"It Don't Matter Anyhow": How the Americans with Disabilities Act Has Become (Mostly) Irrelevant to the Criminal Trial Process*

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ABSTRACT: The application of the Americans with Disabilities Act (ADA) (42 U.S.C. § 12101 et seq.) to all aspects of the criminal justice system is a remarkably under-considered one, but it is one that should be of far greater interest to all those whose work involves this system in any way, as well as to scholars whose work touches on either the ADA, criminal justice or both. In this paper, we focus on the multiple connections between the two, with specific considerations of issues that affect arrestees with mental illness or disability in the pretrial and trial processes. and how Title II of the ADA can be enforced in civil litigation in the context of criminal proceedings. We also will examine the therapeutic jurisprudence implications of judicial decisions in this area.

Our studies reveal an inescapable truth: the ADA has had virtually no impact on the criminal justice system at all. Only a handful of cases have ever granted relief to civil plaintiffs in such matters, a finding that is certainly ironic in light of the fact that the Supreme Court, unanimously -- and per Justice Scalia -- ruled years ago in a decision that has never been questioned or limited (see Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206 (1998)) that the ADA applies to state prisons and claims of prisoners, a universe that has always had fewer rights than those not yet convicted of crime.

Here, we focus on how counsel must take the lead in urging courts to enforce the ADA in cases involving the population in question, and conclude that the application of the ADA to all aspects of the criminal trial process (defining this

phrase as broadly as possible) fits perfectly into a therapeutic jurisprudence framework, focusing especially on questions related to adequacy of counsel, and the need for dignity and compassion in all aspects of this process.

Introduction

The application of the Americans with Disabilities Act (ADA)[1] to all aspects of the criminal justice system is a remarkably under-considered one, but it is one that should be of far greater interest to all those whose work involves this system in any way, as well as to scholars[2] whose work touches on either the ADA, criminal justice or both. In this paper, we focus on the multiple connections between the two, with specific considerations of issues that affect arrestees with mental illness or disability in the pretrial and trial processes. and how Title II of the ADA can be enforced in civil litigation in the context of criminal proceedings. We also will examine the therapeutic jurisprudence implications of judicial decisions in this area.

Our studies reveal an inescapable truth: the ADA has had virtually no impact on the criminal justice system at all. Only a handful of cases have ever granted relief to civil plaintiffs (or criminal defendants) in such matters, a finding

[1] 42 U.S.C. § 12101 et seq.

[2] There is extensive legal literature on the ADA but surprisingly little in the criminology literature. See Michael L. Perlin et al, *"The Distant Ships of Liberty": Why Criminology Needs to Take Seriously International Human Rights Laws that Apply to Persons with Disabilities,* 31 S. CAL. REV. L. & SOC. JUST. 374, 386 (2022), noting the "dearth of scholarship," citing Danielle Wallace, *Criminology, Criminal Justice, and 30 Years of the Americans with Disabilities Act: Where Is the Research from Our Field?* 46 CRIMINOLOGIST 1, 4 (2021).

that is certainly ironic in light of the fact that the Supreme Court, unanimously -- and per Justice Scalia --ruled years ago in a decision that has never been questioned or limited that the ADA applies to state prisons and claims of prisoners,[3] a universe that has always had fewer rights than those not yet convicted of crime.[4]

Briefly, the ADA has been hailed by advocates for persons with disabilities as "a breathtaking promise,"[5] "the most important civil rights act passed since 1964,"[6] and as the "'Emancipation Proclamation for those with disabilities.'"[7] It is, without question, Congress's most innovative attempt to address the pervasive problem of discrimination against citizens with mental and physical disabilities by providing,

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[3] Pennsylvania Dep't of Corrections v. Yeskey, 524 U.S. 206 (1998). In an article-in-progress, one of the co-authors (MLP) is writing with two others (Prof. Talia Harmon and Maren Geiger) about the impact of the ADA on claims by prisoners regarding conditions on death rows. See *A Therapeutic Jurisprudence Consideration of the Relationship Between the Americans with Disabilities Act, Death Row Conditions, and Questions About Competency to Be Executed.*

[4] See e.g. Kathleen Noone, *Keeping the Commitment: Why California Should Maintain Consideration of the Commitment Offense in Determining Parole for Life Inmates*, 37 HASTINGS CONST. L.Q. 789, 795-96 (2010) ("imprisoned inmates have fewer rights than ordinary citizens").

[5] Bonnie Milstein, Leonard Rubenstein, & Renée Cyr, *The Americans with Disabilities Act: A Breathtaking Promise for Persons with Mental Disabilities*, 24 CLEARINGHOUSE REV.. 1240, 1240 (1991).

[6] Kimberly Ackourey, *Insuring Americans With Disabilities: How Far Can Congress Go To Protect Traditional Practices?*, 40 EMORY L. J 1183, 1183 n.1 (1991).

[7] *Id.* at 1183 n.2, citing *Americans with Disabilities Act of 1990: Summary and Analysis*, 4 Lab. Rel. Wk. (BNA) 29, Special Supplement, at S-5 (July 18, 1990),

in the words of a congressional committee, "a clear and comprehensive national mandate to end discrimination against individuals with disabilities."[8] And it does this by providing basically the same bundle of protections for persons with disabilities as the Civil Rights Acts of the 1960s did for citizens of color with clear, strong, and enforceable standards.[9]

The purpose of the ADA was made clear by Congress: " to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring those individuals into the economic and social mainstreams of American life."[10] The law's invocation of the full "sweep of congressional authority, including the power to enforce the fourteenth amendment"[11] means that any violation of the ADA must be read in the same light as a violation of the equal

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[8] H.R. Rep. No. 485, pt. 1, at 3 (1990).

[9] Michael L. Perlin, *"I Ain't Gonna Work on Maggie's Farm No More": Institutional Segregation, Community Treatment, the ADA, and the Promise of* Olmstead v. L.C., 17 T.M. COOLEY L. REV. 53, 57-58 (2000).

[10] HOUSE COMM. ON THE JUDICIARY, AMERICANS WITH DISABILITIES ACT OF 1990, H.R. REP. NO. 485(III), 101st Cong., 2d Sess., at 23 (1990), as quoted in Milstein, Rubenstein & Cyr, *supra* note 5; *see also, e.g.*, John J. Sarno, *The Americans with Disabilities Act: Federal Mandate to Create an Integrated Society*, 17 SETON HALL LEGIS. J. 401 (1993); Steven J. Schwartz et al, *Realizing the Promise of* Olmstead: *Ensuring the Informed Choice of Institutionalized Individuals with Disabilities to Receive Services in the Most Integrated Setting*, 40 J. LEGAL MED. 63 (2020). *See* Carparts v. Automotive Wholesaler's Ass'n of New England, 37 F.3d 12, 19 (1st Cir. 1994) (quoting House Report).
On the important related issue of the significance of *claiming* disability, *see* Katie Eyer, *Claiming Disability,* 101 B.U. L. REV. 547 (2021).

[11] 42 U.S.C. § 12101(b)(4).

protection clause of the Constitution, guaranteeing--for the first time--that this core constitutional protection will finally be made available to persons with disabilities.[12]

In this context, it is also crucial to consider the Supreme Court's 1999 decision in *Olmstead v. L.C.,*[13], finding a qualified right to community treatment and services for certain institutionalized persons.[14] *Olmstead,* although not a constitutional decision,[15] revitalized the application of the "least restrictive alternative" doctrine[16] to questions involving the institutionalization of persons with mental disabilities, and compels us to rethink many of the repressive policies adopted that mandate longer (and more restrictive) terms of confinement for many persons with mental disabilities who initially entered the institutional system through the portal marked "criminal."[17] One of the co-authors (MLP) has argued

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[12] Timothy M. Cook, *The Americans With Disabilities Act: The Move to Integration,* 64 TEMP. L. REV . 393, 434 (1991); see generally, Michael L. Perlin, *"For the Misdemeanor Outlaw": The Impact of the ADA on the Institutionalization of Criminal Defendants with Mental Disabilities,* 52 ALABAMA L. REV. 193 (2000) (Perlin, *Misdemeanor Outlaw*); Michael L. Perlin, *The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?* 8 J. L. & HEALTH 15 (1993-94) (Perlin, *Attitudes Be Undone*).

[13] 527 U.S. 581 (1999).

[14] *Id.* at 607.

[15] *Id.* at 587.

[16] See Michael L. Perlin, *"Their Promises of Paradise": Will* Olmstead v. L.C. *Resuscitate the Constitutional "Least Restrictive Alternative" Principle in Mental Disability Law?* 37 HOUS. L. REV. 99 (2000).

[17] Perlin, *Misdemeanor Outlaw, supra* note 12, at 194. On issues related to the *arrests* of such persons, see Michael L. Perlin & Alison J. Lynch, *"Had to be Held Down by Big Police":*

previously that *Olmstead* and the ADA affirmatively apply to one discrete subset of persons with mental disability--criminal defendants charged with misdemeanors and certain non-violent felonies.[18] In this paper, we expand this conclusion to encompass the entire criminal justice system.This includes pretrial matters and post-conviction matters, in all levels of criminal charges.[19]

Importantly, the entire ADA applies to persons with a mental disability, including persons with mental illness.[20] Yet, very little of the final statute, the

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A Therapeutic Jurisprudence Perspective on Interactions between Police and Persons with Mental Disabilities, 43 FORDHAM URBAN L.J. 685 (2016)

[18] Perlin, *Misdemeanor Outlaw, supra* note 12, at 194:

> *Olmstead*--although not a constitutional decision --revitalizes the application of the [least restrictive alternative] doctrine to questions involving the institutionalization of persons with mental disabilities, and compels us to rethink many of the repressive policies adopted in the past decade that mandate longer (and more restrictive) terms of confinement for many persons with mental disabilities who initially entered the institutional system through the portal marked "criminal."

[19] In another paper, one of the co-authors (MLP) is writing a complementary piece on the application of the ADA to claims by prisoners on death row. See Harmon, Perlin & Geiger, supra note 3.

