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AMERICANS WITH DISABILITIES ACT — PAROLE — MASSACHUSETTS SUPREME JUDICIAL COURT OBSERVES THAT AMERICANS WITH DISABILITIES ACT APPLIES TO PAROLE. — *Crowell v. Massachusetts Parole Board*, 74 N.E.3d 618 (Mass. 2017).

The mass incarceration and mistreatment of persons with mental impairments<sup>1</sup> has long been one of the many injustices wrought by the American criminal legal system.<sup>2</sup> While “[i]t is difficult, if not impossible, to provide humane and just treatment to persons with mental illness in prisons and jails,”<sup>3</sup> reformers have used the Americans with Disabilities Act<sup>4</sup> (ADA) to challenge some of the worst aspects of prison life for incarcerated persons with mental impairments.<sup>5</sup> But the ADA may have a role to play beyond mitigating the harshness of prison conditions. Recently, in *Crowell v. Massachusetts Parole Board*,<sup>6</sup> the Massachusetts Supreme Judicial Court stated that the ADA requires that the Parole Board (the Board) reasonably modify its policies to accommodate incarcerated persons with disabilities.<sup>7</sup> In doing so, the court explained that the Board ought to “consider whether there are risk-reduction programs designed to reduce recidivism in those who are mentally disabled.”<sup>8</sup> The court left open the question whether the Board would be required to actually develop such programs if none exist. But based on the principles articulated in *Crowell*, the answer to that question is yes: the Board

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<sup>1</sup> The term “mental impairment” refers to mental disability, mental illness, and traumatic brain injury. This terminology choice reflects the language used in the Americans with Disabilities Act definition section, 42 U.S.C. § 12102 (2012), in an effort to convey the broad application of this legal analysis and is not intended to minimize the differences between mental disabilities, mental illnesses, traumatic brain injuries, and other forms of mental impairment not mentioned here.

<sup>2</sup> See DARRELL STEINBERG ET AL., STANFORD LAW SCH. THREE STRIKES PROJECT, WHEN DID PRISONS BECOME ACCEPTABLE MENTAL HEALTHCARE FACILITIES? 1 (2015), [https://law.stanford.edu/wp-content/uploads/sites/default/files/publication/863745/doc/slspublic/Report\\_v12.pdf](https://law.stanford.edu/wp-content/uploads/sites/default/files/publication/863745/doc/slspublic/Report_v12.pdf) [<https://perma.cc/7BT5-F5VG>]. Recently, nearly 20% of the people incarcerated in state and federal prisons and over 30% of those incarcerated in local jails reported having a cognitive disability, compared to less than 5% of the general population. JENNIFER BRONSON ET AL., BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, NCJ 249,151, DISABILITIES AMONG PRISON AND JAIL INMATES, 2011–12, at 3 tbls.1 & 2 (2015), <https://www.bjs.gov/content/pub/pdf/dpj1112.pdf> [<https://perma.cc/ZYE8-XGDD>]. These figures do not include incarcerated persons with mental disorders such as depression, anxiety disorders, or schizophrenia. *Id.* at 3.

<sup>3</sup> *Position Statement 53: Mental Health Courts*, MENTAL HEALTH AM., <http://www.mentalhealthamerica.net/positions/mental-health-courts> [<https://perma.cc/R92Y-8QSU>].

<sup>4</sup> Pub. L. No. 101-335, 104 Stat. 327 (1990) (codified as amended in scattered sections of 42 and 47 U.S.C.).

<sup>5</sup> See, e.g., *Cox v. Mass. Dep’t of Corr.*, 18 F. Supp. 3d 38 (D. Mass. 2014); Private Settlement Agreement, Disability Advocates, Inc. v. N.Y. State Office of Mental Health, No. 02 Civ. 04002 (S.D.N.Y. Apr. 27, 2007), ECF No. 94.

<sup>6</sup> 74 N.E.3d 618 (Mass. 2017).

<sup>7</sup> *Id.* at 624.

<sup>8</sup> *Id.*

must provide postrelease treatment to ensure that no one is denied parole and kept incarcerated because of his or her mental impairment.

