr. Austin has not completed his report, but has indicated that he will focus on diversion mechanisms for mentally disabled prisoners.¹⁶⁷

Though the population reduction remedies that Dr. Austin has recommended in Broward County and will recommend in the Virgin Islands are not court-enforceable, they can be benchmarks for public advocacy campaigns striving to reduce the populations in these jails. The reports themselves are public documents, and can garner significant public and press attention.¹⁶⁸ And, with effective advocacy, the reforms can be implemented.

161. *Id.* at 2 n.4.

162. *Id.* at 3 n.5.

163. According to Mr. Bogard, housing unit staff left their respective housing units with unsecured and unsupervised inmates while they provided escort and supervision duties related to recreation. *Id.* at 3, n.6.

164. Mr. Bogard found, "prisoner assaults have occurred as a result of security gates, housing unit doors and cell doors being left unlocked." *Id.* at 3 n.7.

165. "Mental health care at CJC is deficient in virtually every aspect." Burns Report, *supra* note 158, at 20.

166. Order, *Carty v. Farrelly*, 957 F. Supp. 727 (D.V.I. 1997) (No. 94-78).

167. Telephone call from James Austin to *Carty* plaintiffs' counsel (Dec. 2, 2016).

168. See, e.g., Brittany Wallman & Dana Williams, *Report Suggests Letting 500 Inmates Out of Crowded Broward Jails*, FLA. SUN SENTINEL (Sept. 29, 2012), http://articles.sun-sentinel.com/2012-09-29/news/fl-broward-jail-inmates-20120919_1_broward-jails-eric-balaban-jail-population [<https://perma.cc/LS9V-2XCP>] (covering Austin's work); Brittany Wallman, *Broward Wants to End Federal Watch of Jails*, FLA. SUN SENTINEL (July 16, 2016), <http://www.sun-sentinel.com/local/broward/fl-jail-overcrowding-broward-20160716-story.html> [<https://perma.cc/3TU4-M22E>] (same).

New Orleans provides an effective model for just such an advocacy campaign. There, Sheriff Marlin Gusman applied for and secured FEMA funding after Hurricane Katrina to expand Orleans Parish Prison (OPP), the New Orleans jail, to 5,800 beds, which would have made it large enough to jail one out of every sixty New Orleans residents.¹⁶⁹ Significant public advocacy resulted in the parish hiring Dr. Austin to conduct an independent assessment of the Sheriff's expansion plans, to develop a baseline population projection for OPP, and to determine the population savings via the implementation of a slate of criminal justice reforms.¹⁷⁰ Dr. Austin's report was the centerpiece of a successful public campaign¹⁷¹ that resulted in the New Orleans City Council approving a plan for the construction of a 1,438 bed facility,¹⁷² which was one-quarter the size of the Sheriff's proposal.¹⁷³ A single reform endorsed by Dr. Austin in his report saved the City of New Orleans \$1.9 million in the first quarter of 2011 alone.¹⁷⁴

III. Diversion via the Americans with Disabilities Act

In 1990, Congress passed the ADA to address longstanding discrimination against individuals with disabilities and to eliminate their exclusion from programs and services provided by public entities.¹⁷⁵ In enacting the ADA, Congress found that discrimination against disabled citizens persists in critical areas, such as institutionalization.¹⁷⁶

Title II of the statute applies to state and local government entities, including prisons and jails.¹⁷⁷ To prevail on a Title II claim, a plaintiff must show that:

