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How U.S. Society Has Treated Those With Mental Illnesses

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HOW U.S. SOCIETY HAS TREATED THOSE WITH MENTAL ILLNESSES

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Michael Mullan, an S.J.D Candidate at American University Washington College of Law, passed away on November 23, 2020. He was working on his dissertation entitled, "Abolishing the Insanity Defense – An American Criminal Law and Human Rights Perspective" making significant progress and publishing in his field while undergoing treatment for cancer. Michael aspired to create meaningful legal change through his academic work.
Mr. Mullan, originally from Ireland, spent the past number of years living in Boston. His legal education began at Trinity College Dublin, where Michael graduated with a first-class honors in Law and Business. Michael's legal interests and passion were at the intersection of criminal law and disability. Michael completed an LL.M at Harvard Law School, receiving a number of scholarships, such the JFK Fund scholarship and a Cancer for College scholarship. At Harvard Law School, Michael specialized in criminal law and justice, disability law and human rights jurisprudence. He received the Graduate Student's Humanitarian Award for his voluntary work with Harvard's Project on Disability and Harvard's Prisoners Legal Assistance Fund. Michael's work is widely published in Ireland and in the U.S. on a variety of criminal law and justice topics.

ABSTRACT

Persons with mental illness are incarcerated in prisons across the United States at disproportionate rates compared to the general population. Understanding why this is so requires an examination of how society in general has treated persons with mental illnesses. This article relates a history of neglect and stigmatization in examining the entities responsible for care of persons with mental illnesses, including the family, asylums and prisons. The article identifies trends of institutionalization, deinstitutionalization, and transinstitutionalisation, whereby large amounts of inpatients with mental illnesses moved out of psychiatric institutions, into the streets, and then into the criminal justice system. The article also analyses socioeconomic factors bearing on mental illness as a cause of crime, the high arrest rates and prison conditions experienced by those with mental illness, and public perceptions and myths about persons with mental illnesses.

The article claims the impact of social control via the criminal justice apparatus – policing, imprisonment, and subsequent labeling – is a predominant cause of the high rates of imprisonment. It is suggested that in order to reverse the trend towards the mass incarceration of those with mental illnesses, we should reject calls for a return to the asylum. Instead, our focus should be on providing community-based treatment and interventions that address the socioeconomic causes of crime.

INTRODUCTION

In order to understand how the criminal law treats defendants with mental illnesses, it is important to understand how society more generally has treated persons with mental illnesses in the United States. Persons with mental illnesses have a history marked with minority status, discrimination,[1] stigma,[2] abuse, inequality,[3] and ill-treatment.[4] As the academic Gostin outlines, "[d]espite countless promises for a better life by national commissions, governments and the international community, there has evolved a worrying

[1] *See* Elaine Brohan et al., E*xperiences of mental illness stigma, prejudice and discrimination: a review of measures*, 10 BIOMED CENT. HEALTH SERVS. RSCH. 1, 1 (2010).

[2] *Id.*

[3] Tom Fryers et al., *Social inequalities and the common mental disorders: A systematic review of the evidence*, 38 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 229, 229 (2003); *see* Vikram Patel & Arthur Kleinman, *Poverty and Common Mental Disorders in Developing Countries*, 81 BULL. WORLD HEALTH ORG. 609, 609 (2003).

[4] Janos Fiala-Butora, *Disabling Torture: The Obligation to Investigate Ill-Treatment of Persons with Disabilities*, 45 COLUM. HUM. RTS. L. REV. 214, 219 (2013); Lawrence O. Gostin, *'Old' and 'new' institutions for persons with mental illness: Treatment, punishment or preventive confinement?*, 122 PUB. HEALTH 906, 906 (2008).

cycle of neglect, abandonment, indignity, cruel and inhuman treatment, and punishment of persons with mental illness."[5] This population has experienced a "shameful history of benign, and sometimes malignant, neglect."[6] Persons with mental illnesses have traditionally faced significant barriers towards full integration and full participation in society, through legal, governmental, social policy, criminal justice and other societal mechanisms.[7] This is a partial explanation for the poorer quality of life that persons with mental illnesses experience.[8] This article will explain the historical treatment of those with mental illnesses by U.S. society, particularly in the criminal law apparatus. This involves looking at the various entities that have been primarily responsible for looking after and dealing with persons with mental illnesses., including the family, asylums and prisons.

Four hundred and fifty million people worldwide suffer from mental illnesses.[9] And, a recent study in 2016 estimated that over 44 million U.S. adults over 18-years-old have a mental illness.[10] This represents 18% of the U.S. adult population. The study also estimated that 10.4 million, or 4.2%, of U.S. adults, have a severe mental illness.[11] Furthermore, in another governmental study, it was found that 3.7% of the US population over 18 years of age have experienced serious psychological distress (a broader term than mental illness) in the prior month.[12] In fact, a similar finding was established in a 2017 study by Weismann et al., at 3.4%.[13]

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[5] Gostin, *supra* note 4.

