

Institutionalize Alternative Pathways to Treatment and Recovery and Improve Outcomes

ESSENTIAL ELEMENT 2: Civil Responses

POLICY

Although estimates are that 70% of those in jail at any given time have a substance use disorder, mental health disorder, or both, the criminal justice system is structured for those without any such disorders. In some jurisdictions “special” interventions and “specialty courts” were developed to respond to small segments of those with behavioral health needs, but the fundamental structure of the criminal justice system remains the same. Deflection and diversion are appropriate strategies, but for many, some level of legal leverage is required to gain compliance with needed treatment. Civil court responses can fill this need, and answer the question, divert to what?

Courts should develop and provide multiple civil court alternatives and seek to divert people with behavioral health disorders to civil options at multiple points in the process. Whether as diversions from the criminal justice system or as separate processes, those civil interventions should be easily accessible by individuals, families, and behavioral health systems. Courts have a central role in ensuring that these appropriately balance individual autonomy and choice in compelled treatment, with the state’s *parens patriae* interest and public safety.

EVIDENCE-BASED PRACTICES

Involuntary Civil Commitment

Most states’ laws for the involuntary commitment of persons with mental illnesses in existence today were adopted in the 1970s. As part of an effort to deinstitutionalize the treatment of mental illness, this generation of statutes favored “dangerousness” standards and individual rights-oriented court processes for involuntary treatment. As a result, in many states today, individuals with mental illnesses who do not clearly present an imminent risk of harm may not be subject to involuntary treatment. If there are no other pathways to treatment, these persons are more likely to experience homelessness, poverty, serious health consequences, and involvement in the criminal justice system.

Statutory and court processes should both ensure that persons with mental illness are able to access needed services voluntarily and provide for involuntary treatment not only for individuals who do meet traditional dangerousness criteria but also for those who are at significant risk of experiencing a crisis. Outpatient treatment should be presumed, unless clear clinical or public safety needs indicate a need for inpatient treatment.¹

¹ *Olmstead v. LC*, 527 US 581 (1999) provides that people with disabilities have a qualified right to receive state funded supports and services in the community rather than institutions. This presumption should apply not only at the initial determination of capacity, but at each treatment placement decision and review opportunity.

Emergency Intervention

The standard for Emergency Intervention is by necessity lower than that for longer term civil commitment. Less information is available on which to make longer term decisions, and the presumption should be that a person's self-determination is limited by the court only to the extent necessary to assess the person's safety and prognosis. The initial detention for emergency assessment should be as brief as possible and oriented as a treatment intervention, as opposed to a criminal justice intervention, and a determination of the appropriateness of further detention.

Medication Over Objection

The determination of whether a person can be compelled to take psychiatric medications is a separate one from a determination of the need for involuntary treatment and generally involves a different standard, and often a separate hearing. However, whenever possible, this medication hearing should immediately follow the hearing on inpatient or outpatient civil commitment. The person who is the subject of the hearing is entitled to be present, represented by counsel, and afforded the opportunity to present evidence.

Involuntary treatment orders should be as specific as possible and should contain information including the medication(s) to be prescribed, how adherence to the medication will be monitored, and the degree to which modifications to the medications can be made without returning to court.

Assisted Outpatient Treatment

Assisted Outpatient Treatment (AOT) means different things in different jurisdictions. In general, AOT refers to involuntary mental health treatment in an outpatient setting with varying degrees of judicial involvement and oversight. This court involvement can be invoked by a distinct petition for AOT, as a diversion alternative to a criminal proceeding, or as an alternative or adjunct to a general civil commitment process. Ideally, the level

of ongoing judicial oversight is dictated by the individual's treatment compliance history and criminogenic risk level, i.e., their assessed likelihood of compliance with the court's directives.

Guardianship

The applicability of guardianship/conservatorship processes to individuals with mental health disorders varies by state. In some states, guardians have no authority to make mental health treatment decisions, and in other states, that authority is limited, for example, involuntary medication is excluded from the purview of a guardianship. If applicable, guardianships should be limited in scope only to the demonstrated areas of incapacity.

AOT as an Alternative to Guardianship

Guardianships are often used for persons who become incapacitated by mental illness. AOT can be a less intrusive, time-limited form of treatment that can restore a person's capacity and eliminate the need for a guardian. Individual autonomy is better preserved since most decision making is retained and AOT typically is time limited.

GETTING STARTED

Other than using civil options as alternatives to criminal processes, many issues surrounding civil court responses are legislative policy issues. Courts and their system partners should review those statutes and identify gaps or deficiencies, particularly as they relate to the best practices identified above.

NEXT GENERATION

Innovation, Technology, New Practice

An emerging tool for achieving the balance between self-determination and the need for involuntary treatment is the Psychiatric Advance Directive (PAD). The concept is to allow those with recurring episodes of disabling mental illness, while they are in a stable phase, to explicitly provide anticipatory legal directives for

consent to particular treatment or treatment components. In some circumstances, these PADs also explain past treatment histories, successful and unsuccessful, with particular medications, approaches, and strategies. While the legal force of PADs varies greatly from state to state, the treatment preferences and tips would seem to be helpful regardless of their legal effect.

Related resources include SAMHSA's [A Practical Guide to Psychiatric Advance Directives](#), and the [National Resource Center on Psychiatric Advance Directives](#).

Finally, emerging research suggests that judges can play a critical role in the treatment success of individuals with court involvement. Using principles of [procedural justice](#), judges can create and foster supportive relationships with participants. When judges are perceived “as being more respectful, fair, attentive, enthusiastic, consistent, and caring in their interactions with the participants in court,” recidivism is reduced as is program requirement noncompliance.² Their perceptions of the fairness of the process and their subsequent willingness to comply with court directives, including treatment compliance, can be directly influenced by the way in which judges (and others) speak with and listen to them. As participants comply more voluntarily, their treatment progress increases, and the need for further court coercion decreases.

² Zweig et. al. (2012).

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RESOURCES

[Civil Commitment and the Mental Health Care Continuum: Historical Trends and Principles for Law and Practice](#) (SAMHSA)

[Grading the States: An Analysis of Involuntary Psychiatric Treatment Laws](#) (Treatment Advocacy Center)

[Commitment and Guardianship Laws: Persons with a Substance Use Disorder](#) (National Judicial Opioid Task Force)

[Adult Guardianship Guide](#) (National Association for Court Management)

[Implementing Assisted Outpatient Treatment: Essential Elements, Building Blocks and Tips for Maximizing Results](#) (Treatment Advocacy Center)

[Assisted Outpatient Treatment \(AOT\) Community-Based Civil Commitment](#) (National Center for State Courts)

[Seven Habits of Highly Effective Assisted Outpatient Treatment \(AOT\) Judges](#) (SAMHSA's GAINS Center)

[SAMHSA Assisted Outpatient Treatment \(AOT\) Grant Program Evaluation](#) (SAMHSA)

[What is AOT?](#) (Treatment Advocacy Center)