On August 28, 2012, Richard Crowell appeared before the Board for a review hearing to determine his eligibility for parole.<sup>9</sup> Crowell, who was in his seventies at the time of the hearing,<sup>10</sup> had long experienced “deficiencies in his memory, speech, and cognition” owing to a traumatic brain injury (TBI) that he suffered in 1987.<sup>11</sup> Since 1990, when the Board revoked his parole for second-degree murder,<sup>12</sup> Crowell had spent all but twenty days incarcerated in the Massachusetts prison system.<sup>13</sup>

During the August 2012 hearing, one Board member acknowledged Crowell’s brain injury, noting that Crowell “would need to be in some sort of setting where [he] could be managed and cooperate with people forever.”<sup>14</sup> Crowell, with the assistance of a volunteer student attorney from the Harvard Prison Legal Assistance Project, proposed living at a recovery house while receiving support services from the Statewide Head Injury Program (SHIP).<sup>15</sup> However, the Board denied Crowell parole, stating that he “was unable to offer any concrete, viable release plan that could assure the Board that he would be compliant on parole.”<sup>16</sup> Crowell requested reconsideration, which the Board denied.<sup>17</sup>

Crowell filed a complaint in Massachusetts Superior Court alleging that the Board had violated his rights under the ADA, article CXIV of the Amendments to the Massachusetts Constitution,<sup>18</sup> and the Massachusetts Equal Rights Act,<sup>19</sup> and seeking certiorari review of the Board’s decision to deny him parole.<sup>20</sup> The Board filed a motion to

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<sup>9</sup> Brief for the Plaintiff-Appellant at 9, *Crowell*, 74 N.E.3d 618 (No. SJC-12203), 2016 WL 7407471.

<sup>10</sup> *Id.* at 8.

<sup>11</sup> *Crowell*, 74 N.E.3d at 620.

<sup>12</sup> *See id.* Crowell was initially sentenced to life in prison in 1962, when he pleaded guilty to second-degree murder for serving as the getaway driver in a robbery-turned-homicide. *See id.* at 620 & n.2. In 1974 his sentence was commuted to a term of thirty-six years to life. *Id.* at 620. He was first paroled in 1975. *Id.* Over the next fifteen years, Crowell was reincarcerated five times for various violations of his parole conditions, including alcohol abuse and assaultive behavior. *Id.*

<sup>13</sup> Brief for the Plaintiff-Appellant, *supra* note 9, at 9.

<sup>14</sup> *Crowell*, 74 N.E.3d at 621 (alteration in original).

<sup>15</sup> Brief for the Plaintiff-Appellant, *supra* note 9, at 1, 9. According to the SHIP website, its services include a residential services program in which “[s]upervision and support is provided around the clock.” Mass. Exec. Office of Health & Human Servs., *Statewide Head Injury Program*, MASS.GOV, <http://www.mass.gov/eohhs/consumer/disability-services/services-by-type/head-injury/services/community-based-residential-services.html> [<https://perma.cc/MK3L-MX6Q>].

<sup>16</sup> *Crowell*, 74 N.E.3d at 621 (alteration in original).

<sup>17</sup> *Id.*

<sup>18</sup> MASS. CONST. art. CXIV (“No otherwise qualified handicapped individual shall, solely by reason of his handicap, be excluded from the participation in, denied the benefits of, or be subject to discrimination under any program or activity within the commonwealth.”).

<sup>19</sup> MASS. GEN. LAWS ch. 93, §§ 102–103 (2016) (declaring the equal rights of all “person[s] within the commonwealth, regardless of handicap,” *id.* § 103(a)).

<sup>20</sup> *Crowell*, 74 N.E.3d at 620, 621.

dismiss, which Judge Yessayan granted, reasoning that the Board had not discriminated against Crowell because it did not rest its decision only on his TBI and disability status but also listed other factors.<sup>21</sup> Crowell then unsuccessfully moved for reconsideration on the issue of whether his sentence was a life term or a term of years, a distinction that affects the frequency of review for parole eligibility.<sup>22</sup> Crowell appealed to the Appeals Court, raising three issues: whether the Board was required to file an administrative record before filing a motion to dismiss, whether the trial court erred in granting the motion to dismiss, and whether the trial court properly considered Crowell's commuted sentence a life sentence.<sup>23</sup>