[6] *Id.*

[7] *Id.*

[8] Heinz Katschnig, *Quality of life in mental disorders: challenges for research and clinical practice*, 5 WORLD PSYCHIATRY 139, 143–44 (2006); Janice Connell et al., *Quality of life of people with mental health problems: a synthesis of qualitative research*, 10 HEALTH & QUALITY LIFE OUTCOMES 1, 1 (2012); Suprakash Chaudhury et al., *Quality of life in psychiatric disorders*, 1 J. TRENDS IN BIOMEDICAL RSCH. 1, 1 (2018); Amy L. Barnes et al., *Health-Related Quality of Life and Overall Life Satisfaction in People with Serious Mental Illness*, 2012 SCHIZOPHRENIA RSCH. & TREATMENT 1, 1 (2012); Carol C. Choo et al., *Quality of Life in Patients with a Major Mental Disorder in Singapore*, 9 FRONTIERS PSYCHIATRY 1, 1 (2019); Sherrill Evans, *The impact of mental illness on quality of life: A comparison of severe mental illness, common mental disorder and healthy population samples*, 16 QUALITY LIFE RSCH. 17, 17 (2017); Frank Holloway & Jerome Carson, *Quality of Life in Severe Mental Illness*, 14 INT'L REV. PSYCHIATRY 175, 176 (2003).

[9] WORLD HEALTH ORG., THE WORLD HEALTH REPORT: MENTAL HEALTH: NEW UNDERSTANDING, NEW HOPE 3 (2001).

[10] REBECCA AHRNSBRAK ET AL., U.S. DEPT. OF HEALTH & HUM. SERVS., KEY SUBSTANCE USE AND MENTAL HEALTH INDICATORS IN THE UNITED STATES: RESULTS FROM THE 2016 NATIONAL SURVEY ON DRUG USE AND HEALTH 36 (2017), https://www.samhsa.gov/data/sites/default/files/NSDUH-FFR1-2016/NSDUH-FFR1-2016.pdf.

[11] *Id.*

[12] *Early Release of Selected Estimates Based on Data From the 2018 National Health Interview Survey*, CTRS. FOR DISEASE CONTROL & PREVENTION, NAT'L CTR. FOR HEALTH STATS. fig.13.1 (May 30, 2019), https://www.cdc.gov/nchs/nhis/releases/released201905.htm#13.

[13] Judith Weissman et al., *Disparities in Health Care Utilization and Functional Limitations Among Adults*

Part I of this piece looks at this history until after the period of institutionalization. Part II then continues this historical analysis, discussing the trend of deinstitutionalization and its causes. Part III analyses one consequence of deinstitutionalization, namely transinstitutionalisation. Part IV then transitions to examine how mental illness can be a cause of crime, including the role of socioeconomic factors. Part V looks at how those who have a mental illness are disproportionately arrested by police. Penultimately, Part VI discusses the prison conditions that prisoners with mental illness face and the harsh legal ramifications they experience. Finally, Part VII briefly examines the public perceptions, including myths, that the public has about persons with mental illnesses.

I. History of Mental Illness

A. Family & Local Community

Traditionally, the care of persons with mental illnesses was seen to be the responsibility of the family.[14] However, over time, the state has taken over this role, due to the federal government's welfare responsibility.[15] As a result of this federal government involvement, American society began to see substantial confinement of persons with mental illnesses in institutions, such as psychiatric hospitals. Before this, during the pre-civilization era of history, at the earliest of the stone ages, early tribal groups believed that mental illnesses were a manifestation of evil spirits.[16] At this time, managing and treating these individuals was the family's or the clan's responsibility.[17] Another method of dealing with persons with mental illnesses in early times was to banish them from the community or even kill them.[18]

With Serious Psychological Distress, 2006-2014, 68 PSYCHIATRIC SERVS. 653, 655 (2017) (noting that in 2009 and 2014, the weighted percentage of serious psychological distress aong adults ages 18 to 64 years was 3.4%).

[14] Bernard E. Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s*, 9 OHIO ST. J. CRIM. L. 53, 61 (2011).

[15] *See* GERALD N. GROB, FROM ASYLUM TO COMMUNITY: MENTAL HEALTH POLICY IN MODERN AMERICA 4 (Princeton Univ. Press 1991).

[16] Michael A. Carron & Hanna Saad, *Treatment of the Mentally Ill in the Pre-Moral and Moral Era: A Brief Report*, 24 JEFFERSON J. PSYCHIATRY 1, 2 (2012); Graham C.L. Davey, *'Spirit Possession' and Mental Health*, PSYCH. TODAY (Dec. 31, 2014), https://www.psychologytoday.com/us/blog/why-we-worry/201412/spirit-possession-and-mental-health; RICHARD RESTAK, MYSTERIES OF THE MIND 8 (Nat'l Geographic Soc'y 2000); DEBORAH CORNAH, MENTAL HEALTH FOUND., THE IMPACT OF SPIRITUALITY ON MENTAL HEALTH: A REVIEW OF THE LITERATURE 17 (2006); Stafford Betty, *The Growing Evidence for "Demonic Possession": What Should Psychiatry's Response Be?*, 44 J. RELIGION & HEALTH 13, 24 (2005).

[17] *The History & Evolution of Mental Health & Treatment*, SUNRISE HOUSE (Aug. 5, 2020), https://sunrisehouse.com/research/history-evolution-mental-health-treatment/.