[20] See generally, MICHAEL L. PERLIN & HEATHER ELLIS CUCOLO, MENTAL DISABILITY LAW: CIVIL & CRIMINAL § 11-2.2 (3d ed. 2016) (Spring 2024 Supplement), and see also, William Christian, *Normalization as a Goal: The Americans with Disabilities Act and Individuals with Mental Retardation*, 73 TEX. L. REV. 409 (1994); John M. Casey, *From Agoraphobia to Xenophobia: Phobias and Other Anxiety Disorders Under the Americans with Disabilities Act*, 17 U. PUGET SOUND L. REV. 381 (1994); Paul F. Mickey & Maryelena Pardo, *Dealing with Mental Disabilities Under the ADA*, 9 LAB. LAW. 532 (1993); Perlin, *Attitudes Be Undone, supra* note 12.

legislative history, or floor debate focused on the "grotesque" history of discrimination and mistreatment suffered by such individuals,[21] the economic, social, and psychological burdens borne by such persons in their day-to-day lives, the conditions faced by such persons when institutionalized in public facilities or when discharged from such facilities without adequate transitional mental health, medical or social services, or the legal effects that flow from the badge of mental disability.[22] The significance of this looms large, given the reality that surveys show that mental disabilities are the most negatively perceived of all disabilities.[23]

Again, our thesis is that the ADA applies to individuals within the criminal trial process at every step of the proceedings.[24] However, there has been stunningly little scholarly consideration of many of the "pieces" of the trial process, and most cases deciding relevant issues have been, to be kind, perfunctory. We argue here that scholars – law professors, criminologists, and criminal justice scholars – and

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[21] City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 454 (1985) (Stevens, J., concurring); *id.* at 461 (Marshall, J., concurring in part and dissenting in part).

[22] See also e.g., Janet L. Hamilton, *New Protections for Persons with Mental Illness in the Workplace Under the Americans with Disabilities Act of 1990*, 40 CLEV. ST. L. REV. 63 (1992); John W. Parry, *Mental Disabilities Under the ADA: A Difficult Path to Follow*, 17 MENT. & PHYS. DIS. L. REP. 100 (1993); Mickey & Pardo, *supra* note 22.

[23] Jane West, *The Social Policy Context of the Act*, in THE AMERICANS WITH DISABILITIES ACT: FROM POLICY TO PRACTICE 9 (J. West ed., 1991), citing A.J. ARANGIO, BEHIND THE STIGMA OF EPILEPSY: AN INQUIRY INTO THE CENTURIES-OLD DISCRIMINATION AGAINST PERSONS WITH EPILEPSY (1979).

[24] For a survey of *all* areas of the criminal trial process about which there has been ADA litigation, see. PERLIN & CUCOLO, *supra* note 20, § 11-2,1.

attorneys representing this population (as well as those prosecuting this population) must "wake up" to its significance to all aspects of this process.

The paper proceeds this way. In Part I, we look at Title II of the ADA. In Part II, we consider issues that relate to what happens prior to the trial process, including arrest decisionmaking, bail applications, and conditions of pretrial detention. In Part III, we look at all aspects of the criminal process, from substantive pretrial motions to the trial itself to plea-bargaining to sentencing. In Part IV, we discuss how Title II of the ADA can be a vehicle for enforcing these rights. In Part V, we discuss the principles of therapeutic jurisprudence (TJ) – focusing on dignity, voice, validation and voluntariness – to all of these issues, and how TJ best offers lawyers (and judicial officers, and expert witnesses) an opportunity to remediate the full range of underlying issues that arise in these cases. We then offer some conclusions with recommendations to those who are involved in any aspect of the criminal justice system as to how the ADA can be more meaningfully enforced in these specific contexts.

Bob Dylan, in his epic song, *Don't Think Twice It's All Right,* begins with these words to the girl friend with whom he is breaking up: *It ain't no use to sit and wonder why, babe/It don't matter, anyhow*. The rock critic Evan Schlansky describes the song as evoking "feelings that are equally world weary, tender, forgiving, and spiteful."[25] Those who litigate on behalf of persons with disabilities

[25] https://americansongwriter.com/the-30-greatest-bob-dylan-songs-4-dont-think-twice-its-all-right/ (Schlansky ranked *Don't Think Twice* as Dylan's fourth best song in history).

are certainly, as a group, "world-weary." And the failure of courts to take the ADA seriously in matters that involve the criminal trial process should likely make them "spiteful." Our hope is that this article leads lawyers representing those in the criminal trial process to turn more to the ADA on behalf of their clients, and that judges begin to take these issues more seriously.

I. On the ADA

Again, the ADA is Congress' most innovative attempt to address the pervasive problem of discrimination against citizens with physical and mental disabilities.[26] Prior to the enactment of the ADA, individuals discriminated against because of disability previously often had no legal recourse of any sort by which to seek redress for such discrimination.

There is no question that discrimination against such individuals continues to be a "serious and pervasive social problem."[27] The Act specifically states that, to combat this discrimination, the "full sweep of congressional authority, including the power to enforce the Fourteenth Amendment is invoked."[28] Congress deemed that the enforcement powers, remedies, and procedures set forth in the Civil Rights Act

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[26] See generally, PERLIN & CUCOLO, *supra* note 20, § 11-2.

[27] See 42 U.S.C. § 12101(a)(2) (1994)).

[28] See 42 U.S.C. § 12011 (b)(3)-(4). See, on this section, e.g., Catherine Grace Vanchiere, *Stalled on the Road to Health Care Reform: An Analysis of the Initial Impediments to the Oregon Demonstration Project,* 10 J. CONTEMP. HEALTH L. & POL'Y 405, 419 n. 105 (1993).

of 1964 shall be operative under the ADA; further, Congress barred Eleventh Amendment immunity arguments under this Act.[29]

The Supreme Court's decision in *Pennsylvania Department of Corrections v. Yeskey*[30] -- explicitly finding that the ADA applies to state prisons – underscored that the act's language "unmistakably includes State prisons and prisoners in its coverage," and that there was no "exception that could cast the coverage of prisons into doubt."[31] The following year, in *Olmstead v. L.C.*, the Court qualifiedly affirmed a decision by the Eleventh Circuit that had provided the first coherent answer to the question of the right of institutionalized persons with mental disabilities to community services under the ADA. There, it found that the ADA entitled plaintiffs—residents of Georgia State Hospital—to treatment in an

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[29] 42 U.S.C. § 12202.

[30] 524 U.S. 206 (1998). *Yeskey* affirmed a Third Circuit decision that had allowed the plaintiff to maintain his suit against the state department of corrections, alleging that he was denied placement in a "motivational boot camp" first-offender program because of his medical history of hypertension. *Id.* at 206.

[31] *Id*. See generally, Tim Horsley, Pennsylvania Department of Corrections v. Yeskey*: The ADA and the '"Clear Statement" Doctrine,* 26 N. KY. L. REV. 391 (1999); William D. Goren, Ann K. Wooster & James Lockhart, *Rights of Prisoners under Americans with Disabilities Act and Rehabilitation Act*, 163 A.L.R. FED. 285 (2000). See generally, Perlin, *Misdemeanor Outlaw, supra* note 12, at 221-22.

"integrated community setting" as opposed to an "unnecessarily segregated" state hospital.[32]

The Eleventh Circuit had focused on the "basic goal" of the ADA:

> The ADA does not only mandate that individuals with disabilities be treated the same as persons without such disabilities. Underlying the ADA's prohibitions is the notion that individuals with disabilities must be accorded reasonable modifications not offered to other persons in order to ensure that individuals with disabilities enjoy "equality of opportunity, full participation, independent living, and economic self-sufficiency … ."[33]

It relied on Justice Marshall's separate opinion in *City of Cleburne v. Cleburne Living Center*[34] that "[t]he ADA is intended to ensure that qualified individuals receive services in a manner consistent with basic human dignity rather than a manner that shunts them aside, hides, and ignores them,"[35] and emphasized:

> Discrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect.[36]

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[32] 138 F.3d 893, 897 (11th Cir. 1998), *aff'd in part, rev'd in part & vacated in part*, 527 U.S. 581 (1999).

[33] *Id.* at 899 (quoting, inter alia, 42 U.S.C. § 12101(a)(8).

[34] 473 U.S. 432 (1985).

[35] *L.C.*, 138 F.3d at 899–900 (quoting, *inter alia, City of Cleburne*, 473 U.S. at 432).

[36] *Id.* at 901 (quoting Alexander v. Choate, 469 U.S 287, 295–96 (1985).

On appeal, the Supreme Court, in a split opinion qualifiedly affirmed, focusing on what it saw as Congressional judgment supporting the finding that "unjustified institutional isolation of persons with disabilities is a form of discrimination,"[37] in a decision that "breathed important life into the Congressional findings on questions of institutional segregation, discrimination, and exclusion."[38]

Although only a handful of cases have ever relied on *Olmstead* squarely in deciding cases such as those we write about in this paper, it is important to underscore that there are criminal trial process cases that have relied on *Olmstead* in this context.[39] And scholars agree that *Olmstead* should apply to all aspects of the law enforcement system.[40]

II. Prior to the initiation of the actual trial process

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[37] *Olmstead,* 527 U.S. at 600.

[38] PERLIN & CUCOLO, supra note 20, § 11-3.2, at 11-106.

[39] Geness v. Cox, 902 F.3d 344, 362 (3d Cir. 2018): "Procedural protections [related to competency restoration] are designed to avoid undue delays and safeguard the fair and efficient functioning of the criminal justice system, and the denial of those protections, leading to the "unjustified institutional[ization] ... of persons with disabilities," is "a form of discrimination," citing *Olmstead.*

[40] See e.g., Michael Pecorini, *Trying to Fit a Square Peg into a Round Hole: Why Title II of the Americans with Disabilities Act Must Apply to All Law Enforcement Services*, 24 J. L. & POL'Y 551 (2016).

a. Introduction

To comply with the ADA, governmental entities may need to reasonably modify their pre-existing policies, practices, and procedures, provide physical access to buildings, and provide effective communication aids and services.[41] There is no question that the ADA applies to police activities and investigations.[42] Examples of what may be done to modify usual police practices include these: handcuffing a person who is deaf in front of the body instead of behind, so that he or she may continue to use sign language,[43] and having someone with an intellectual disability

[41] See e.g., Salinas v. City of New Braunfels, 557 F.Supp.2d 777 (W.D. Tex. 2008) (city's emergency services for persons with deafness fell within protections of ADA); Silva v. Baptist Health South Florida, Inc., 856 F.3d 824 (11th Cir. 2017) (question of material fact as to whether earing-impaired patients could succeed in case involving claims for discrimination under the ADA based on hospitals' failure to offer appropriate auxiliary aids so patients could effectively communicate with hospital staff); Hahn *ex* rel Barta v. Linn County IA, 130 F.Supp.2d 1036 (N.D. Iowa 2001) (county plan's compliance with state laws pertaining to mental health and developmental disability services did not establish compliance with ADA with respect to claim that county's policy or practice did not provide facilitated communication to autistic individual).

[42] Mauney v. Cugno, 2019 WL 3842582, *5 (M.D.N.C. 2019).