The Supreme Judicial Court transferred the case from the Appeals Court on its own motion.<sup>24</sup> Writing for a unanimous court, Justice Budd<sup>25</sup> first held that the trial judge erred when granting the motion to dismiss, because "the only appropriate way for the court to evaluate the claim is through a review of the administrative record."<sup>26</sup> The court thus vacated the dismissal and remanded the case.<sup>27</sup> The court also rejected Crowell's argument that his sentence was indeterminate, and held that he was not entitled to annual review hearings.<sup>28</sup>

Although the court's decision to vacate the dismissal on procedural grounds obviated the need to reach the merits of Crowell's disability claim, the bulk of the opinion was nevertheless dedicated to that issue. The court explained "that the [B]oard's decision to deny the parole petition d[id] not appear to have considered adequately the application of the ADA" and related state law, and therefore made several "observations" about what those provisions require.<sup>29</sup> The court began by noting that both the ADA and Massachusetts state law prohibit the exclusion of persons with disabilities from the benefits of public programs.<sup>30</sup> The court also observed that the Board "clearly assumed" that Crowell suffered from a disability.<sup>31</sup> Finally, the court noted that Crowell "allege[d] that he ha[d] been denied the benefits of a State program," namely, a fair parole process.<sup>32</sup> The court indicated that parole is properly understood as the benefit of a state program, acknowledging that the Supreme

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<sup>21</sup> *Id.* at 621.

<sup>22</sup> *Id.* at 621, 626.

<sup>23</sup> See Brief for the Plaintiff-Appellant, *supra* note 9, at 5.

<sup>24</sup> *Crowell*, 74 N.E.3d at 621.

<sup>25</sup> Justice Budd was joined by Chief Justice Gants and Justices Lenk, Hines, Gaziano, and Lowy.

<sup>26</sup> *Crowell*, 74 N.E.3d at 622.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 626.

<sup>29</sup> *Id.* at 623.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

Court has held that the ADA applies to prisoners<sup>33</sup> and the Ninth Circuit has held that the Act applies to parole decisionmaking.<sup>34</sup> Thus, according to the court, “the only open question is whether the plaintiff was excluded from the program, or discriminated against in the form of denial of parole, by reason of his disability.”<sup>35</sup>

The court went on to explain that while the Board is accorded “considerable deference”<sup>36</sup> on parole determinations, it “clearly may not categorically exclude any prisoner by reason of his or her disability.”<sup>37</sup> The court also noted that under the ADA and state law, the Board must make some reasonable modifications to its policies to accommodate incarcerated persons with disabilities.<sup>38</sup> By way of example, the court suggested that the Board should “provid[e] an expert or other assistance” to incarcerated persons with mental disabilities “to help . . . identify appropriate postrelease programming” and should “consider whether there are risk reduction programs designed to reduce recidivism in those who are mentally disabled.”<sup>39</sup> Importantly, the court noted that the bottom line for the Board was that “it had the responsibility to determine whether reasonable modifications could enable the plaintiff to qualify” for parole.<sup>40</sup> Still, the court acknowledged that the Board may consider whether an incarcerated person’s impairment makes him or her more likely to commit a crime while released on parole<sup>41</sup> and concluded that “it is impossible to determine the weight the [B]oard gave to the disability” without the administrative record for Crowell’s review hearing.<sup>42</sup>

As the Board and lower courts grapple with *Crowell*’s significance, they will need to determine what types of accommodations are required in the parole context.<sup>43</sup> The principles outlined by the ADA and repeated by *Crowell* suggest that the Board will be required to develop

<sup>33</sup> *Id.* (citing Pa. Dep’t of Corr. v. Yeskey, 524 U.S. 206, 210 (1998)).

<sup>34</sup> *Id.* (citing Thompson v. Davis, 295 F.3d 890, 896–97 (9th Cir. 2002) (per curiam)).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 624 (quoting Greenman v. Mass. Parole Bd., 540 N.E.2d 1309, 1311 (Mass. 1989)).

<sup>37</sup> *Id.* (citing Thompson, 295 F.3d at 898 n.4).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 625.