[18] RISDON N. SLATE ET AL., THE CRIMINALIZATION OF MENTAL ILLNESS: CRISIS AND OPPORTUNITY FOR THE JUSTICE SYSTEM 30 (Carolina Acad. Press 2d ed. 2013); *The History & Evolution of Mental Health*

B. Ancient Civilizations

There was a development of scholarly interest in what was referred to at the time as 'madness' during the periods of the ancient civilizations, for example in the works of Plato[19] and Hippocrates.[20] Importantly, it was the ancient Greeks and Romans who progressively determined that persons with mental illness required care and treatment from the government.[21] Mental illness acted as a "criminal excuse" under Roman law.[22]

C. Middle Ages

The Middle Ages brought the advent of religion, which established a link between mental illness and demonology.[23] In fact, historically, in certain faiths such as Judaism and Hinduism, the link between evil spirits and mental illness was so strong that some of the persons with mental illnesses were subject to exorcisms.[24] In regards to medieval society, although most persons with mental illnesses took an active part in society,[25] some of those with mental illnesses were confined in custodial centers.[26]

D. Violence Leads to Institutionalization

Similarly, there were between 600,000 to 9 million persons with mental illnesses outcasted, tortured and killed during the witch hunts known as Malleus Maleficarum.[27] This was particularly the case at the end of the 1600s.[28]

& Treatment, supra note 17.

[19] SLATE ET AL., *supra* note 18, at 20 (noting that Plato "proposed that the body and soul were distinct, yet interdependent, entities").

[20] *Id.* (stating Hippocrates believed in distinct physical cause of mental illness, namely imbalanced bodily fluids).

[21] *Id.* at 20-21.

[22] Paul F. Stavis, *The Nexum: A Modest Proposal for Self-Guardianship by Contract: A System of Advance Directives and Surrogate Committees at-Large for the Intermittently Mentally Ill*, 16 J. CONTEMP. HEALTH L. & POL'Y 1, 8 (1999).

[23] *See* ALEXIS BRIDLEY & LEE W. DAFFIN, JR., ESSENTIALS OF ABNORMAL PSYCHOLOGY 1.3.3 (Carrie Cuttler ed., 1st ed. 2018) (ebook). In this way, control of crime and control of persons with mental illnesses have similar historical underpinnings, with criminal punishment originally seen as a method to remove the evil spirit and sins of the offender. *See* HARRY E. BARNES, THE STORY OF PUNISHMENT: A RECORD OF MAN'S INHUMANITY TO MAN 39 (Stratford Co. 1930).

[24] SLATE ET AL., *supra* note 18, at 21.

[25] BRILL, MADNESS IN MEDIEVAL LAW AND CUSTOM 3 (Wendy Turner ed., 2010).

[26] A custodial center can be any institution used to control, change, or stop certain behaviors. *See* Aaron Rosenblatt, *Providing Custodial Care for Mental Patients: An Affirmative View*, 48 PSYCHIATRIC Q. 14, 15 (1974); Guy Geltner, *Medieval Prisons: Between Myth and Reality, Hell and Purgatory*, 4 HIST. COMPASS 261, 264 (2006); WILLIAM C. COCKERHAM, SOCIOLOGY OF MENTAL DISORDER 13 (Routledge 10th ed. 2017).

[27] SLATE ET AL., *supra* note 18, at 21–22.

[28] *See* Beatriz Quintanilla, *Witchcraft or Mental Illness?*, PSYCHIATRIC TIMES (June 21, 2010), https://www.psychiatrictimes.com/view/witchcraft-or-mental-illness.

During the Renaissance, there was a movement to institutionalize persons with mental illnesses as opposed to torturing and executing them.[29] As Appleman points out, from the beginning of European society, persons with mental illnesses were confined and isolated, often in asylums.[30] However, despite some good intentions when establishing these public institutions, many inpatients were chained, abused and tortured under the premise of therapy.[31]

E. Historical Treatment by U.S. Society

Both Dershowitz and Appleman, two prominent legal academics and lawyers, provide thorough descriptions of how U.S. society has treated persons with mental illnesses throughout American history.[32] During early American colonial society, persons with mental illnesses were often not incarcerated. Instead, they were treated within the community as any other dependent.[33]

Again, persons with mental illnesses were the responsibility of the family and were traditionally contained in the family home's attic or basement.[34] If this was not possible, the town or village became responsible for confining those with mental illnesses in a shack or hut in the middle of the commons.[35] Occasionally, they were confined in a poor almshouse or prison.[36] The enforcement of poor laws was largely to blame for this initial trend of imprisoning persons with mental illnesses,[37] with peace and stability of the community being the primary goal.[38]

F. The Shift to Institutionalization

There was then a societal shift in responsibility from the community to the institution.[39] America's first public hospital housed those with mental

[29] BRIDLEY & DAFFIN, JR., *supra* note 23, at 1.3.4.

[30] Laura I. Appleman, *Deviancy, Dependency, and Disability: The Forgotten History of Eugenics and Mass Incarceration*, 68 DUKE L.J. 417, 421 (2018); *see* RON POWERS, NO ONE CARES ABOUT CRAZY PEOPLE: THE CHAOS AND HEARTBREAK OF MENTAL HEALTH IN AMERICA 59–60 (Hachette Books 2017).

[31] *See* Appleman, *supra* note 30, at 422.