[43] See e.g., *Criminal Justice* (webpage of US Dept. of Justice, Civil Rights Division), accessible at https://www.ada.gov/topics/criminal-justice (listing this as a reasonable modification of police practices). Compare Seremeth v. Board of County Com'rs Frederick County, 673 F. 3d 333 (4th Cir. 2012) (police officers did not deny deaf suspect a reasonable accommodation under Title II of the ADA during their investigation of report of domestic violence when they followed protocol by handcuffing suspect with his hands behind his back, as opposed to with his hands in front of his body which would have allowed suspect to

repeat back each sentence of their *Miranda* rights in their own words to ensure they understand what they are being told, and the protections being afforded to them.[44] Further, it may be necessary to reevaluate the way bail and bail conditions are set.[45] Finally, there are arguments that might be put forth, concluding that conditions of pretrial detention violate the ADA[46]

There are specific issues that affect persons with mental disabilities. First, law enforcement agencies must acknowledge that mental illness can be varying in its

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write notes to communicate), to Estate of LeRoux, Montgomery County, Maryland, 2023 WL 2571518, *11 (D. Md. 2023) ("The mere existence of exigent circumstances does not excuse officers from providing reasonable accommodations").

[44] See e.g., *Criminal Justice, supra* note 43; see generally, Simon Schatz, *Interrogated with Intellectual Disabilities: The Risks of False Confession,* 70 STAN. L. REV. 643, 676 (2018)) (studies have demonstrated that *no* individual at any level of intellectual disability was able to understand the legal concepts enshrined in the *Miranda* warnings, and that factors used to assess the validity of a waiver—"age, education, prior experience with the criminal justice system and prior reception of the *Miranda* warnings"—do not correlate with greater comprehension in the population of persons who are intellectually disabled), citing to research reported in Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions, and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495, 538 (2002).

[45] See e.g., Andrew Hamm, White v. Hesse: *Challenging an Oklahoma County's Bail Practices Under the Americans with Disabilities Act and the Rehabilitation Act,* 26 TEX. J. ON CIV. LIBS. & CIV. RTS 229 (2021).

[46] For case examples where these arguments have failed, see e.g., Lloyd v. Fitzwater, 854 Fed. Appx. 903 (9th Cir, 2021); Verrier v. Beth Israel Deaconess Hosp.-Plymouth, Inc., 2023 WL 8544988, at *2 (D. Mass. 2023).

severity (the severity of the illness itself),[47] and in its current presentation (factors such as medication compliance,[48] understanding of symptoms,[49] etc.), so that arrestees (even with similar diagnoses) may present very differently at the time of arrest.[50]

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[47] See e.g., Panetti v. Lumpkin, 2023 WL 6348877, *11 (W.D. Tex. 2023) ("although the severity of Panetti's disordered thinking may vary from day to day, his ability to comprehend the world around him is always limited because of his mental illness"). This case is part of the extensive litigation in which the Supreme Court decided, in Panetti v. Quarterman,551 U.S. 930, 957 (2007), that a state may not execute a prisoner "whose mental illness prevents him from comprehending the reasons for the penalty or its implications" or is "unaware of the punishment they are about to suffer and why they are to suffer it." See, on lower courts' generic failure to comply with the *Panetti* holding, Michael L. Perlin & Talia R. Harmon, *"Insanity is Smashing up Against My Soul": The Fifth Circuit and Competency to be Executed Cases after* Panetti v. Quarterman, 60 U. LOUISVILLE L. REV. 557 (2022); Michael L. Perlin, Talia R. Harmon & Haleigh Kubiniec, *"The World of Illusion Is at My Door": Why* Panetti v. Quarterman *is a Legal Mirage*, 59 CRIM. L. BULL. 273 (2023), and Michael L. Perlin, Talia R. Harmon & Maren Geiger, *The Timeless Explosion of Fantasy's Dream": How State Courts Have Ignored the Supreme Court's Decision in* Panetti v. Quarterman, 49 AM. J. L. & MED. 205 (2023).

[48] On the question of medication compliance issues in the context of treatment plans, see Tellis v. LeBlanc, 2024 WL 3470644 (W.D. La. 2024).

[49] On the question of understanding of symptoms in the context of insurance coverage, see e.g., Brian D. Shannon, *The Brain Gets Sick, Too—The Case for Equal Insurance Coverage for Serious Mental Illness*, 24 ST. MARY'S L.J. 365 (1993).

[50] See e.g., Julianne C. Duncan & Richard Rogers, *Medication Compliance in Patients with Chronic Schizophrenia: Implications for the Community Management of Mentally Disordered Offenders,* 43 J. FORENS. SCI.1133 (1998).

Further, an arrested individual's competency can be wavering, and it may not be clear, at the time of arrest, whether there must be a subsequent determination of the individual's competency to stand trial. [51] Also, a defendant's mental illness may be co-occurring with other disabilities (physical or intellectual) and should be taken into account from the time of arrest onward.[52]

Those who represent persons with mental disabilities in the criminal process must consider – from the time of arrest, and at every turn of the case, whether their client is being treated in a way that comports with due process rights, regardless of disability status. If he or she is not, then the question of whether the ADA should be invoked must be considered. In this context, the ADA highlights the importance of communication; while that traditionally may have been more limited to those whose disabilities more directly have an impact on communication, it is our position that an argument can be made that any mental illness can potentially impair communication, and modifications in the treatment of this cohort of individuals, when arrested, may be needed.[53]

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[51] For an analysis of a case in which the defendant "waver[ed] between competency and incompetency, by a thin margin on either side," see United States v. Martin, 16 Fed. Appx. 943, 946 (10th Cir. 2001).

[52] See e.g., Anthony v. State, 371 So.3d 383, 385 (Fla. Dist. Ct. App. 2021) ("mental illness and intellectual disability can be `co-occurring'").

[53] For a statutory consideration – in the context of individuals with opioid use disorder – seeking to make advance directives, see Rebecca Dresser, *Precommitment Devices: A*

In this context, we must remain aware of the ways that persons with mental disabilities are disproportionately arrested for what are commonly called "nuisance crimes," and how these arrests regularly lead to potential ADA violations.[54] In an earlier article, one of the co-authors (MLP) extensively explored the implications of stereotyping and prejudice in the arrest process of persons with mental disabilities, noting that, per valid and reliable research, "[o]fficers' stereotypes of mentally disturbed people included the idea that it is not possible to have a meaningful conversation with such people," and that "officers hold on to the ideas that mentally disturbed people are completely irrational and cannot be reasoned with."[55] A study has found that people with psychiatric disabilities are *sixteen* times more likely

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Defensible Treatment for Opioid Addiction? 46 AM. J.L. & MED. 189, 196 (2020) discussing VA. CODE ANN.§ 54.1-2982 (covering people whose decisional incapacity is produced by "mental illness, intellectual disability, or any other mental or physical disorder that precludes communication or impairs judgment").

[54] See e.g., Perlin & Lynch, *supra* note 17; Michael L. Perlin & Alison J. Lynch, *"To Wander Off in Shame": Deconstructing the Shaming and Shameful Arrest Policies of Urban Police Departments in Their Treatment of Persons with Mental Disabilities*, *in* SYSTEMIC HUMILIATION IN AMERICA: FINDING DIGNITY WITHIN SYSTEMS OF DEGRADATION 175 (Daniel Rothbart ed. 2018).

[55] See Perlin & Lynch, *supra* note 17, at 703 (quoting Robert Panzarella & Justin O. Alecia, *Police Tactics in Incidents with Mentally Disturbed Persons,* 20 POLICING: INT'L J. POLICE STRAT. & MGMT. 326, 335-36 (1997).

than members of the general population to die in encounters with the police.[56] The potential significance of the ADA to this population cannot be overestimated.

III. The criminal trial process

A. Introduction

Consider next the trial process itself. There are reported cases involving the invocation of the ADA in cases that have arisen at multiple stages of the criminal trial process: pretrial,[57] at trial,[58] at the plea stage,[59] at sentencing,[60] and more.[61]

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[56] *See* Liz Szabo, *People with Mental Illness 16 Times More Likely to be Killed by Police*, USA Today (Dec. 10, 2015, 4:26 PM), http://www.usatoday.com/story/news/2015/12/10/people-mental-illness-16-times-more-likely-killed-police/77059710/ [https://perma.cc/TEC7-NLE8], *relying on* Doris A. Fuller et al., *Overlooked in the Undercounted: The Role of Mental Illness in Fatal Law Enforcement Encounters*, Treatment Advoc. Ctr. (Dec. 2015), http://www.tacreports.org/overlooked-undercounted [https://perma.cc/T82M-W5C9].

[57] See *infra* text accompanying nn. 66-87. These include competency to stand trial inquiries, questions as to the right to testify, and motions seeking suppression of a criminal confession or of seized evidence, and motions seeking to withdraw a guilty plea.

[58] See *infra* text accompanying nn. 88-89. This encompasses motions seeking to withdraw a guilty plea.

[59] See *infra* text accompanying n. 90. This includes the criminal plea-bargaining process.

[60] See *infra* text accompanying nn. 91-95. This also includes questions as to the need for reasonable accommodations at this juncture of the trial. See *infra* text accompanying note 107.

[61] See *infra* text accompanying nn. 96-106.This includes the extradition process, probation revocation, and parole conditions. On all of these issues, see generally, PERLIN & CUCOLO, *supra* note 20, § 11-2.1.

Scholars have also begun to consider the implications of the use of artificial intelligence in criminal cases involving defendants with disabilities.[62]

Civil plaintiffs have generally not been successful in these challenges, but that does not negate the point that courts have accepted the argument that the ADA is cognizable in criminal cases.[63] We believe that it is essential that lawyers representing persons with disabilities who have been charged with crime incorporate ADA arguments into their "toolkit."[64] It must be underscore at the

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[62] Sarah Takshi, *Algorithmic (Un)Fairness: Artificial Intelligence-Based Discrimination Against Individuals with Disabilities*, 57 Crim. Law Bull. Art 3 (Summer 2021) (exploring whether criminal defendants with disabilities who are harmed by AI decisions have recourse under the Americans with Disabilities Act). See also, Center for Justice Innovation, *The Do's and Don'ts of AI in the Criminal Justice System* (Feb. 19, 2025), accessible at https://www.innovatingjustice.org/articles/dos-and-donts-ai-criminal-justice-system.

One of the co-authors (MLP) is currently exploring the relationship between AI and the entire mental disability law decisionmaking process. See Michael L. Perlin, Heather Ellis Cucolo & Joanna Kulesza, *Artificial Intelligence, Algorithmic Bias, and Mental Disability Law: Ethical Challenges and Regulatory Solutions* (manuscript in progress; draft on file with author).