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169. Matt Davis, *Gusman to Get 1,438 Beds in Exchange for Major Closures; Community Input Monday*, LENS (Nov. 19, 2010), <http://thelensnola.org/2010/11/19/jail-group-votes-to-move-ahead-with-1438-bed-jail-will-take-public-input-monday> [<https://perma.cc/6G3T-6TUV>].
 170. JAMES AUSTIN ET AL., ORLEANS PARISH PRISON TEN-YEAR INMATE POPULATION PROJECTION (2010).
 171. The campaign was led by local advocates, including the ACLU of Louisiana and the Orleans Parish Prison Reform Coalition, and umbrella organization that includes a number of organizations and individuals committed to reforming OPP. See, e.g., *No Jail Expansion: 1,438 Bed Cap*, ORLEANS PARISH PRISON REFORM COALITION, <https://oppnola.org/no-jail-expansion-1438-bed-cap> [<https://perma.cc/YBZ5-7B7L>].
 172. Naomi Martin, *Orleans Parish Reform Coalition Demands Mayor Mitch Landrieu Enforce 1,438-Bed Cap on New Jail*, TIMES-PICAYUNE (Sept. 13, 2013, 3:47 PM), http://www.nola.com/crime/index.ssf/2013/09/orleans_parish_prison_reform_c.html [<https://perma.cc/J8FB-EUAA>].
 173. Davis, *supra* note 169.
 174. Matt Davis, *Changes in NOPD's Arrest Policies Save City Nearly \$2 Million in Jail Fees so far This Year*, LENS (Mar. 29, 2011, 4:13 PM), <http://thelensnola.org/2011/03/29/jail-savings-report> [<https://perma.cc/5GVZ-4DRN>].
 175. AMERICANS WITH DISABILITIES ACT OF 1990, 42 U.S.C. § 12101 (2012).
 176. *Id.* § 12101(a)(3).
 177. *Dep't. of Corr. v. Yeskey*, 524 U.S. 206 (1998).

(1) he is a qualified individual with a disability; (2) he was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) this exclusion, denial, or discrimination was by reason of his disability.¹⁷⁸

Title II's implementing regulations "flesh out public entities' statutory obligations with more specificity," and are controlling authority "[u]nless they are arbitrary, capricious, or manifestly contrary to the statute."¹⁷⁹

Pursuant to the regulations, "no qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, 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 public entity."¹⁸⁰ In the same vein, "[a] public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities."¹⁸¹ A public entity must "make reasonable modifications in policies, practices, or procedures when modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."¹⁸²

By reason of their disability, prisoners are excluded from a host of programs, services, and activities that can speed their release from prison. These include vocational and treatment programs, which many prisoners are court-ordered to complete before they can be considered for parole. Also, disabled prisoners can lose good time credits they have earned (counted against their sentence) via disciplinary infractions, which can arise due to an inmate's disability (such as a deaf prisoner being disciplined for failing to obey an order he did not hear). Other systems categorically exclude disabled prisoners from halfway houses, or fail to accommodate their disabilities in parole hearings, so they cannot meaningfully participate.

The ADA is a powerful tool that can be deployed to challenge the denial of programs and services that either divert disabled criminal defendants from incarceration, or speed disabled prisoners' release. However, a review of existing decrees and judgments from ADA cases filed on behalf of prisoners shows that the statute has been rarely used in this manner. The leading repository for civil rights lawsuits is the Civil

178. *Cohen v. City of Culver City*, 754 F.3d 690, 695 (9th Cir. 2014); *see also* 42 U.S.C. § 12132 (2012).

179. *See City of Culver City*, 754 F.3d at 695 (quoting *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1065 (9th Cir. 2010) (internal quotation marks and citations omitted)).

180. 28 C.F.R. § 35.149 (2016).

181. *Id.* § 35.150(a).

182. *Id.* § 35.130(b)(7); *see Pierce v. County of Orange*, 526 F.3d 1190, 1215 (9th Cir. 2008).

Rights Litigation Clearinghouse, administered by the University of Michigan Law School. The Clearinghouse maintains information on over six thousand eight hundred civil rights cases, as well as over fifty thousand dockets and pleadings from those cases.¹⁸³ There are seven hundred and sixty-six prisoner's rights cases in the Clearinghouse; of those, only thirty-six appear to include disability rights claims.