[32] *See generally* Appleman, *supra* note 30; Alan M. Dershowitz, *Origins of Preventative Confinement on Anglo-American Law, Part II: The American Experience*, 43 U. CIN. L. REV. 781 (1974).

[33] Dershowitz, *supra* note 32, at 786.

[34] DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 43 (Little, Brown & Co. 1971).

[35] *Id.* This was an attempt by the local community to house and separate those who were mentally ill from the rest of society. Sometimes this was well intended, and at other times, it was used as a form of social control. Appleman, *supra* note 30, at 423.

[36] Dershowitz, *supra* note 32, at 786–87.

[37] *Frontline: Deinstitutionalization* (PBS television broadcast May 10, 2005).

[38] ROTHMAN, *supra* note 34.

[39] *See generally id.*

illnesses in its basement.[40] This was followed by the first psychiatric hospital and other public psychiatric hospitals opening in urban areas along the east coast.[41] The U.S. established its first asylum in Williamsburg, Virginia, which introduced treatment instead of punishment.[42] This marked a move from taking care of persons with mental illnesses within the family home to institutionalization in the form of safe confinement for those who failed to fit into the 'normal' expectations of societal standard behaviors.[43]

At this stage in history, asylums were seen as a "first resort."[44] The focus was placed on disciplining deviancy.[45] Therefore, asylums were used to spatially exclude a population that was unfamiliar and unlike the rest of society.[46] However, due to overcrowding (in turn, largely caused by urbanization)[47] and poor quality of doctors, there was an end to the 'moral treatment' approach (that focused on individualized treatment, rather than just confinement during early American society). Instead, the practice became warehousing persons with mental illnesses.[48]

Around this time in history, Dorethea Dix, an early pioneering legal advocate, began to publicize the plight of prisoners with mental illnesses in U.S. jails, prisons, and asylums.[49] Her efforts led to the creation of at least thirty public, state psychiatric hospitals across the U.S.[50] Unfortunately, these efforts inadvertently and effectively erased persons with mental illnesses from society.[51] They contributed to the institutionalization of many who had previously been "tolerated" in the community in the name of quasi-community care.[52] "[C]rowded, understaffed and underfunded," these institutions created poor and often dangerous living conditions for their patients.[53] In terms of

[40] *See* POWERS, *supra* note 30.

[41] *See* E. FULLER TORREY, OUT OF THE SHADOWS: CONFRONTING AMERICA'S MENTAL ILLNESS CRISIS 81 (John Wiley & Sons, Inc. 1998).

[42] SLATE ET AL., *supra* note 18, at 24.

[43] Appleman, *supra* note 30, at 427.

[44] ROTHMAN, *supra* note 34.

[45] Appleman, *supra* note 30, at 428.

[46] Bernard E. Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution*, 84 TEX. L. REV. 1751, 1758 (2006).

[47] ANDREW T. SCULL, DECARCERATION: COMMUNITY TREATMENT AND THE DEVIANT: A RADICAL VIEW 66 (Prentice-Hall, Inc. 1977).

[48] TORREY, *supra* note 41, at 82.

[49] Sol Wachtler & Keri Bagala, *From the Asylum to Solitary: Transinstitutionalization*, 77 ALB. L. REV. 915, 915 (2014).

[50] E. FULLER TORREY ET AL., NAT'L ALL. FOR THE MENTALLY ILL & PUB. CITIZEN'S HEALTH RSCH. GROUP, CRIMINALIZING THE SERIOUSLY MENTALLY ILL: THE ABUSE OF JAILS AS MENTAL HOSPITALS 11 (1992).

[51] Dershowitz, *supra* note 32, at 807.

[52] *Id.*

[53] Appleman, *supra* note 30, at 433.

social control theory, at this point in history asylums were used to reorder society.[54] Again, the psychiatric institutions were an agent of society and of the government to reinforce an existing strict social hierarchy.[55]

G. Eugenics

Despite the efforts by early reformists, such as Louis Dwight, Benjamin Rush, Dorothea Dix, and some progressive politicians, to bring about humane treatment of this population, there was a growing movement that believed persons with mental illnesses could not be treated and their deviant behavior could not be changed. [56] This resulted in efforts to sterilize, i.e., undergoing a forced medical procedure that would prevent procreation,[57] those who had a mental illness,[58] as well as attempts to use lobotomies, eugenics, and euthanasia against this population.[59] Eugenicists wanted to stop the reproduction of 'degenerate' populations.[60] Given that Cesare Lombroso, an influential criminologist at the time whose work was well received by many in power,[61] believed that the criminal mind was inherited and the hereditary criminal[62] was deemed necessary to be eliminated by stopping the criminal class' ability

[54] Michael Zuckerman, *Review of Conscience and Convenience: The Asylum and Its Alternatives in Progressive America*, 73 J. CRIM. L. & CRIMINOLOGY 1803, 1804 (1982) (reviewing DAVID ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA (Little, Brown 1980)).

[55] Appleman, *supra* note 30, at 425 (citing NANCY ISENBERG, WHITE TRASH: THE 400 YEAR-OLD UNTOLD HISTORY OF CLASS IN AMERICA 102 (2016)).