[63] See Karen O. Talley, *Independent Protection and Advocacy: The Role of Counsel in Institutional Settings,* 53 N.Y.L. SCH. L. REV. 55, 70 (2008-09) ("Another group in need of advocacy under *Olmstead* are those individuals who primarily have an intellectual disability or a brain injury but are inappropriately placed at state psychiatric facilities, often having entered through the criminal justice system).

[64] There is an operational dilemma here. Many state public defender statutes prohibit Public Defenders from bringing civil suits, see e.g., In re Nicole H., 201 Cal.App.4th 388,

outset, however, that nothing has changed since one of the co-authors (MLP) concluded, some 25 years ago, "that no coherent doctrinal threads could be found in a reading of this universe of cases."[65]

B. Pretrial

1. Competency to stand trial

The majority of ADA-related litigation comes at this juncture, and it touches on many of the most critical issues that can be resolved at this point of a case.[66] On the all-important question of competency to stand trial, in one case, the court found the defendant had no disability, and thus was not entitled to ADA protections;[67] in

394 (2011), and our experiences across the nation with state-level, publicly-funded disability rights programs has made it clear to us that, in many jurisdictions, disability rights lawyers generally avoid involvement in the criminal process. Similarly, many disability rights programs prohibit lawyers from representing defendants in the criminal process. See e.g., 42 C.F.R. § 51.6(a) (federally funded entities operating the Protection and Advocacy for Individuals with Mental Illness Act program "allotments must be used to supplement and not to supplant the level of non-Federal funds available in the State to protect and advocate the rights of individuals with mental illness.").

[65] Perlin, *Misdemeanor Outlaw, supra* note 12, at 221.

[66] See generally, PERLIN & CUCOLO, *supra* note 20, § 13-1.6.4.

[67] Shaholli v. Deangelo-Kipp, No. 17-13184, 2020 WL 2745303, at *8 (E.D. Mich. May 27, 2020) (habeas corpus case). Here, the court noted that the competency inquiry is a different one than an inquiry as to whether defendant had a mental disability, "the fact remains that defendant used the same symptoms to cover competence, mental illness and insanity." As the court found the defendant did not have disability, he was not entitled to ADA-based accommodations.

another, the court found that a defendant with severe autism who had been found incompetent to stand trial had not been treated by deliberate indifference by state officials was not transferred from a county jail to a state development center for persons with developmental disabilities.[68] Other cases simply reject, without any explanation, defendants' arguments that the ADA demanded a competency hearing in their cases,[69] one noting that the defendant "provides no authority to support the inference that the ADA protects the rights of incompetent defendants during

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Importantly, the court also found that alleged violation of a defendant's rights under the ADA is "inappropriate for a habeas corpus case" and not cognizable on habeas review. *Id.,* citing, inter alia, Lowe v. Bear, 2019 WL 1756283, at *3 (E.D. Okla. April 19, 2019)) (claims alleging violations of the ADA are not cognizable on habeas review because the ADA is not a federal constitutional provision or guarantee). See also, Walker v. Lynn, 2022 WL 21842361, *6 (E.D.N.Y, 2022) (citing *Shaholli*) ; Nelson v. Shinn, 2021 WL 2012696, at *1, *2 (D. Ariz. May 20, 2021); Hoke v. Miller, 2007 WL 2292992, at *6 (N.D.N.Y. Aug. 6, 2007) State ex rel. Young v. Schnell, 956 N.W.2d 652, 673 n.21 (Minn. 2021) (all same).

[68] Matthew P. by Fedora P. v. Neifeld, 185 N.Y.S.3d 623 (N.Y. Sup. Ct. 2023). In this case, the court concluded that the defendant failed to adequately allege that Commissioner of Office for People with Developmental Disabilities (OPWDD) acted or failed to act with deliberate indifference to strong likelihood that her conduct would result in violation of ADA Title II integration mandate, and thus committee failed to state a claim for monetary damages under that title against the Commissioner in her official capacity regarding failure to transfer committee from county jail to OPWDD's development center.

[69] See e.g., Smith v. Holt, 2008 WL 1929905 (M.D. Ala. 2008); see also, Indiana Prot. & Advoc. Servs. Comm'n v. Indiana Fam. & Soc. Servs. Admin., 630 F. Supp. 3d 1022 (S.D. Ind. 2022) (failure to provide competency restoration services).

criminal proceedings such that a trial court's failure to provide a competency hearing violated the ADA."[70]

A powerful dissent in a Washington state case illustrates the complexity of the underlying issues. There, in *State v. Ortiz-Abrego,*[71] although the Supreme Court reinstated a finding that the defendant was incompetent to stand trial, noting that the trial court's discussion of "possible disability accommodations, which were never implemented in this case, did not alter the legal competency standard applied."[72] Dissenting, Justice Madsen focused on the importance of disability accommodations:

> Disability accommodations, on the other hand, are not aimed at a defendant's *capacity* to understand. Rather, accommodations serve to safeguard a defendant's rights under the Sixth Amendment to confront witnesses and be present during trial and preserve a defendant's equal protection rights under the Americans with Disabilities Act of 1990 (ADA) [citation]. *See State v. Gonzales–Morales*, 138 Wash.2d 374, 379, 979 P.2d 826 (1999) (citing U.S. Const. amend. VI); 42 U.S.C. § 12101(b)(4) (Congress

[70] Brooks v. Hatton, 2017 WL 11540587, *2 (N.D. Cal. 2017).

[71] 387 P.3d 638 (Wash. 2017).

[72] *Id.* at 647.

> invoking its power to enforce the Fourteenth Amendment to address discrimination against persons with disabilities through the ADA).[73]

Here, he concluded that "The trial court's conclusions of law… demonstrate that we cannot separate the discussion of accommodations from the court's conclusion of incompetency."[74] He then focused on the need to consider the ADA in such decisionmaking:

> I am also concerned about the harmful, systemic effect that utilizing competency to address the needs of defendants with disabilities may have in our judicial system. We do not want to make the statement that defendants with disabilities do not have the *capacity* to understand and assist. Rather, we must examine how, in line with the ADA, we can structure court proceedings to allow for the maximum participation and fairness to defendants, jurors, and community members with disabilities.[75]

A defendant was also preliminarily successful in a federal case in Washington in which he alleged that the ADA is implicated in determining whether proceedings relating to a defendant's competency to stand trial "eviscerate[ed his] speedy trial

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[73] *Id.* at 648.

[74] *Id.* at 649.

[75] *Id.* at 650.

rights," the court simply denying defendants' motion to dismiss the defendant's speedy trial claim.[76]

Another relevant competency issue relates to the circumstances of confinement after a defendant is found incompetent to stand trial. Thus, a federal district court in Pennsylvania has held – in a case in which the defendant was detained for incompetency-based reasons for *nine* years awaiting trial -- that the state was not entitled to sovereign immunity on an ADA claim based on failure to avoid protracted involuntary competency restoration treatment[77] and was vicariously liable for any violations by judges of pretrial detainee's rights under both the ADA and the Fourteenth Amendment.[78]

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[76] Peterson v. County of Okonogan, 2008 WL 11425391, *3 (E.D. Wash. 2008).

[77] See generally, PERLIN & CUCOLO, *supra* note 20, §§ 13-1.4 & 13-1.8.5. On how many jail restoration programs violate the ADA, see Alexandra Douglas, *Caging the Incompetent: Why Jail-Based Competency Restoration Programs Violate the Americans with Disabilities Act Under* Olmstead v. L.C., 32 GEO. J. LEGAL ETHICS 525 (2019); see also, Marisol Orihuela, *The Unconstitutionality of Mandatory Detention During Competency Restoration*, 22 BERKELEY J. CRIM. L. 1 (2017).

For the most recent consideration, see Devrey Martin, Cassandra Bailey & W. Neil Gowensmith, *Ethical Considerations of Competency Restoration: The Risk of Decompensation in Correctional Settings,* 29 PSYCHOL. PUB. POL'Y & L. 62 (2023).

[78] Geness v. Pennsylvania, 503 F.Supp.3d 318 (W.D. Pa. 2020). In earlier proceedings in the same case, the court had found that state statutory procedural protections were "designed to avoid undue delays and safeguard the fair and efficient functioning of the criminal justice system, and the denial of those protections, leading to the "unjustified

Application of the ADA in such cases would the best option to avoid unnecessary institutionalization of the population in question, and would best ensure that criminal defendants with disabilities have equal opportunities to participate in the competency restoration and evaluation process.

2. Motions to suppress

The ADA has also been raised—again, mostly unsuccessfully -- in cases involving defendants' motions to suppress confessions and the seizure of evidence.[79] Thus, in *People v. Gaylord,*[80] the court simply ruled noncompliance with the ADA "by itself" was not a basis for confession suppression, simply citing to an earlier *non*-ADA New York case.[81] In *Patrice v. Murphy,* the Court found that an arrest (that

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institutional[ization] ... of persons with disabilities," is "a form of discrimination," citing *Olmstead ,* 527 U.S. at 600. See Geness v. Cox, 902 F.3d 344, 362 (3d Cir. 2018).

[79] Significantly, a case has differentiated between constitutional and statutory violations in this manner:

> [W]hen the government has violated a statute (as opposed to the Constitution), suppression of evidence has generally been imposed only when the government's violation of the statute demonstrably prejudiced a defendant's ability to exercise related constitutional rights or to prepare or present a defense.

Nathan v. Anchorage, 955 P.2d 528, 533 (Alaska Ct. App. 1998), cited favorably on this proposition in Winfrey v. State, 78 P.3d 725, 729 (Alaska Ct. App. 2003).

[80] 621 N.Y.S.2d 247 (App. Div. 1994), *appeal denied*, 623 N.Y.S.2d 107 (1995).

[81] *Id.* at 980, citing to People v. Patterson, 78 N.Y.2d 711, 714–172 (1991) (ADA not mentioned in *Patterson*).

preceded the confession in question) was not, in itself, "the type of service, program, or activity from which disabled person could be excluded or denied benefits."[82] It noted, however, that "the ADA should apply to the context of an arrest only where the arrestee was subjected to discrimination because of his disability,"[83] circumstances it did not find to apply in the case in question.[84] On the other hand, there is scholarship persuasively arguing that the ADA should be a safeguard against false confessions.[85]

On the question of seizure of evidence, an appellate court in Illinois found there to be no ADA violation in a case in which the use of written communications and physical demonstrations to communicate requisite information to a deaf motorist during a stop and sobriety testing, rather than the use of a sign language

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[82] 43 F. Supp. 2d 1156, 1158 (W.D. Wash. 1999), citing 42 U.S.C. § 12132. See Calloway v. Boro of Glassboro Dept. of Police, 89 F. Supp. 2d 543, 556 n. 20 (D.N.J. 2000) (citing *Patrice* on this point), and compare Lum v. County of San Joaquin, 756 F.Supp.2d 1243 (E.D. Cal. 2010) (arrests are "activities" of a public entity under the public services provisions of the ADA).