The sparse use of the ADA is particularly puzzling given that the statute has so many advantages over constitutional conditions of confinement claims. The ADA does not have a state of mind requirement, unlike the deliberate indifference standard applied to Eighth Amendment claims. The ADA provisions set clear standards, particularly for claims alleging architectural barriers that affect mobility-impaired individuals.¹⁸⁴ Finally, the ADA has its own attorney's fees provision authorizing awards to prevailing litigants, and fees awarded under the ADA are not subject to the restrictions and caps applicable to attorney's fees awards in prison conditions cases.¹⁸⁵

There have been a handful of cases that have sought to use the ADA to secure access to programs and services that could speed the release of disabled prisoners or divert them from incarceration. In fact, the leading case holding the ADA applicable to prison programs, *Pennsylvania Department of Corrections v. Yeskey*,¹⁸⁶ was just such a challenge: Ronald Yeskey, who suffered from hypertension, was refused admission to a correctional boot camp program that could have led to his parole in six months on an eighteen to thirty-six-month sentence. The Court did not rule on the merits of Mr. Yeskey's claims, remanding the case back to the district court after finding that the statute applied to state prisons. On remand, Mr. Yeskey's complaint was dismissed, in part because the court concluded that hypertension was not a disability under the ADA,¹⁸⁷ a decision at odds with the statute and implementing regulations.¹⁸⁸

The *Yeskey* case is a bit of an outlier: Mr. Yeskey sought to be transferred from a prison to an outside program. While there are other cases where disabled prisoners have also sought or secured access to programs outside prison walls,¹⁸⁹ most of the ADA cases seeking diversion of pris-

183. *What Is the Clearinghouse*, U. MICH. L. SCH., <https://www.clearinghouse.net/about.php> [<https://perma.cc/C4FK-H887>].

184. See U.S. ACCESS BD., *ADA Accessibility Guidelines*, <https://www.access-board.gov/guidelines-and-standards/buildings-and-sites/about-the-ada-standards/background/adaag> [<https://perma.cc/3YLD-758U>].

185. Compare 42 U.S.C. § 12205 (2012) (ADA fees implementing statute), with 42 U.S.C. § 1997e(d)(1) (2012) (capping hourly rate for prevailing plaintiffs in prison conditions cases).

186. Pa. Dep't. of Corr. v. *Yeskey*, 524 U.S. 206 (1998).

187. *Yeskey v. Pennsylvania*, 76 F. Supp. 2d 572 (M.D. Pa. 1999).

188. See 76 Fed. Reg. 17010, 17011 (Mar. 25, 2011) (codified at 29 C.F.R. § 1630) (listing hypertension as a qualified disability).

189. Disabled California prisoners negotiated a settlement and remedial plan that ensured their access to the state's conservation camps. CAL. DEP'T. CORR. & REHAB., *ARMSTRONG V. DAVIS COURT-ORDERED REMEDIAL PLAN 31* (2001), <http://>

oners with disabilities target a denial of access to programs that prisoners need to be parole eligible or to earn good time credits to reduce their sentences. For example, disabled prisoners in the New York prison system brought a suit under the ADA that challenged the exclusion of persons in the Regional Medical Units (RMUs) from all program activities. Prisoners sent to the RMUs had medical problems that called for ready access to a higher level of medical care that was not available at most prisons, but they were not necessarily so sick that they could not work, go to school, or otherwise participate in programs and services available at other New York prisons, “including those that would qualify them for an earlier release from prison.”¹⁹⁰ The settlement in the case ensured their access to the meaningful program activities, “including those programs that may assist them in earning credits that may enhance their suitability for release on parole or their eligibility for Presumptive Release, Merit Time and Earned Eligibility.”¹⁹¹ To this end, the settlement required the Department to provide an individualized assessment of all RMU prisoners to determine their eligibility for prison programs. The settlement also required the establishment of an alcohol and substance abuse program and aggression replacement training, which are frequently required or strongly encouraged by the parole board as a precondition for release for some prisoners, to be established at the RMUs.¹⁹²