[56] ME. ADVISORY COMM., THE CRIMINALIZATION OF PEOPLE WITH MENTAL ILLNESSES IN MAINE 10 (2019); C. Joseph Boatwright II, *Solving the Problem of Criminalizing the Mentally Ill: The Miami Model*, 56 AM. CRIM. L. REV. 135, 138–39 (2019).

[57] Elyce Zenoff Ferster, *Eliminating The Unfit-Is Sterilization The Answer?*, 27 OHIO ST. L.J. 591, 591–92 (1966).

[58] Such as in the infamous case of *Buck v. Bell*, which concerned a person with an intellectual disability. 274 U.S. 200, 205 (1927). In *Buck v. Bell*, the U.S. Supreme Court stated that "(i)t is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind." *Id.* at 207. As Young points out, "(a)s recently as 1983, 15 states had compulsory sterilization laws for people with disabilities." Lauren Young, *Decriminalizing Disability*, 52 MD. B.J. 62, 64 (2019).

[59] *See generally* William Gronfein, *Psychotropic Drugs and the Origins of Deinstitutionalization*, 32 SOC. PROBS. 437, 443–44 (1985) (describing lobotomies and other therapies that were used to treat the mentally ill).

[60] Appleman, *supra* note 30, at 437–38.

[61] *See* Anthony J. Grasso, Punishment and Privilege: The Politics of Class, Crime, and Corporations in America (2018) (unpublished Ph.D. dissertation, University of Pennsylvania) (on file with Penn Libraries, University of Pennsylvania).

[62] *See* Marvin E. Wolfgang, *Pioneers in Criminology: Cesare Lombroso*, 4 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 361, 368 (1961)

to reproduce.[63] These developments led to a form of social Darwinism, and subsequently, more incarceration for disability than crime.[64]

H. Compulsory Confinement

Custodial care orders were also extremely common[65] due to the widespread belief that if society could segregate the inferior class (using incarceration, institutionalization and sterilization) then this class of individuals would "eventually die out."[66] Thus, in an effort to completely eliminate persons with mental illness,[67] around the mid-1800s, there were large numbers of civil, involuntary commitments to mental institutions.[68] However, it wasn't until the 1960s that we saw the mass confinement of criminals and persons with mental illnesses in United States prisons.[69]

II. Deinstitutionalization

A. The Emergence of Deinstitutionalization

Prior to the civil rights movement,[70] a new trend of "deinstitutionalization" began. This trend focused on releasing persons with mental illnesses from psychiatric institutions, with the objective of getting treatment in the community.[71] At the time, Foley and Sharfstein outlined the rationale behind deinstitutionalization:

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[63] *See* GINA LOMBROSO-FERRERO, CRIMINAL MAN ACCORDING TO THE CLASSIFICATION OF CESARE LOMBROSO 209 (2009) (ebook).

[64] *See generally* MARGARET WERNER CAHALAN, U.S. BUREAU OF JUST. STAT., HISTORICAL CORRECTIONS STATISTICS IN THE UNITED STATES 1850-1984, at 29 (1986), https://www.bjs.gov/content/pub/pdf/hcsus5084.pdf (showing the number of persons present in state and federal prisons from 1880-1980).

[65] *See generally* Appleman, *supra* note 30, at 430-32 (describing the commonality of compulsory confinement).

[66] *Id.* at 446.

[67] *See id.* ("As concern mounted over the ever-rising numbers of feebleminded and mentally ill, permanent correctives began to be sought. Doctors, lawyers, and state legislators agreed that one of the best solutions to this social problem was the establishment of asylums and farm colonies, to house and segregate the 'defective' individuals.")

[68] *See* Stuart Anfang & Paul Applebaum, *Civil Commitment – The American Experience*, 43 ISR. J. PSYCHIATRY RELAT. SCI. 209, 210 (2006).

[69] *See generally* CAHALAN, *supra* note 64 (showing the increase in the number of individuals in U.S. prisons in the 1960s); *see also* Appleman, *supra* note 30, at 456 (describing the shift in treating mental illness as a medical decision to treating it as a legal decision as well).

[70] Stephen P. Kliewer et al., *Deinstitutionalization: Its Impact on Community Mental Health Centers and the Seriously Mentally Ill*, 35 ALA. COUNSELING ASS'N J. 40, 40–41 (2009); Samantha Raphelson, *How The Loss Of U.S. Psychiatric Hospitals Led To A Mental Health Crisis*, NPR (Nov. 30, 2017), https://www.npr.org/2017/11/30/567477160/how-the-loss-of-u-s-psychiatric-hospitals-led-to-a-mental-health-crisis.

[71] Ralph Slovenko, *The Transinstitutionalization of the Mentally Ill*, 29 OHIO N.U. L. REV. 641, 649 (2003).