<sup>43</sup> Although two decades have passed since the Supreme Court held that “the ADA unambiguously extends to state prison inmates,” Pa. Dep’t of Corr. v. Yeskey, 524 U.S. 206, 213 (1998), surprisingly little precedent exists regarding the application of the ADA to parole decisions. The Ninth Circuit is the only federal court of appeals to have closely examined the issue, concluding that the ADA clearly applies to parole decisionmaking. See Thompson v. Davis, 295 F.3d 890, 896–99 (9th Cir. 2002) (per curiam). Several state courts have addressed the issue of applying the ADA to parole, see Bloom v. Cline, No. 110,763, 2014 WL 5347375, at \*8 (Kan. Ct. App. Oct. 17, 2014); Grimm v. Bd. of Parole & Post-Prison Supervision, 310 P.3d 736, 738–39 (Or. Ct. App. 2013); Short v. Barkley, No. 438 M.D. 2016, 2017 WL 1337557, at \*3 (Pa. Commw. Ct. Apr. 12, 2017), but none of those decisions offers much in the way of guidance for Massachusetts courts and agencies.

postrelease mental health services and programs to ensure that persons with mental impairments are not kept incarcerated simply because the state does not have adequate programs already in place.<sup>44</sup> Under the ADA's regulatory framework, an accommodation is required if it is both reasonable and necessary to prevent discrimination. Because the reentry programs currently in effect in Massachusetts may be ill-equipped to serve Richard Crowell and others with mental impairments, the creation of new programs is likely necessary to avoid future discrimination. And the creation of programs tailored to the reentry needs of persons with mental impairments would also be reasonable because providing such programs would be consistent with the fundamental nature of parole and would not be excessively costly.

The ADA's implementing regulations mandate that "[a] public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity."<sup>45</sup> Thus, courts adjudicating ADA claims filed by persons with mental impairments seeking parole will need to inquire both whether some new or modified reentry programming is necessary to avoid discrimination on the basis of disability and whether the creation of such programming is reasonable.<sup>46</sup>

In *Crowell*, as the court noted, the absence of an administrative record makes it difficult to know why Richard Crowell remains in prison today.<sup>47</sup> But the Board's decision to deny parole, and in particular the conclusion that "Mr. Crowell was unable to address the concerns related to his combative attitude and the challenges presented in supervising him as a patient or parolee,"<sup>48</sup> at least suggests the necessity of creating new postrelease programs to avoid discrimination on the basis of disability. Moreover, it is unlikely that SHIP would qualify as the type of

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<sup>44</sup> However, it is important to note that any proposal to increase the Board's role in providing postrelease programs should recognize the danger that doing so will potentially result in more surveillance and further stigmatization of persons with mental impairments.

<sup>45</sup> 28 C.F.R. § 35.130(b)(7) (2016).

<sup>46</sup> The implementing regulations provide an exception to the requirement for reasonable modification when allowing an individual to benefit from a public entity's programs would "pose[] a direct threat to the health or safety of others." *Id.* § 35.139(a). However, to determine whether an individual poses a direct threat, "a public entity must make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk . . . and whether reasonable modifications . . . will mitigate the risk." *Id.* § 35.139(b). Massachusetts state law already contains similar requirements for parole eligibility. *See* MASS. GEN. LAWS ch. 127, § 130 (2016).

<sup>47</sup> 74 N.E.3d at 622.

<sup>48</sup> *In re Crowell*, No. W28969, at 5 (Mass. Parole Board Aug. 30, 2013).

“program[] designed to reduce recidivism in those who are mentally disabled” the court referred to.<sup>49</sup> Indeed, given the general state of reentry efforts in Massachusetts, the Board may often have trouble identifying such programs: as one 2016 report on recidivism in the Commonwealth concludes, “most reentry programming is provided in prisons pre-release.”<sup>50</sup> But where the unavailability of a risk-reduction program is the only barrier to parole for a person with a mental impairment, it is no less an act of discrimination to deny that person parole on that basis than it is to deny parole based on the categorical exclusion of all persons with mental impairments.

Given, then, that it is necessary for the Board to provide a program that it would deem as providing adequate supervision for a person with mental impairments to be released on parole, the next question under the ADA is whether it is reasonable to do so. Because few courts have engaged in the fact-specific analysis required<sup>51</sup> for determining what constitutes a reasonable accommodation in parole decisionmaking, two general principles are helpful for understanding what a reasonable accommodation analysis might look like for parole. First, as the implementing regulations suggest, whether an accommodation will result in a fundamental alteration in the nature of a program is often the primary determinant of the reasonableness of a proposed accommodation.<sup>52</sup> Second, the reasonableness analysis often involves weighing the costs and benefits associated with a proposed accommodation.<sup>53</sup>

An examination of the function of parole in Massachusetts demonstrates the broad scope of reasonable accommodations that would fall within the “fundamental nature” of parole in the state. In Massachusetts, parole is intended to be rehabilitative and reintegration oriented. The Board decides which persons to release from incarceration and supervises formerly incarcerated persons upon release, and it

<sup>49</sup> *Crowell*, 74 N.E.3d at 624.

