The felony court judges of Harris County, Texas, are considering the creation of a mental health court as early as September that would embrace the underlying philosophy that “time and treatment expended upfront can save countless dollars and problems years down the line.”¹ The purpose of the mental health court would be to “save money and reduce crime” by providing “specialized medical treatment and legal consideration to those with such conditions as schizophrenia, bipolar disorder and psychotic episodes” through “independent funding and designated staff.”² Although changes relating to the way in which mentally ill defendants are handled in the criminal justice system certainly are needed,³ the implementation of the mental health courts should proceed with caution.⁴

Mental health courts derived from the drug treatment courts that were established in an effort to alleviate the congestion of the criminal justice system with drug-related cases.⁵ In the 1980s, the United States launched its war on drugs, which resulted in many drug-users being forced off the streets and into prisons.⁶ However, after serving their sentences, the drug-users would return to their criminal behavior and eventually find their

² Id.
⁵ Id. at 814.
⁶ Id. The war on drugs resulted in an expansion of existing drug laws, as well as the imposition of stricter punishments for drug-related offenders. Id. As a result of the new drug laws coupled with an influx of drugs into the country, the criminal court system became flooded with drug cases. Id.
Because of the high rate of recidivism among defendant drug-users, it became apparent that the system needed to address the defendants’ underlying addiction problems rather than focusing entirely on incarceration. In 1989, Broward County, Florida, implemented the first drug treatment court. The goals of this drug treatment court included helping defendants become addiction-free so they would be less likely to re-offend, alleviating the monetary strain on the criminal court system resulting from the influx of drug cases, and opening up jail cells for more violent offenders. This “therapeutic justice” approach proved to be so successful in the drug courts that it was later adapted to address the special needs of the mentally ill defendant. In 1997, Broward County, Florida, created the first mental health court to “relieve the overcrowded prison system[] and to treat the mentally ill population more effectively without any public safety implications.” Since the birth of the first mental health court in 1997, seven additional experimental courts were created in Washington, Alaska, New York, Ohio, Indiana, and California to decrease recidivism among mentally ill defendants convicted of misdemeanor and non-violent felony cases by treating their underlying illness. Because of the widespread support the experimental courts have received, the implementation of

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7 Id.  
8 Id.  
9 Id. at 814-15. See also James R. Walker, Getting the Mentally Ill Misdemeanant Out of Jail, 6 ST. MARY’S L. REV. 371, 392 (2004) (stating that drug courts help the problem of recidivism of non-violent drug-offenders by offering a mixture of alternatives to jail, such as accelerated case processing, intensive case management, urine analyses, outpatient services, and assistance with community integration).  
10 “Therapeutic justice is a theory that identifies the law and the way in which it is applied by various legal actors, including lawyers, as having inevitable consequences for psychological well-being that should be studied with the tools of the behavioral sciences.” Faraci, supra note 4, at 815.  
11 Id. at 821.  
12 Id.  
13 Id. at 811, n.1.  
14 Id. at 824. See also Byers, supra note 3, at 528 (stating that the purpose of mental health courts is to divert the mentally ill defendants in minor criminal cases into treatment and intensive supervision).
mental health courts has rapidly expanded to approximately thirty-two states nationwide.\textsuperscript{15}

Because the mental health courts are modeled after the drug courts, the problems that accompany the drug courts also may arise in the mental health courts. Mental health courts thus should be ready to address: (1) ways to deal with defendants who do not comply with treatment orders; (2) the coercive nature of participation in many of the mental health programs (notwithstanding the “voluntary” participation requirement); (3) the non-adversarial nature of the courts, which results in new roles for judges, prosecuting attorneys, and defense attorneys, and creates opportunities for due process and discretion abuses; and (4) the need for financial and other resources to support the mental health courts and their related programs.\textsuperscript{16}

Mental health courts also must be ready to address the unique issues that arise in dealing with defendants who are mentally ill.\textsuperscript{17} For example, the mental health court judges must be able to apply a number of subjective criteria to determine which patients fall within the definition of “mentally ill” and, therefore, are eligible to participate in the court. Because of the nature of mental illness, predicting an individual defendant’s amenability to treatment is very case-specific and subjective.\textsuperscript{18} The mental health court judges also must be able to steer clear of a phenomena known as “net-widening,” which

\textsuperscript{15} Byers, supra note 3, at 528. Congress helped encourage the implementation of mental health courts in 2000 by passing America’s Law Enforcement and Mental Health Project Act, which authorized “grants to state and local courts to initiate programs for alternative treatment of mentally ill and retarded persons charged with misdemeanors and non-violent offenses.” \textit{Id}. at 528.

\textsuperscript{16} Faraci, supra note 4, at 813.

\textsuperscript{17} \textit{Id}. at 835.

\textsuperscript{18} \textit{Id}. at 841.
occurs when a judge abuses his or her discretion in determining who is eligible for the
court by expanding the reach of the court to individuals beyond those are mentally ill.\textsuperscript{19}

The mental health court system also must be able to balance the need to quickly
identify mental health court participants and remove them from the criminal justice
system as soon as possible (in order to avoid the “damaging experience of incarceration”)
with the need to thoroughly evaluate and accurately diagnose candidates in order to
ensure proper treatment.\textsuperscript{20} In addition, the system must address confidentiality issues that
arise when mentally ill defendants’ medical records are requested for review as part of
the mental health court eligibility process.\textsuperscript{21}

The mental health court system also must determine: (1) when each mentally ill
defendant has successfully completed the program in light of the fact that many mental
illnesses can be managed but not cured,\textsuperscript{22} (2) when to exclude from court participation
mentally ill defendants who have been arrested for violent crimes;\textsuperscript{23} and (3) whether
participation in prolonged treatment programs that exceed otherwise applicable jail times
compromise mentally ill defendants’ liberty interests.\textsuperscript{24}

Before Texas jurisdictions implement the mental health courts, the issues,
problems, and concerns identified by the research available to date, particularly the need
for sufficient community resources, should be considered and addressed. As with drug-
users, there are inherent conflicts in dealing with mentally ill defendants in the judicial

\begin{footnotesize}
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\item \textsuperscript{19} Id. at 850.
\item \textsuperscript{20} Id. at 850-51.
\item \textsuperscript{21} Id. at 851.
\item \textsuperscript{22} Id. at 851-52.
\item \textsuperscript{23} Id. at 852-53.
\item \textsuperscript{24} Id. at 853.
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setting. Texas’ mental health courts will have a greater likelihood of success if these issues are addressed prior to implementation.