> It will be possible within a decade or two to reduce the number of patients now under custodial care by 50 percent or more. Many more mentally ill can be helped to remain in their homes without hardship to themselves or their families. Those who are hospitalized can be helped to return to their own communities... Central to a new mental health program is comprehensive community care. Merely pouring Federal funds into a continuation of the outmoded type of institutional care which now prevails would make little difference.[72]

This began with the 1963 Community Mental Health Act.[73] The Act aimed to create 1500 local community mental health centers.[74]

B. Causes of Deinstitutionalization

1. The Development of Pharmaceutical Drugs

Certain pharmaceutical developments played a large role in deinstitutionalization.[75] The development of psychotropic drugs, like Thorazine, meant that certain symptoms of mental illness, such as psychosis, could be curtailed, making it easier for the patients who used such drugs to be treated in the community, yet remain under the control of medical professionals.[76]

2. Poor Conditions in Asylums

Another driving force of the deinstitutionalization movement was the media's coverage of the dire and deplorable conditions of some psychiatric hospitals and asylums.[77] Other causes of deinstitutionalization include broader social reform,[78] a combined effort towards decarceration and deinstitutionalization,[79] lessons learned from the civil rights movement,[80] the high cost of

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[72] HENRY FOLEY & STEVEN SHARFSTEIN, MADNESS AND GOVERNMENT: WHO CARES FOR THE MENTALLY ILL? 166 (Am. Psychiactric Press, Inc. 1st ed. 1983).

[73] Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963, Pub. L. No. 88-164, 77 Stat. 282. *See* John W. Murphy & Khary K. Rigg, *Clarifying the Philosophy Behind the Community Mental Health Act and Community-Based Interventions*, 42 J. COMMUNITY PSYCHOL. 285, 285–86 (2014) (stating that the Community Mental Health Act began community-based planning and operation of mental health treatment programs).

[74] Wesley Sheffield, *The Community Mental Health Act of 1963: Still Pursuing the Promise of Reform Fifty Years Later*, YOUNG MINDS ADVOC. (Oct. 31, 2013), https://www.ymadvocacy.org/the-community-mental-health-act-of-1963/.

[75] RICHARD G. FRANK & SHERRY A. GLIED, BETTER BUT NOT WELL: MENTAL HEALTH POLICY IN THE UNITED STATES SINCE 1950, at 28–29 (Johns Hopkins Univ. Press 2006).

[76] *See id.* at 29–32; Thomas A. Ban, *Fifty years chlorpromazine: a historical perspective*, 3 NEUROPSYCHIATRIC DISEASE & TREATMENT 495, 495 (2007); Deanna Pan, *Timeline: Deinstitutionalization and its Consequences*, MOTHER JONES (Apr. 29, 2013), https://www.motherjones.com/politics/2013/04/timeline-mental-health-america/.

[77] PATRICIA ERICKSON & STEVEN ERICKSON, CRIME, PUNISHMENT, AND MENTAL ILLNESS: LAW AND THE BEHAVIORAL SCIENCES IN CONFLICT 29–30 (Rutgers Univ. Press 2008); Harcourt, *supra* note 14, 68–69.

[78] Harcourt, *supra* note 14.

[79] Chaz Arnett, *From Decarceration to E-Carceration*, 41 CARDOZO L. REV. 641, 658–59 (2019).

[80] Paul S. Appelbaum, *A History of Civil Commitment and Related Reforms in the United States: Lessons*

running asylums,[81] WWII developments,[82] and the rise of individualism and individual rights.[83] Some factors combined to encourage social change generally (such as the Civil Rights Movement), and others, in particular within the mental healthcare setting like the rise of rights in this context.[84] Finally, a number of the other factors contributed by shedding light on the plight of those stuck in mental psychiatric institutions, such as developments in WWII related to PTSD and media coverage.[85]

3. Public Interest Litigation

To a large extent it was the courts, at the behest of civil libertarian groups like the American Civil Liberties Union (ACLU), that had a significant role to play in deinstitutionalization,[86] through public interest litigation.[87] Courts[88] required the usage of the least restrictive setting[89] (which required that those institutionalized for their mental illness must be confined in the least invasive seeing possible),[90] and required procedural safeguards for psychiatric inpatients[91] in the form of "heightened due process."[92] Advocating for an "ideological shift,"[93] legal activism by liberal legal advocates stemming from the

for Today, 25 DEVS. MENTAL HEALTH L. 13, 18 (2006); Steven S. Sharfstein, *Whatever Happened to Community Mental Health?*, 51 PSYCHIATRIC SERVS. 616, 617 (2000); Daniel Yohanna, *Deinstitutionalization of People with Mental Illness: Causes and Consequences*, 15 AM. MED. ASS'N J. ETHICS 886, 886 (2013); Olga L. Kofman, Deinstitutionalization and Its Discontents: American Mental Health Policy Reform 26 (Apr. 23, 2013) (unpublished B.A. thesis, Claremont McKenna College) (on file with Claremont Colleges Library, Claremont McKenna College).

[81] Kofman, *supra* note 80, at 26–27.

[82] Harcourt, *supra* note 14, at 68. Although the diagnosis was the same, the term PTSD was not used at the time. Instead the veterans and soldiers were deemed to have experienced shell shock diagnosis, Combat Stress Reaction (CSR), or battle fatigue. *See* Marc-Antoine Crocq & Louis Crocq, *From shell shock and war neurosis to posttraumatic stress disorder: a history of psychotraumatology*, 2 DIALOGUES IN CLINICAL NEUROSCIENCE 47, 47 (2000).

[83] *See* ERICKSON & ERICKSON, *supra* note 77, at 27.

[84] *See id.* at 29–30.

[85] *See id.* at 29.