<sup>50</sup> JONATHAN JONES & BENJAMIN FORMAN, MASSINC, REDUCING RECIDIVISM IN MASSACHUSETTS WITH A COMPREHENSIVE REENTRY STRATEGY 17 (2016), <https://massinc.org/wp-content/uploads/2016/01/Reentry-Policy-Brief.pdf> [<https://perma.cc/5ZCQ-N2KZ>].

<sup>51</sup> See Michael Ashley Stein, *The Law and Economics of Disability Accommodations*, 53 DUKE L.J. 79, 86 (2003) (“[A]pplication of this [reasonableness] standard would seem to mandate detailed factual analyses . . .”).

<sup>52</sup> *Alexander v. Choate*, 469 U.S. 287, 300 (1985) (quoting *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 410 (1979)) (construing section 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C.)).

<sup>53</sup> See *Se. Cmty. Coll.*, 442 U.S. at 412 (suggesting in the context of section 504 of the Rehabilitation Act of 1973 that modifications might be reasonable if they do not “impos[e] undue financial and administrative burdens upon a State”); *Wynne v. Tufts Univ. Sch. of Med.*, 932 F.2d 19, 26 (1st Cir. 1991) (en banc) (creating a test for academic institutions responding to reasonable accommodations requests under section 504 of the Rehabilitation Act of 1973 that asks whether the relevant officials “considered . . . cost and effect on the academic program”); see also Stein, *supra* note 51, at 102–18 (discussing cost-benefit analyses for employment discrimination claims under the ADA).

lists among its responsibilities “assisting parolees with housing, employment, and treatment services as they transition back into the community.”<sup>54</sup> Moreover, the Board states that it achieves its mission by “[p]roviding transitional planning, supervision and assistance to the offender,” and “visualizes itself as an agency” that enhances public safety through “partnerships targeted to provide state of the art, research proven, risk-reduction programming” and “graduated supervision levels to accommodate the accountability needs of all parolees under our supervision.”<sup>55</sup> Indeed, the last available annual report for the Board describes the Board’s Reentry Housing Program,<sup>56</sup> which provides parolees with housing, vocational training, and mental health services.<sup>57</sup> Whether this program would be appropriate or beneficial for Richard Crowell is uncertain, but its existence clearly demonstrates that creating postrelease programs designed to accommodate persons with mental impairments is a modification wholly consistent with the history and nature of parole in Massachusetts.

Creating new postrelease programs where necessary would also likely be reasonable from a cost-benefit perspective.<sup>58</sup> On the cost side of the ledger, the state might need to fund research, purchase or build new treatment centers, and pay staff. These costs could be mitigated by modifying existing initiatives like the Reentry Housing Program to better fit the needs of persons with mental impairments being released from prison. On the benefit side, fewer people would be incarcerated, which could have substantial economic benefits: according to the Department of Corrections, the average cost per year to incarcerate a person in

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<sup>54</sup> Mass. Exec. Office of Pub. Safety & Sec., *Welcome to the Parole Board*, MASS.GOV, <http://www.mass.gov/eopss/agencies/parole-board/welcome-to-the-parole-board.html> [https://perma.cc/NJZ5-V2QN].

<sup>55</sup> Mass. Exec. Office of Pub. Safety & Sec., *Parole Board Mission and Vision Statements*, MASS.GOV, <http://www.mass.gov/eopss/agencies/parole-board/parole-board-mission-and-vision-statements.html> [https://perma.cc/LK6T-5YAE].

<sup>56</sup> The program was developed by the Board in 2004. KIRA DUNN & STEPHANIE COUGHLIN, MASS. PAROLE BD., *HOUSING AFTER PRISON: THE MASSACHUSETTS PAROLE BOARD MODEL 1* (2008), <http://www.mass.gov/eopss/docs/pb/appaarticle.pdf> [https://perma.cc/UH35-VVQK].