[83] *Patrice,* 43 F. Supp. 2d at 1160.

[84] *Id.* at 1161: "Plaintiff was arrested because probable cause existed, as discussed more fully below, not because she is disabled. Absent a causal link between plaintiff's disability and the injury of which she complains (her arrest), there can be no claim under [the ADA]."

[85] See Lauren Rogal, *Protecting Persons with Mental Disabilities from Making False Confessions: The Americans with Disabilities Act as a Safeguard*, 47 N.M. L. REV. 64, 97 (2017) (concluding that the defendant could argue that "the ADA violation constitutes the necessary coercion" to support judicial suppression).

interpreter, did not violate the ADA.[86] And at least one case has explicitly found that the ADA "does not create rights that require the court to exclude evidence or dismiss a case if violations [of that statute] were found."[87]

C. At trial

There have been unsuccessful efforts to employ the ADA in connection with trial-based motions. By way of example, it was held that a defendant with a speech impediment waived his right to appellate review of his ADA-based arguments that the trial court's failure to provide him with either an interpreter, aid or service (despite the fact of his speech impairment) as this was never objected to by counsel at trial.[88]

D. **At the plea stage**

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[86] People v. Long, 693 N.E.2d 1260 (Ill. App. 1998), discussed favorably in People v. Fickes, 2014 WL 4050047, *5 (Il. App. Ct. 2014).

[87] State v. Pudvah, 2005 WL 6151337, *1 n. 1 (Vt. 2005).

[88] Mora v. State, 2012 WL 2929387 (Tex. App.2012). There has been significant scholarship on this question as it applies to *victims* with disabilities. See e.g., Janine Benedet & I. Grant, *Taking the Stand: Access to Justice for Witnesses with Mental Disabilities in Sexual Assault Cases*, 50 OSGOODE HALL L.J. 1, 8 (2012); Janine Benedet & I. Grant, *Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issue*s, 52 MCGILL L.J. 515, 546 (2007); Louise Ellison, *Responding to the Needs of Victims with Psychosocial Disabilities: Challenges to Equity of Access to Justice*, 1 CRIM. L. REV. 28, 40–41 (2015); Louise Ellison et al., *Challenging Criminal Justice? Psychosocial Disability and Rape Victimization*, 15 CRIMINOLOGY & CRIM. JUST 225, 230–234 (2015); Voula Marinos et al., *Victims and Witnesses with Intellectual Disability in the Criminal Justice System*, 61 CRIM. L. Q 517 (2014).

In a procedural decision, the Vermont Supreme Court ruled that a defendant failed to preserve for appeal his claim that the prosecutor's withdrawal of plea agreement at status conference violated the ADA.[89] And, in an Alabama case, a defendant's ADA-based motion to withdraw his guilty plea was rejected, the court concluding that there was no evidence that he did not understand the nature and potential consequences of his plea.[90]

E. At sentence

Courts have uniformly held that there were no violations in imposing criminal sentences on defendants who claimed, inter alia, ADA protections.[91] In one case, the Court went further: "Nowhere in the ADA does it appear that Congress intended the Act to provide rights that could be asserted in a criminal proceeding."[92]

As discussed below, such arguments have been raised following probation revocations[93] and imposition of custodial sentences, the defendants arguing unsuccessfully that they had ADA-based rights to alternative treatment programs.[94] The Iowa Court of Appeals has suggested:

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[89] State v. Duford, 660 A.2d 736, 737 (Vt. 1995).

[90] Martin v. State, 705 So.2d 876 (Ala. Crim. App. 1997)

[91] See e.g., Fincher v. State, 2000 WL 1618435 (Tex. Ct. App. 2000) (no ADA violation); Ruffin v. Commonwealth, 1999 WL 1256313 (Va. Ct. App. 1999) (same); Wilson v. Commonwealth, 522 S.E.2d 385 (Va. App. 1999) (same).

[92] *Id.* at 387.

[93] See *infra* text accompanying notes 101-04.

[94] See e.g., *Ruffin, supra; Wilson, supra.*

> [The defendant] has not pointed us to any precedent from Iowa or other jurisdictions where a criminal defendant has relied on the ADA to successfully attack a sentencing court's exercise of discretion, and we have found none.[95]

F. Other aspects of the criminal trial process

On the other hand, the ADA has also been raised successfully in cases involving the extradition process. In *Chisholm v. McNanimon*,[96] the court found that there was a genuine issue of fact—thus precluding summary judgment – on the question of whether a hearing-impaired pretrial detainee had a right to a sign language interpreter at intake prior to his extradition hearing.[97] And, in *Lee v. City of Los Angeles*[98] plaintiffs were permitted on remand to amend their complaint to add an ADA claim alleging that certain activities or services undertaken by law enforcement and provided by correctional facilities to those incarcerated as part of the extradition process were "services, programs, or activities of a public entity" within the ADA.[99]

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[95] State v. Barclay, 895 N.W.2d 923, 2017 WL 104952 *4 (Iowa Ct. App. 2017).

[96] 275 F.3d 315 (3d Cir. 2001).

[97] *Id.* at 328.

[98] 250 F.3d 668 (9th Cir. 2001).

[99] *Id.* at 691. See appellants' reply brief in Lee v. County of Los Angeles, 1999 WL 33604776, **22-23 (9th Cir. 1999):

> Both the City and the County have similar policies that violate the ADA: each withheld the services Mr. Sanders has identified from the most disabled segment of the population. With respect to their fingerprinting and extradition functions, the

On the other hand, persons with disabilities have *not* been successful in cases involving probation and parole revocations. In *Burnham v. Massachusetts,*[100] a procedural decision, the court ruled that the plaintiff could not raise his claim in a petition for extraordinary relief that his probation revocation violated the ADA as that was a claim that could only be raised on direct appeal.[101] And, in *Wilson v. Virginia*,[102] the court found that a probation revocation hearing in criminal court was an improper forum in which to assert that a detention center violated the ADA by rejecting him for admission.[103]

> City defendants have a policy whereby they withhold their services that would positively identify a suspect until the suspect asserts that he is not the person sought in another jurisdiction. Similarly, the County relies on a policy of *24 self-reporting with respect to the mentally ill. If the inmate is too ill to self-report, he receives no mental health services. The policies of the City and the County have the effect of denying the services that would have uncovered Kerry Sanders' misidentification to the people, such as Kerry, who need it the most, i.e., those unable to assert the misidentification.

[100] 143 N.E.3d 424 (Mass. 2020).

[101] *Id.* at 425. See also, e.g., Carter v. State, (Tex. Ct. App. 2001) (ADA issue waived on appeal for not having been raised in a timely fashion).

[102] 522 S.E.2d 385 (Va. Ct. App. 1999).

[103] *Id.* at 387. See also e.g., People v. Cheeseman, 2008 WL 434976 (Cal. Ct. App. 2008) (rejecting defendant's argument that trial court violated the ADA in revoking her probation because she allegedly could not enter a particular substance abuse program due to "a medical condition)"; *see also,* Harris v. Commonwealth, 2022 WL 16556488, *6 (Va. Ct. App. 2022) (Raphael, J., concurring) (court's decision in *Wilson, supra,* does not necessarily preclude application of the ADA to probation revocation decisions).

On the question of parole revocation, a federal court in Pennsylvania has rejected a class claim by disabled parolees over the Board of Prison Terms' ("BPT" or "Board") alleged failure to provide reasonable accommodation at parole revocation hearings as required by the ADA, finding that a parolee had no right to be placed in community-based treatment program for veterans instead of being imprisoned after his parole was revoked,[104] Contrarily, the Ninth Circuit has found that the failure of the parole board to abide by requirements of the ADA in parole revocation proceedings was not supported by legitimate penological interest.[105] This case, however, was very recently subsequently abrogated by a non-parole, non-ADA case,[106] leaving its authoritativeness in doubt.

G. Conditions of confinement

A federal court has rejected a plaintiff-prisoner's claim that the medical treatment he underwent in a state penal facility violated the ADA, holding that that

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[104] Webber v Pennsylvania Bd. of Probation & Parole, 199 Fed. Appx. 186, 187-88 (3d Cir. 2006).

[105] Armstrong v. Davis, 275 F.3d 849, 874 (9th Cir. 2001), *cert.* den., 537 U.S. 812 (2002).

[106] See Mattioda v. Nelson, 98 F.4th 1164, 1174 (9th Cir. 2024), indicating that *Armstrong* was abrogated by Johnson v. California, 543 U.S. 499, 504-05 (2005) (*Armstrong* not mentioned in *Johnson).*

law cannot support a cause of action for medical malpractice or medical negligence.[107]

Conclusion

In short, while it is clear that the ADA applies at all these stages of the criminal prosecution, there have been very few cases in which criminal defendants have been granted any relief at all..[108] Despite the barriers, defense attorneys should still pursue arguments to support the application of reasonable modifications and effective communications as well other ADA protections on behalf of their clients throughout the pre-trial, trial, and sentencing process.

IV. Litigation under the ADA

A. Introduction

In this section, we will look more carefully at Title II of the ADA, and consider its application to the population in question. We will then consider that law's potential application to claims seeking release/discharge, and compare and contrast *systemic* advocacy to ensure that qualified individuals with disabilities can

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[107] Thomas v. Holmes, 2024 WL 4135511, *32 (S.D. Tex. 2024), citing *Olmstead*, 527 U.S. a 603 n. 14, and Whetstone v. Hall, No. 4:17CV158-JMV, 2018 WL 1022586, at *2 (N.D. Miss. 2018) ("The ADA and [the Rehabilitation Act] exist to protect individuals from being discriminated against because they have disabilities; they do not exist to challenge a person's treatment for a disability.").

[108] Interestingly, litigants appear to have been the most successful in cases involving the extradition process. See e,g, *Chisholm, supra* and *Lee, supra.*

move from institutions to the community at a reasonable pace as required by Title II of the ADA, by considering what relief might be available under Title II actions and what might be available under habeas corpus petitions. In this context we will also briefly examine abstention issues and cases looking at the scope of potential injunctive relief.

Again, Title II of the ADA prohibits covered state and local public entities from discriminating against qualified individuals with disabilities on the basis of their disability.[109] There are three main affirmative defenses to Title II actions: the fundamental alteration defense,[110] the undue burden defense,[111] and the direct threat defense.[112] Each of these may pose pitfalls for litigants seeking ADA enforcement in this area of the law.