[86] See Foucha v. Louisiana, 504 U.S. 71, 83–86 (1992); Addington v. Texas, 441 U.S. 418, 426 (1979); O'Connor v. Donaldson, 422 U.S. 563, 575 (1975); Lessard v. Schmidt, 379 F.Supp. 1376, 1378–80 (1974); Baxstrom v. Herold, 383 U.S. 107, 114–15 (1966); Jackson v. Indiana, 406 U.S. 715, 738 (1972), for cases that extended the rights of the mentally ill.

[87] Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1, 44 (2012); *see generally* Patricia M. Wald, *Whose Public Interest Is It Anyway?: Advice for Altruistic Young Lawyers*, 47 ME. L. REV. 3, 15–21 (2018).

[88] For example, in *Addington v. Texas*, the Court established a clear and convincing standard of evidence required to result in civil involuntary indefinite detention. 441 U.S. 418, 432–433 (1979).

[89] Lake v. Cameron, 364 F.2d 657, 661 (D.C. Cir. 1966).

[90] Paul S. Appelbaum, *Law & Psychiatry: Least Restrictive Alternative Revisited: Olmstead's Uncertain Mandate for Community-Based Care*, 50 PSYCHIATRIC SERVS. 1271, 1271 (1999).

[91] *See* Lake v. Cameron, 364 F.2d 657, 662 (D.C. Cir. 1966).

[92] Harcourt, *supra* note 14, at 70.

[93] Fred E. Markowitz, *Psychiatric Hospital Capacity, Homelessness, and Crime and Arrest Rates*, 44 CRIMINOLOGY 45, 46–47 (2006).

civil rights movement[94] also challenged the involuntary treatment and involuntary confinement of this population[95] and made such state involuntary practices more difficult.[96] *Wyatt v Stickney*[97] recognized the constitutional right to treatment and *Lessard v Schmidt*[98] found that involuntary confinement could only occur if there were an extreme likelihood of immediate harm to himself or others. The *Lessard* case also importantly established that a person being faced with involuntary commitment must have the same procedural rights as a criminal defendant.[99] This made civil commitment more difficult for states, and, therefore, contributed to deinstitutionalization.[100] Additionally, the Americans with Disabilities Act ("the ADA") was fundamental in building on the progress of the deinstitutionalization movement.[101] Although Title II came later, it importantly had an integration mandate, that required public services, including housing, to be provided in the most integrative manner possible.[102] Based on the ADA, the Supreme Court held in *Olmstead v. L.C.*, that "unjustified isolation" constituted discrimination.[103]

The lack of resources that followed deinstitutionalization, such as the lack of availability of housing resources for those recently discharged from institutions, had a number of significant consequences.[104] For instance, although 1500 community mental health centers were going to be built as part of the 1963 Community Mental Health Act, only half of these centers were actually built and none were fully funded.[105]

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[94] David Mechanic & David A. Rochefort, *A Policy of Inclusion for the Mentally Ill*, 11 HEALTH AFFAIRS 128, 131 (1992).

[95] *Id*.

[96] Markowitz, *supra* note 93.

[97] *See* Wyatt v. Stickney, 325 F. Supp. 781, 784 (M.D. Ala. 1971), *aff'd sub nom.* Wyatt v. Aderholt, 503 F.2d 1305, 1313–14 (5th Cir. 1974).

[98] Lessard v. Schmidt, 349 F. Supp. 1078, 1093 (E.D. Wis. 1972), *vacated*, 414 U.S. 473 (1974), *reinstated*, 413 F. Supp. 1318 (E.D. Wis. 1976).

[99] *See id.* at 1087–88.

[100] ALISA ROTH, INSANE: AMERICA'S CRIMINAL TREATMENT OF MENTAL ILLNESS 91 (Basic Books ed., 2018).

[101] *See* Bagenstos, *supra* note 87, at 5–6.

[102] 28 C.F.R. § 35.130(d) (2016).

[103] Olmstead v. L.C. *ex rel*. Zimring, 527 U.S. 581, 597 (1999).

[104] *See* David J. Rothman, *The Rehabilitation of the Asylum*, THE AM. PROSPECT (Dec. 5, 2000), http://prospect.org/article/rehabilitation-asylum.

[105] Appleman, *supra* note 30, at 452–53 (citing *The Community Mental Health Act of 1963: Still Pursuing the Promise of Reform Fifty Years Later*, YOUNG MINDS ADVOC. (Oct. 31, 2013), https://www.ymadvocacy.org/the-community-mental-health-act-of-1963).

C. Extent of Deinstitutionalization

It should be noted that between 1965 and 1975, the number of individuals becoming inpatients in local psychiatric hospitals fell almost 60%.[106] More broadly, in 1955 over 500,000 severely mentally ill patients were in public psychiatric hospitals, and this was reduced to just over 70,000 in 1994.[107] In terms of the corresponding incarceration rates, since the 1970s, it has grown by nearly 400%.[108] These statistics effectively demonstrate the most immediate impacts of the deinstitutionalization movement.