<sup>57</sup> SHAWNA M. HAWKSLEY, MASS. PAROLE BD., *2014 ANNUAL STATISTICAL REPORT 31–32* (2015), <http://www.mass.gov/eopss/docs/pb/2014annualstatisticalreport.pdf> [https://perma.cc/MEE4-H2ED].

<sup>58</sup> This analysis assumes that new programs created for one person would provide benefits for many more. This assumption is based on two premises: first, that a significant number of persons with mental impairments are incarcerated in Massachusetts, *see* MASS. DEP’T OF CORR., *PRISON POPULATION TRENDS 2016*, at 17 (2017), <http://www.mass.gov/eopss/docs/doc/research-reports/pop-trends/prisonpoptrends-2016-final.pdf> [https://perma.cc/R9LG-ZWF6]; and second, that many of those persons will at one point be eligible for parole or some other form of release and that some of them would benefit from postrelease mental health services.

Massachusetts is over \$53,000.<sup>59</sup> Research suggests that providing better reentry services for persons with mental impairments generates benefits by reducing recidivism and avoiding costs associated with crime and taxes associated with funding incarceration.<sup>60</sup> Crucially, these figures encompass only the tangible benefits that the public would realize, to say nothing of the profound, though less easily measurable, benefits of removing persons with mental impairments from the awful confines of prison cells.<sup>61</sup> While it is obviously difficult to state with certainty that a hypothetical program will result in net benefits to society, the weight of the benefits associated with comprehensive reentry services suggest that modifications to make parole more accessible for persons with mental impairments would satisfy the inexact reasonableness standards that courts use to adjudicate ADA claims.

*Crowell* represents a potentially significant step toward preventing further injustices for Richard Crowell and other persons with mental impairments incarcerated in Massachusetts. By clarifying that the antidiscrimination protections of the ADA extend to incarcerated persons seeking parole, the Supreme Judicial Court paved the way for a more just parole system. But Crowell remains in prison, and the unavailability of postrelease programs tailored to the needs of persons with mental impairments stands as a potential obstacle to his release. To avoid further discrimination, and to comply with *Crowell* and the ADA, the Board must take action: the next time the Board believes that a person with a mental impairment needs specialized treatment or supervision in order to reenter society, it must either find a suitable program for release or, if none exists, create one.

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<sup>59</sup> Mass. Exec. Office of Pub. Safety & Sec., *Frequently Asked Questions About the DOC*, MASS.GOV, <http://www.mass.gov/eopss/agencies/doc/faqs-about-the-doc.html> (last updated Mar. 2015) [<https://perma.cc/T4VV-BHNT>].

<sup>60</sup> See WASH. STATE INST. FOR PUB. POLICY, *THE DANGEROUS MENTALLY ILL OFFENDER PROGRAM: COST EFFECTIVENESS 2.5 YEARS AFTER PARTICIPANTS' PRISON RELEASE 5* (2007), [http://www.wsipp.wa.gov/ReportFile/065/Wsipp\\_The-Dangerous-Mentally-Ill-Offender-Program-Cost-Effectiveness-2-5-Years-After-Participants-Prison-Release\\_Full-Report.pdf](http://www.wsipp.wa.gov/ReportFile/065/Wsipp_The-Dangerous-Mentally-Ill-Offender-Program-Cost-Effectiveness-2-5-Years-After-Participants-Prison-Release_Full-Report.pdf) [<https://perma.cc/4LWW-8ETD>] (estimating that a mental health services program for formerly incarcerated persons averted more than \$25,000 in costs of crime per program participant); see also JONES & FORMAN, *supra* note 50, at 10–13; PEW-MACARTHUR RESULTS FIRST INITIATIVE, *MASSACHUSETTS' EVIDENCE-BASED APPROACH TO REDUCING RECIDIVISM* (2014), <http://www.pewtrusts.org/~media/assets/2014/12/resultsfirstmassachusetts2014casestudy.pdf> [<https://perma.cc/A5ER-2QB2>] (documenting the projected net benefits of more comprehensive and rehabilitative reentry programs).

<sup>61</sup> Cf. Cass R. Sunstein, Essay, *Cost-Benefit Analysis Without Analyzing Costs or Benefits: Reasonable Accommodation, Balancing, and Stigmatic Harms*, 74 U. CHI. L. REV. 1895, 1903 (2007) (arguing that cost-benefit analyses for reasonable accommodations “should pick up emotional as well as material harm,” even though emotional harm may be less easily measured).