In short, this is not an easy path for lawyers representing persons with disabilities in the criminal justice system. One of the co-authors (MLP) has written in a white paper prepared for the American University School of Public Affairs' Justice Programs Office on the question of the quality of representation of criminal defendants with mental disabilities, that, in determining adequacy of counsel in cases involving this population, attention must be paid to the "fear of faking," the

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[109] 42 U.S.C.A. § 12132.

[110] 28 C.F.R. § 35.130(b)(7).

[111] See e.g., Walsh v. Coleman, No. 3:19-CV-980 (JAM), 2021 WL 3036920, at *9 (D. Conn. July 19, 2021) (considering whether genuine disputes of material fact exist as to whether proposed accommodations are reasonable or would pose an undue burden).

[112] See 42 U.S.C.A. § 12182(b)(3).

likelihood of undiagnosed or misdiagnosed disabilities, and the impact of prescribed medications on mental functioning.[113]

On the question of release and discharge lawyers representing the population in question need to weigh whether it is more advantageous to their client to file an affirmative ADA case under the *Olmstead* doctrine, or to file a petition for a writ of habeas corpus.[114] On the other hand, actions seeking *systemic* changes (such as

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[113] Michael L. Perlin, Am. Univ., Justice Programs Office, *Representing Clients with Mental Health and/or Cognitive Impairments in Treatment Courts* 3 (2016), http://www.american.edu/spa/jpo/initiatives/drug-court/upload/Perlin-Mental-Impairments-7-8-16.pdf [https://perma.cc/DM26-89EL], as quoted in Michael L. Perlin, *"Who Will Judge the Many When the Game is Through?": Considering the Profound Differences between Mental Health Courts and "Traditional" Involuntary Civil Commitment Courts,* 41 SEATTLE U. L. REV. 937, 941 n. 19 (2018). On issues related to the "fear of faking," see generally, Michael L. Perlin, *"The Borderline Which Separated You from Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment,* 82 IOWA L. REV. 1375 (1997).

[114] Claims that seek release from prison or discharge from a forensic psychiatric hospital are usually brought through a habeas petition as courts have regularly rejected ADA claims in cases where the plaintiff was seeking release see e.g., Heath v. Hanks, 433 F.Supp.3d 221 (D.N.H. 2019)(court dismissed the ADA claims of a civilly committed man seeking to invalidate a prior administrative order confining him to a secure facility); Beam v. Madigan, Case No. 16-cv-1211-MJR, 2017 WL 679950 (S.D. Illinois, 02/21/2017)(prisoner's ADA claims were dismissed, in part, because relief sought included "immediate release" from prison); and Clemons v. Williams, Case No. 2:14-cv-02195-APG-NJK (March 29, 2016)(Court denied disabled prisoner ADA claim seeking a reduction in sentence because he was denied the ability to work and earn credits towards a sentence reduction because of his disability.).

reasonable modifications and changes to the way in which a public entity operates it programs and systems so that individuals with qualified individuals with disabilities (e.g., certain insanity acquittees) can transition to the community at a reasonable pace would best be served by an *Olmstead* action, given the *Olmstead* mandate.[115]

It is important to reinforce the fact that systemic relief is simply not available in a habeas proceeding as the scope of the relief that could be obtained through a habeas petition is limited as the purpose of a habeas is narrow as its objective is limited and the purpose is narrow: to invalidate the state court's judgment of conviction in a particular case.[116] Thus, plaintiffs seeking such relief could not obtain systemwide changes to policies, practices and procedures so as to stop, and

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[115] See e.g. Bogovich v. Sandoval, 189 F.3d 999 (9th Cir. 1999). In *Bogovich*, two disabled prisoners brought ADA claims seeking prospective injunctive relief only challenging a parole board's policy of considering substance abuse history in making parole decisions. The Court held that the plaintiffs' claims could proceed and were not limited to only a remedy through a habeas action because, in bringing their ADA claims, they did not challenge the validity or duration of their prison confinement. *Id*. at 1003-04. Instead, the court found that the plaintiffs attacked "the Board's decision-making process" and that "success on their claim would not guarantee their parole or shortening of their sentences because the parole board would still have the authority to deny their parole." *Id*. at 1003, quoting Neal v. Shimoda, 131 F.3d 818, 824 (9th Cir. 1977). The court noted that the prisoners had not alleged that they had been improperly denied parole and that they did not seek to "upset any previous decisions denying parole." *Id*. at 1003.

[116] See Rodriguez v. Mitchell, 252 F.3d 191, 198 (2d Cir. 2001) ("The habeas motion under 28 U.S.C. § 2254 seeks to invalidate the state court's judgment of conviction.").

avoid *future*, disability discrimination if they were limited to only seeking relief through a habeas petition.

The next litigation question to consider is the possible application of the *Younger* abstention doctrine. Per the doctrine articulated in *Younger v. Harris*, [117] although Federal courts have the authority and obligation to enforce federal law and remediate violations of federal law, abstention is the exception. Federal courts should abstain in "exceptional circumstances" including:

> (1) ongoing state criminal prosecutions,
>
> (2) certain civil enforcement proceedings, and
>
> (3) civil proceedings involving certain orders uniquely in furtherance of the state's ability to perform their judicial functions.[118]

[117] 401 U.S. 37 (1971).

[118] Cavanaugh v. Geballe, 28 F.4th 428,432 (2d Cir. 2022) (quoting Falco v. Justs. of the Matrimonial Parts of Sup. Ct. of Suffolk Cnty., 805 F.3d 425, 427 (2d Cir. 2015) (quoting *Sprint*, 571 U.S. at 78)).

Younger has been invoked to support abstention in multiple ADA cases,[119] and in other cases, it has been rejected.[120]

A plaintiff must decide whether to proceed through a habeas petition or whether to bring an affirmative Title II ADA *Olmstead* case in federal court. If bringing a case in federal court, the plaintiff should probably not bring the habeas as well, because of the risk of *Younger* abstention. Another important consideration is the assessment of the exact relief being sought. If the relief is to challenge the forensic commitment on behalf of, by way of example, an individual who had been found not guilty by reason of insanity, then a habeas petition is appropriate. If, however, the relief is *only* systemic in nature and does not seek individualized relief, such as the discharge or release of a particular individual, the *Younger* doctrine should likely not be implicated.[121]

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[119] E.g., Discovery House v. Consolidated City of Indianapolis, 970 F. Supp. 655 (S.D. Ind. 1997) (court abstained under *Younger* doctrine principles due to issues raised in pending state court proceeding). See also, e.g, Kotz v. Florida, 33 F. Supp. 2d 1019 (M.D. Fla. 1998); W.R. v. Connecticut Department of Children and Families, 2003 U.S. Dist. LEXIS 5128 (D. Conn. 2003.

[120] Roe v. Ogden, 253 F.3d 1225 (10th Cir. 2001) (*Younger* abstention did not apply); Harris v. New York State Department of Health, 202 F. Supp. 2d 143, 2002 U.S. Dist. LEXIS 7179 (S.D.N.Y. 2002) (same); Pathways, Inc. v. Dunne, 172 F. Supp. 2d 357 (D. Conn. 2001) (same).

[121] Compelling defendants to comply with a prophylactic federal disability anti-discrimination law is not an unlawful "interference" with any state court proceeding and can be an appropriate remedy to avoid disability discrimination. Mary Jo C. v. N.Y. State v. & Local Ret. Sys., 707 F. 3d 144,163 (2d Cir. 2013) ("We conclude that the ADA's reasonable modification requirement contemplates modification to state laws, thereby permitting

There are other potential abstention issues as well that must be considered. One, for example, is referred to as *O'Shea* abstention. In *O'Shea v. Littleton,*[122] the United States Supreme Court held that federal *c*ourts must refrain from exercising jurisdiction in cases where the relief sought would require the court to issue injunctions that would bind the future actions of state criminal courts, when the relief sought would impose a major intrusion into state power.[123] Here, federal courts have held that determining whether *O'Shea* abstention is required is a "heavily fact-specific" exercise which "primarily turns on the relief sought" by the plaintiffs.[124] Also, other courts have held that where relief sought in a case does not implicate state court procedures or their day-to-day operations and does not involve

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preemption of inconsistent state laws, when necessary to effectuate Title II's reasonable modification provision.") This is particularly true given "the broad scope and purpose of the ADA." *Id.* at 162.

[122] 414 U.S. 488, (1974).

[123] *Id.* at 502.

[124] Bronx Defenders v. Office of Court Admin., 475 F.Supp.3d 278, 285 (S.D.N.Y 2020), *quoting* Trowbridge v. Cuomo, 16-CV-3455, 2016 WL 7489098, at *11 (S.D.N.Y. Dec. 21, 2016) (internal citations omitted). In *Bronx Defenders*, public defender organizations sued the state court system alleging constitutional and disability discrimination claims. The court held that the relief sought -- several changes to the *court system*, including specific disability accommodations -- ran afoul of *O'Shea*. *Id.* at 289.

an ongoing intrusion into the state's administration of justice, *O'Shea* abstention is inapplicable.[125]

An *Olmstead* case seeking *only* systemic relief, such as changes in policies and procedures that do not interfere with state court procedures such as sentencing, is unlikely to implicate state court procedures. Likewise, such relief is unlikely to be viewed as interfering with a state court's daily operation and thus would avoid *O'Shea* abstention. Nevertheless, whether *O'Shea* abstention is implicated depends on the relief sought. Thus, plaintiffs must think carefully about the relief that they seek to avoid this problem.

It is also necessary to consider, in the context of affirmative ADA litigation, the scope of injunctive relief being sought by plaintiffs. Here, it is necessary to consider the Supreme Court's *dicta* in *Rizzo v. Goode*.[126] There, the Court cautioned lower courts to be cognizant of federalism and comity principles when considering injunctive relief so as not to intrude on a state (or local) agency's ability to carry out its everyday operations.[127]

It is important to note that *Rizzo* does not preclude federal courts from ordering appropriately-tailored systemic injunctive relief, especially where, plaintiffs, who clearly have pled a case or controversy and have standing and aggrievement, seek vindication of federal statutory rights through relief tailored to systemic violations

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[125] *See* Courthouse News Service v. Planet, 750 F.3d 776, 790 (9th Cir. 2014); *see also* Disability Rights New York v. New York ("DRNY"), 916 F.3d 12, 136-137 (2d Cir. 2019).

[126] 423 U.S. 362 (1976).