In Florida, prisoners so disabled that they were unable to work were denied equal opportunities to earn incentive time and they brought suit. The court characterized the claims as follows:

The regulation at issue here excludes persons with disabilities from enjoying the full opportunity to participate in the “program” established by statute. It does so by fragmenting the opportunity to earn the maximum amount of incentive gain time, creating lesser opportunities available only for engaging in one of the four statutory activities. While the sum of the separated opportunities is the same for a healthy prisoner, it is not for the disabled.¹⁹³

A later settlement established new criteria permitting disabled prisoners to earn the maximum amount of incentive time provided by statute

www.cdcr.ca.gov/BOPH/docs/ADA-Resources/ARMSTRONG%20I%20Remedial%20Plan.pdf [<https://perma.cc/37VJ-6XLV>]. These facilities are jointly managed by the California Department of Corrections and Rehabilitation and the California Department of Forestry. *Conservation (Fire) Camps*, CAL. DEP'T CORR. & REHAB. http://www.cdcr.ca.gov/Conservation_Camps [<https://perma.cc/LES2-5BGD>].

190. Amended Complaint at 2, *Rosario v. NY State Dep't Corr. Serv.*, No. 03-CIV-859, 2003 WL 22429271 (S.D.N.Y. Sept. 24, 2003).

191. Rule 41 Voluntary Stipulation of Dismissal Subject to Conditions & Order at 1, *Rosario v. NY State Dep't Corr. Serv.*, No. 03-CIV-859, 2003 WL 22429271 (S.D.N.Y. Sept. 24, 2003).

192. *See id.*

193. *Raines v. Florida*, 983 F. Supp. 1362, 1373 (N.D. Fla. 1997).

and allowing some disabled prisoners to gain retroactive incentive time, even though that relief might not have been available in a lawsuit.¹⁹⁴

The Florida settlement goes further in securing a path to release than the New York settlement described above. It treats the good time program itself as a “program, service, or activity” subject to the ADA, not just the programs that prisoners use to earn good time. As such, the Florida settlement provides that seriously disabled inmates could gain incentive time based on behavior if they were unable to work.¹⁹⁵

Prisoners with disabilities face longer prison terms not only because they are denied access to programs that can shorten their sentences. They also are more likely to be subjected to discipline, which hurts their chances for early release or parole. Litigators have had success challenging discrimination in the disciplinary process.

In Kentucky, deaf and hard-of-hearing prisoners filed a class action suit alleging that the defendants, the Kentucky Department of Corrections (and other agencies), failed to provide them auxiliary aids and interpretation services necessary to accommodate them in disciplinary hearings.¹⁹⁶ As a result, deaf and hard-of-hearing prisoners did not have “the ability to meaningfully participate and defend themselves in disciplinary hearings.”¹⁹⁷ The settlement agreement in the case mandates that accommodations for the deaf be made in disciplinary and parole hearings.¹⁹⁸

Deaf prisoners in New York prisons brought a similar challenge under the ADA in 1991.¹⁹⁹ The case was settled via consent decree in 1996. Under the decree, the New York Department of Correctional Services (DOCS) was required to expunge disciplinary records when plaintiffs were disciplined due to an inability to understand instructions and when they were disciplined in a hearing where they had no access to interpretive services.²⁰⁰ Furthermore, the inmates were to be provided with a written notice of the expungement as well as a crediting of any good time lost due to the disciplinary infraction.²⁰¹ In addition, any inmate who was denied parole and received a notice of expungement would be entitled to a *de novo* parole hearing if the expunged infraction was considered in an earlier parole denial.²⁰²

194. *Raines v. Florida*, 987 F. Supp. 1416, 1419 (N.D. Fla. 1997).

195. *See id.* at 1426.