[127] *Id.* at 378-79

of a broad federal remedial scheme.[128] And, it must be stressed that lower courts have held that federalism concerns animating the *dicta* in *Rizzo* apply only in very narrow circumstances.[129]

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[128] See e.g., Youakim v. Miller, 562 F.2d 483, 491 (7th Cir. 1977), *aff'd on other grounds,* Miller v. Youakim, 440 U.S. 125 (1979), In *Youakim*, foster parents of related children had sought injunctive and declaratory relief alleging a state foster care agency (DCFS) paid them less than foster parents of non-related children in violation of the Social Security Act (SSA). The district court ordered the foster care agency to promulgate new rules to comply with the SSA. On appeal, the Seventh Circuit held:

> *The only proper reading of the judgment order is that it requires the DCFS to formulate its regulations consistent with the demands of federal statutory law.* Acceptance of the DCFS argument would strip the federal courts of jurisdiction and power to enforce rights under 42 U.S.C. § 1983. The DCFS reliance on *Rizzo v. Goode*, 423 U.S. 362 (1976), is misplaced. Although the federal courts must be constantly mindful of the adjustment to be preserved between federal equitable power and state administration of its own law, they must, and do, retain power to enforce compliance with federal statutes.

562 F.2d at 491 (emphasis added). Since the district court did not order the defendant to use specific language in the new regulations but only to promulgate the new rules *consistent* with federal law, *Rizzo* did not apply. *Id.*

[129] Federal courts have the authority and obligation to enforce federal law and remediate violations of federal law. New Orleans Public Service, Inc. v. Council of the City of New Orleans, 491 U.S. 350, 358-59(1989) (reversing dismissal on abstention grounds, Court noted "federal courts' obligation to adjudicate claims within their jurisdiction" is "'virtually unflagging,'" *quoting* Deakins v. Monaghan*,* 484 U.S. 193, 203 (1988);"[o]ur cases have long supported the proposition that federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred"). Abstention is a very limited exception and, of course, is prudential not jurisdictional. Sprint Communications, Inc. v. Jacobs, 571 U.S. 69,

In short, the ADA (as well as other federal and state anti-discrimination statutes) *can be* a useful tool when advocating for individuals with disabilities, including mental health disabilities, in the context of, and throughout all aspects of, the criminal justice and forensic mental health system. But, as the cases just discussed teach us, careful consideration should be given to the relief sought in terms of scope and framing to avoid inevitable litigation pitfalls.

We turn now to the principles and application of therapeutic jurisprudence as a potential ameliorative device to help resolve some of these issues.

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78 (2013) (holding federal courts have duty to accept jurisdiction and limiting the application of abstention to narrow categories of cases implicating specific pending state civil and criminal proceedings).

Rizzo is often characterized as an abstention doctrine, but courts have substantially limited its application. *See, e.g., Youakim*, 562 F. 2d at 491 (defendants' reliance on *Rizzo* abstention is "misplaced"); Mille Lacs Band of Ojibwe v. County of Mille Lacs, Minnesota, 508 F. Supp. 3d 486, 512 (D. Minn. 2020)(*Rizzo* is inapplicable). A rule prohibiting federal courts from ever issuing systemic injunctive relief against state agencies would virtually, if not entirely, eviscerate the opportunity for litigants to obtain injunctive relief. *See Youakim*, 562 F.2d at 491.

Further, whether *Rizzo* abstention is appropriate in a particular case is dependent on the nature and scope of the injunctive relief sought. Courthouse News Serv. v. Schaefer, 2 F.4th 318, 324–25 (4th Cir. 2021) (*Rizzo* and *O'Shea* "provide no basis for abstention" as "those cases concern a federal court's ability to issue specific injunctive relief — in each case, the Supreme Court held that the injunctive relief at issue was inappropriate").

V. Considering therapeutic jurisprudence[130]

A. Definition

Therapeutic jurisprudence (TJ) has surfaced as a novel school of thought that recognizes that the law has therapeutic or anti-therapeutic consequences. It attempts to look at the "real world" implications of the way the legal system controls or manages behavior, most importantly, the way it regulates the lives and behavior of those who are marginalized. It seeks to "ferret out biases, and to deal with the vulnerabilities of so much of [this marginalized] population. [, and] is a means of potentially avoiding the polarization that is often the hallmark of traditional litigation."[131]

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[130] This section is largely adapted from Michael L. Perlin et al, *"Their Futures, So Full of Dread": How* Barefoot's *Contamination of the Death Penalty Trial Process Continues***,** 27 RICH. PUB. INT. L. REV. 77, 113-17 (2024). For fuller explanations, see Michael L. Perlin, "*I've Got My Mind Made Up": How Judicial Teleology in Cases Involving Biologically Based Evidence Violates Therapeutic Jurisprudence*, 24 CARDOZO J. EQUAL RTS. & SOC. JUST. 81, 91 n.55 (2017); Michael L. Perlin & Alison J. Lynch, *"In the Wasteland of Your Mind": Criminology, Scientific Discoveries and the Criminal Process*, 4 VA. J. CRIM. L. 304, 357 (2016), and Michael L. Perlin, *"I Hope the Final Judgment's Fair": Alternative Jurisprudences, Legal Decision-Making, and Justice,* in THE CAMBRIDGE HANDBOOK OF PSYCHOLOGY OF LEGAL DECISION-MAKING 17 (Prof. Monica Miller et al, eds.*)* (2023).

[131] Julie Goldenson, Stanley Brodsky & Michael L. Perlin, *Trauma -Informed Forensic Mental Health Assessment: Practical, Legal, Ethical and Alignment with Therapeutic Jurisprudence Perspectives*, 28 PSYCHOL., PUB. POL'Y & L. 226, 227 (2022).

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TJ's goal is to determine whether legal rules, procedures, and lawyer roles can or should be modified to increase their therapeutic potential *while not subordinating due process principles.*[132] Though there is implicitly an intrinsic or innate tension in this inquiry, David Wexler has clearly identified how the implicit inner tension in this definition must be resolved: The law's use of "mental health information to improve therapeutic functioning [cannot] impinge upon justice concerns."[133] And it is clear that therapeutic concerns cannot "trump" civil rights and liberties.[134]

Under TJ principles, the law must "empower individuals, enhance rights, and promote well-being,"[135] and it must similarly emphasize "psychological wellness over adversarial triumphalism."[136] TJ is intrinsically "collaborative and

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[132] See e.g., Michael L. Perlin, *"And My Best Friend, My Doctor, Won't Even Say What It Is I've Got": The Role and Significance of Counsel in Right to Refuse Treatment Cases*, 42 SAN DIEGO L. REV. 735, 751 (2005); David Wexler, *Therapeutic Jurisprudence: Restructuring Mental Disability Law*, 10 N.Y.L. SCH. J. HUM. RTS. 759 (1993).

[133] David B. Wexler, *Therapeutic Jurisprudence and Changing Concepts of Legal Scholarship*, 11 BEHAV. SCI. & L. 17, 21 (1993)

[134] Michael L. Perlin, Deborah A. Dorfman & Naomi M. Weinstein, *"On Desolation Row": The Blurring of the Borders between Civil and Criminal Mental Disability Law, and What It Means for All of Us,* 24 TEX. J. ON CIV. LIBS. & CIV. RTS. 59,103-04 (2018).

[135] Michael L. Perlin & Alison J. Lynch, *"All His Sexless Patients": Persons with Mental Disabilities and the Competence to Have Sex*, 89 WASH. L. REV. 257, 278 (2014).

[136] Warren Brookbanks, *Therapeutic Jurisprudence: Conceiving an Ethical Framework*, 8 J.L. & MED. 328, 329-30 (2001).

interdisciplinary"[137] and supports an ethic of care.[138] Its structural foundations are commitments to dignity and to compassion.[139] Justice with compassion is one of the central premises of TJ.[140] A judge who demonstrates compassion best "represent[s] the goals of therapeutic jurisprudence." Professors Anthony Hopkins and Lorana Bartels make this explicit:

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[137] Nigel Stobbs, Lorana Bartels & Michel Vols, *Therapeutic Jurisprudence – A Strong Community and Maturing Discipline, in* THE METHODOLOGY AND PRACTICE OF THERAPEUTIC JURISPRUDENCE 15, 18 (Nigel Stobbs, Lorana Bartels & Michel Vols eds. 2019) (PRACTICE OF THERAPEUTIC JURISPRUDENCE). See Michael L. Perlin, *"In These Times of Compassion When Conformity's in Fashion": How Therapeutic Jurisprudence Can Root out Bias, Limit Polarization and Support Vulnerable Persons in the Legal Process,* 10 TEXAS A&M L. REV. 219, 223-30 (2023).

[138] Michael L. Perlin & Heather Ellis Cucolo, *"Take the Motherless Children off the Street": Fetal Alcohol Syndrome and the Criminal Justice System*, 77 U. MIAMI L. REV. 561, 601-02 and *id.* n. 14 (2023), citing Bruce J. Winick & David B. Wexler, *The Use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Law Clinic*, 13 CLINICAL L. REV. 605, 605–07 (2006).

[139] See Perlin, *supra* note 137, at 226-30.

[140] Michael L. Perlin, Heather Elis Cucolo & Deborah A. Dorfman, "*I Saw Guns and Sharp Swords in the Hands of Young Children": Why Mental Health Courts for Juveniles with Autism Spectrum Disorder and Fetal Alcohol Spectrum/Disorder Are Needed*, 19 NORTHWESTERN J. L. & SOC'L POL'Y 228, 253 (2024), citing Lorie Gerkey, *Legal Beagles, a Silent Minority: Therapeutic Effects of Facility Dogs in the Courtroom*, 1 INT'L J. THERAPEUTIC JURIS. 405, 415 (2016).

> The argument we make here is that TJ is founded upon the psychology of compassion, understood as a sensitivity to and concern for the suffering of others and a commitment to alleviating and preventing it. The "other" in the context of TJ is any person upon whom the law acts or any actor within the legal process.[141]

Further, Professor Amy Ronner and Judge Juan Ramirez characterize the right to counsel as "the core of therapeutic jurisprudence,"[142] and "an integral component of TJ-supported lawyering."[143] Any consideration of TJ must consider whether the legal practice/process being analyzed "enhances dignity and reflects compassion, and whether counsel assigned to persons at risk is, truly, adequate."[144]

B. On TJ and the ADA

At first blush, the ADA appears to be as therapeutic a law as one can imagine (as it focuses on ability, not disability, and sets out a blueprint for social, political

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[141] Perlin, Cucolo & Dorfman, *supra* note 140*,* at 253, quoting Anthony Hopkins & Lorana Bartels, *Paying Attention to the Person: Compassion, Equality and Therapeutic Jurisprudence*, in PRACTICE OF THERAPEUTIC JURISPRUDENCE *supra* note 137, at 102.