196. Amended Complaint, *Adams v. Commonwealth of Kentucky*, Case No. 3:14-cv-00001-GFVT (E.D. Ky. Oct. 1, 2014), ECF No. 42.

197. *Id.* at 6.

198. Settlement Agreement Between Defendants the Commonwealth of Kentucky et al. and Plaintiffs Oscar Adams and Michael Knights at 7–8, *Adams v. Kentucky*, No. 3:14-cv-00001-GFVT (E.D. Ky. June 24, 2015).

199. *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1024 (S.D.N.Y. 1995).

200. Consent Judgment and Order at ¶ 40, *Clarkson v. Goord*, No. 91-CIV-1792 (S.D.N.Y. June 6, 1996).

201. *Id.*

202. *Id.*

Finally, there have been successful suits that have challenged discrimination in the parole process itself. In 1994, disabled prisoners and parolees in California filed a class action lawsuit against the California Department of Corrections and Rehabilitation (CDCR) and Board of Prison Term (BPT) for violations of the ADA and Rehabilitation Act.²⁰³ By agreement of the parties, litigation against the two departments was bifurcated and proceeded on separate tracks.²⁰⁴

In March 2001, the court found the BPT liable and issued an injunction requiring the Board to alter its policies and practices to comply with the ADA and constitutional standards.²⁰⁵ The remedy applies to all parole proceedings “to determine whether and/or when a prisoner or parolee should be released on parole or involuntarily confined.”²⁰⁶ The Board was required to 1) hire a full-time ADA coordinator, 2) redraft policies and procedures so disabled parolees are provided with effective communication and other accommodations so they can participate in any parole proceedings, 3) desist from shackling the hands of disabled prisoners who use sign language to communicate, and 4) develop a tracking system for disabled parolees, among other provisions.²⁰⁷ In 2002, a fifty-four page revised remedial plan was entered in the case, providing specific provisions addressing attorney assistance, effective communications, coordination of services, the process for requesting disability accommodation, parole proceedings, community transition services, revocation proceedings, and grievances.²⁰⁸

An interesting variation of suits against parole programs was brought by deaf and hard-of-hearing Illinois prisoners in 2011. The Illinois Department of Corrections (IDOC) provides prerelease information to inmates who are eligible for parole or mandatory supervised release. However, deaf inmates allege they are denied the auxiliary services necessary to understand the written and oral information provided in the pre-release process, heightening the risk that deaf inmates will violate their parole.²⁰⁹ Settlement negotiations have broken down twice, and the case is ongoing.

203. The Rehabilitation Act provides, “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance” The Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (2016).

204. *Armstrong v. Davis*, 275 F.3d 849, 855 (9th Cir. 2001).

205. *Id.* at 854.

206. *Id.* at 858–59.

207. *Id.* The Ninth Circuit upheld the injunction in all respects, except to the extent it ordered the Board to train CDCR staff. *Id.* at 879.

208. CA DOC *Armstrong v. Davis* Board of Prison Terms Parole Proceedings Remedial Plan, *Armstrong v. Davis*, No. C-94-2307-CW (N.D. Cal. Jan. 4, 2002).

209. Class Action Complaint, *Holmes v. Godinez*, Case 1:11-cv-02961 (E.D. Ill. May 4, 2011) . at ¶¶ 138–40.

Conclusion

This Article was written with the hope that it would spur some thought among litigators as to how they could leverage prisoners' rights litigation to either divert from incarceration or speed the release of their disabled clients. In absolute numbers, the case-to-case effect of litigation-based diversion remedies may be small. But, the reality is that life for men and women with disabilities in prisons and jails is incredibly damaging and, at its worst, life-threatening. Using these litigation-based tools to divert persons with disabilities from behind bars holds the promise of extending beyond prison walls the relief that can be secured through prisoners' rights lawsuits. Successful lawsuits may also spur a larger conversation and long-overdue action that finally addresses why we continue to incarcerate so many disabled men, women, and children.