[142] Michael L. Perlin, '*Yonder Stands Your Orphan with His Gun*': *The International Human Rights and Therapeutic Jurisprudence Implications of Juvenile Punishment Schemes*, 46 TEX. TECH. L. REV. 301, 337 (2013), quoting Juan Ramirez, Jr. & Amy D. Ronner, *Voiceless Billy Budd: Melville's Tribute to the Sixth Amendment*, 41 CAL. W. L. REV. 103, 119 (2004).

[143] Perlin & Cucolo, *supra* note 138, at 604.

[144] Perlin, *supra* note 137, at 230.

and cultural change).[145] By way of example, Title I allows for persons with mental disability to more easily access to employment and be free from discrimination at the workplace.[146] Further, Title II prohibits unjustified isolation for persons with mental disabilities; if enforced, it ensures that persons with mental disability are able to fully participate more freely in society.[147]

This cannot take place in a vacuum. Counsel must take the lead in urging courts to enforce the ADA in cases involving the population we discuss in this paper. This would enhance TJ principles while ensuring that persons in the criminal justice system with mental disabilities are afforded due process and equal protection rights.[148]

One of the co-authors (DAD) has written previously:

> If, however, Title I is not adequately enforced, mentally disabled individuals risk losing one of the most significant opportunities to overcome traditional barriers to employment and social integration. With so much riding on Title I for persons with mental disabilities, it is imperative that lawyers, advocates, disabled persons, and employers examine the different implementation and enforcement mechanisms of litigation and . . . [alternative dispute resolution].

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[145]. Perlin, *Attitudes Be Undone?*, *supra* note 12, at 44-45.

[146] Perlin, Dorfman & Weinstein, *supra* note 134, at 114-15.

[147] See Olmstead v. L.C. *ex rel*. Zimring, 527 U.S. 581, 597(1999) (holding that "[u]njustified isolation ... is properly regarded as discrimination based on disability" and citing 42 U.S.C. § 12131), as discussed in Perlin, Dorfman & Weinstein, *supra* note 134, at 115.

[148] See *id.*

In doing so, it is useful to assess the options through a therapeutic jurisprudence filter to determine which means is the most beneficial in carrying out the provisions of Title I.[149]

B. On TJ. the ADA and the criminal justice system.

Professor David Wexler has pointed out that a therapeutic jurisprudence approach to disability law would suggest that the "reasonable accommodation" requirement of the ADA be read and implemented, so far as possible, as a "restorative" rather than an "accommodative" provision (that the person's disability should not be regarded necessarily as static and insurmountable).[150] This approach should certainly apply to the entire criminal justice process.[151]

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[149] Deborah A. Dorfman, *Effectively Implementing Title I of the Americans with Disabilities Act for Mentally Disabled Persons: A Therapeutic Jurisprudence Analysis*, 8 J. L. & HEALTH 105, 121 (1993-94). The link between the ADA and therapeutic jurisprudence was also made explicitly years ago in Rose Daly-Rooney, *Designing Reasonable Accommodations Through Co-worker Participation: Therapeutic Jurisprudence and the Confidentiality Provision of the Americans with Disabilities Act.,* 8 J. L. & HEALTH 89 (1993-94), and in T. Howard Stone, *Therapeutic Implications of Incarceration of Persons with Severe Mental Disorders: Searching for Rational Health Policy*, 24 AM. J. CRIM. L. . 283 (1997).

[150] David B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, 35 WM. & MARY L. REV. 279, 289 n.9 (1993).

[151] Our analysis in this paper excludes issues involving TJ, the ADA, and questions of competency to be executed, see e.g., David B. Wexler & Bruce J. Winick, *Therapeutic Jurisprudence as a New Approach to Mental Health Law Policy Analysis and Research,* 45

We can look to therapeutic jurisprudence (TJ) to create more holistic models of understanding for law enforcement, prosecutors, and judges who may encounter the individuals discussed in this article. Thus, such models allow us to better determine what the needs of the individuals in question may be – a consideration of how such an individual communicates best, and whether modifications of existing rules and procedures are needed in order to protect that individual's rights during, by way of examples, an arrest or pretrial process.

In a series of papers, one of the co-authors (MLP), in solo articles, and in articles with his co-author (and others), has applied TJ principles to multiple aspects of the

U. MIAMI L. REV. 979 (1991); Perlin, Harmon & Geiger, *supra* note 47, and conditions on death row see Harmon, Perlin & Geiger, *supra* note 3.

criminal justice system: questions of competency,[152] of insanity,[153] of sentencing,[154] of trial practice.[155] Here it is clear that the application of this methodology to *all* of

[152] E.g., .Michael L. Perlin, *"God Said to Abraham/Kill Me a Son": Why the Insanity Defense and the Incompetency Status Are Compatible with and Required by the Convention on the Rights of Persons with Disabilities and Basic Principles of Therapeutic Jurisprudence,* 54 AM. CRIM. L. REV. 477 (2017);; Michael L. Perlin & Mehgan Gallagher, *"Temptation's Page Flies out the Door": Navigating Complex Systems of Disability and the Law from a Therapeutic Jurisprudence Perspective,* 25 BUFFALO HUM. RTS. L. REV. 1 (2018-19); Michael L. Perlin & Alison J. Lynch, *"My Brain Is So Wired": Neuroimaging's Role in Competency Cases Involving Persons with Mental Disabilities,* 27 B.U. PUB. INT. L.J. 73 (2018).

[153] E.g., Michael L. Perlin, "*I've Got My Mind Made Up": How Judicial Teleology in Cases Involving Biologically Based Evidence Violates Therapeutic Jurisprudence*, 24 CARDOZO J. EQUAL RTS. & SOC. JUST. 81 (2017); Alison J. Lynch, Michael L. Perlin & Heather Ellis Cucolo, *"My Bewildering Brain Toils in Vain": Traumatic Brain Injury, The Criminal Trial Process, and the Case of Lisa Montgomery,* 74 RUTGERS L. REV. 215 (2021).
Michael L. Perlin, Deborah A. Dorfman & Naomi M. Weinstein, *"On Desolation Row": The Blurring of the Borders between Civil and Criminal Mental Disability Law, and What It Means for All of Us,* 24 TEX. J. ON CIV. LIBS. & CIV. RTS. 59 (2018);

[154] E.g., Michael L. Perlin, *"I Expected It to Happen/I Knew He'd Lost Control": The Impact of PTSD on Criminal Sentencing after the Promulgation of DSM-5,* 2015 UTAH L. REV. 881; Perlin & Cucolo, *supra* note 138; Alison J. Lynch & Michael L. Perlin, *"I See What Is Right and Approve, But I Do What Is Wrong": Psychopathy and Punishment in the Context of Racial Bias in the Age of Neuroimaging*, 25 LEWIS & CLARK L. REV.453 (2021).

[155] E.g., Perlin & Cucolo, *supra* note 138; Perlin, Dorfman & Weinstein, *supra* note 134 Michael L. Perlin & Heather Ellis Cucolo, *'Something's Happening Here/But You Don't Know What It Is': How Jurors (Mis)Construe Autism in the Criminal Trial Process*, 82 U. PITT. L. REV. 585 (2021);. Perlin et al, *supra* note 130

the substantive issues we raise here (as well as to the mode of litigation that we discuss)[156] will best serve the needs of persons with disabilities in the criminal trial process.[157] The use of TJ will create more holistic models of understanding for law enforcement, prosecutors, and judges who may encounter these individuals, in part by creating more holistic models of understanding for law enforcement, prosecutors, and judges involved in such cases. [158]

In short, the application of the ADA to all aspects of the criminal trial process (defining this phrase as broadly as possible) fits perfectly into a therapeutic jurisprudence framework, focusing especially on questions related to adequacy of counsel, and the need for dignity and compassion in all aspects of this process.[159]

VI. Conclusion

When we began our research for this paper, we were shocked that there is virtually nothing in the scholarly literature that deals globally with these topics. It

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[156] Compare Goldenson, Brodsky &. Perlin, supra note 131, at 227: ""TJ seeks to ferret out biases, and to deal with the vulnerabilities of so much of the population in question [, and] is a means of potentially avoiding the polarization that is often the hallmark of traditional litigation."

[157] See e.g., Perlin, Cucolo & Dorfman, *supra* note 140, at 257(on how problem solving courts for juveniles with Fetal Alcohol Spectrum/Disorder will best "provide the reasonable modifications for youth with ASD and FASD that best allow them to meaningfully and actively participate in the court proceedings in which they are involved").

[158] Consider, by way of examples, determinations as to how a criminal defendant with a disability best communicates, and whether a modification of court proceedings is needed in order to protect that defendant's rights during an arrest, pretrial process, or the trial itself.

[159] See generally, Perlin, *supra* note 137.

would appear almost as a "given" that the Supreme Court's decision in the *Yeskey* case over a quarter of century ago would have inevitably led to more ADA-based litigation on every aspect of the criminal trial process, and to extensive scholarship on the related issues. But this has not happened. Perhaps this is a result of the gap between lawyers who regularly represent criminal defendants and those who represent plaintiffs in affirmative civil rights litigation on behalf of persons with disabilities. Perhaps it is because judges in criminal cases simply do not generally see the ADA as applying to the criminal process, notwithstanding *Yeskey* and the cases that *have* been litigated in this area. Perhaps it is an inevitable fallout of the way that *sanism* -- an "irrational prejudice of the same quality and character as other irrational prejudices that cause, and are reflected in, prevailing social attitudes such as racism, sexism, homophobia, and ethnic bigotry ...."[160] -- permeates the entire criminal justice system.[161] We believe that a turn to therapeutic jurisprudence will be a best first step in the eradication of this bias.

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[160] See e.g., Michael L. Perlin & Alison J. Lynch, *"Mr. Bad Example": Why Lawyers Need to Embrace Therapeutic Jurisprudence to Root out Sanism in the Representation of Persons with Mental Disabilities*, 16 WYO. L. REV. 299 (2016).

[161] See e.g., Perlin & Gallagher, *supra* note 152, at 34, arguing that "[embracing therapeutic jurisprudence] is the only way that we can begin to eradicate the poison of sanism that contaminates our criminal-justice system"; see generally, Michael L. Perlin, *On Sanism,* 46 SMU L. REV. 373 (1992).

Although Bob Dylan used the giving-up phrase "it don't matter anyhow" in *Don't Think Twice,* at least one critic has argued that, nonetheless, there is a "glimmer of hope in the messy bitterness of this song [that] is sobering and beautiful."[162]. The authors – in spite of the track record of the courts over recent decades – believe in that "glimmer of hope" that therapeutic jurisprudence gives to this area of the law. We noted in our title that the ADA had "become (mostly) irrelevant" to the criminal trial process as it has become (mostly) ignored. We look forward to seeing significant changes in the future.

[162] https://cheyannesolis.com/read/dont-think-twice-its-alright