D. Is the Criminalization Argument Correct?

Certain statistics undermine the criminalization hypothesis—that persons with mental illnesses were primarily released from mental health institutions and without effective and widespread access to community mental healthcare, ended up being institutionalized in criminal justice prisons and jails.[109] For example, from

> 1950 to 2000 . . . the proportion of people with serious and persistent mental illnesses living in psychiatric institutions dropped by 23%, whereas the proportion living in correctional institutions rose only 4%. The rise in incarceration rates for those with severe and persistent mental illnesses follows a predictable pattern, remaining at 1% from 1950 to 1970, but rising to 3% by 1990 and 5% by 2000.[110]

As one can see, a significant number of formerly institutionalized individuals did not end up going directly from psychiatric into criminal justice institutions. That being said, there was "an overall increase (from 8 percent to 11 percent) in the percentage of prison inmates with prior mental hospitalization between 1968 and 1978",[111] demonstrating that some individuals did move from mental healthcare institutions into the criminal justice institutions. Currently in U.S. prisons and jails, there are "over 350,000 inmates with serious

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[106] Harcourt, *supra* note 14, at 70 (citing William Gronfein, *Incentives and Intentions in Mental Health Policy: A Comparison of Medicaid and Community Mental Health Programs*, 26 J. HEALTH & SOC. BEHAV. 192, 196 (1985)).

[107] TORREY, *supra* note 41, at 8–9.

[108] *See* Steven Raphael & Michael A. Stoll, *Why Are So Many Americans in Prison?* 1, 73 (Nat'l Poverty Ctr., Working Paper No. 07-10, 2007).

[109] E. FULLER TORREY ET AL., TREATMENT ADVOC. CTR., MORE MENTALLY ILL PERSONS ARE IN JAILS AND PRISONS THAN HOSPITALS: A SURVEY OF THE STATES 2 (2010), https://www.treatmentadvocacycenter.org/storage/documents/final_jails_v_hospitals_study.pdf; Jennifer L. Skeem et al., *Correctional Policy for Offenders with Mental Illness: Creating a New Paradigm for Recidivism Reduction*, 35 L. HUM. BEHAV. 110, 116 (2010).

[110] Skeem et al., *supra* note 109.

[111] Markowitz, *supra* note 93, at 48.

mental illness compared to approximately 70,000 patients with serious mental illness in hospitals."[112]

III. Transinstitutionalization

Despite the good intentions behind deinstitutionalization, there was insufficient financial[113] and political support given to community treatment plans.[114] This resulted in many former inpatients "falling through the cracks" of community-based psychiatric support.[115] Although it is more costly to institutionalize those with a mental illness in psychiatric hospitals or prisons, it is far cheaper to intervene *earlier* in the form of community mental healthcare.[116] As Slate et al. argue, deinstitutionalization occurred with the best of intentions and for the right reasons, but ultimately was an abysmal failure resulting in transinstitutionalization.[117]

A. Monetary Support for Deinstitutionalization

Around the time of the deinstitutionalization movement, there was a shift in fiscal policy, whereby the financial responsibility of providing psychiatric services, and providing public welfare aid such as Medicare, Medicaid, and Social Security Disability, was transferred from the states to the federal government.[118] This shift in responsibility did not correspond with a shift insufficient financial resources, and instead, there were many budget cuts and an underfunding of public mental health services.[119]

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[112] Michael Mullan, *Statistics on Mental Illness & the Insanity Defense*, MENTAL ILLNESS & THE CRIM. L. (Apr. 8 2019), https://www.mentalillnessandthecriminallaw.com/post/statistics-on-mental-illness-the-insanity-defense.

[113] *See* John A. Talbott, *Deinstitutionalization: Avoiding the Disasters of the Past*, 55 PSYCHIACTRIC SERVS. 1112, 1112–113 (2004).

[114] *See* RISDON N. SLATE & WESLEY JOHNSON, THE CRIMINALIZATION OF MENTAL ILLNESS: CRISIS AND OPPORTUNITY FOR THE JUSTICE SYSTEM 41 (Carolina Acad. Press 2d ed. 2008); GEORGE PAULSON, CLOSING THE ASYLUMS: CAUSES AND CONSEQUENCES OF THE DEINSTITUTIONALIZATION MOVEMENT 6 (McFarland & Co., Inc. 2012); Talbott, *supra* note 113; L. Davis et al., *Deinstitutionalization? Where Have All the People Gone?*, 14 CURR. PSYCHIATRY REP. 259, 264 (2012); Jennifer S. Bard, *Re-arranging Deck Chairs on the Titanic: Why the Incarceration of Individuals With Serious Mental Illness Violates Public Health, Ethical, and Constitutional Principles and Therefore Cannot Be Made Right By Piecemeal Changes to the Insanity Defense*, 5 HOUSTON J. HEALTH L. & POL'Y 21 (2005); ERICKSON & ERICKSON, *supra* note 77, at 34.

[115] Markowitz, *supra* note 93, at 45.

[116] Boatwright II, *supra* note 56, at 145, 160.

[117] SLATE ET AL., *supra* note 18, at 8.

[118] Markowitz, *supra* note 93, at 47.

[119] *Id.* at 45, 47.

B. Extent of Transinstitutionalization

This trend can again be illustrated statistically, as Abramson, one of the leading academics in the area, demonstrates:"[b]etween 1880 to 1960, the percentage of prisoners with mental illnesses ranged from 0.7% to 1.5%."[120] Today approximately 15-20% of all prisoners have a serious mental illness.[121] The problem has become so extensive, that critics now argue we have entered into a period characterized by the "criminalization of mental illness."[122]

1. Criminalization

The asylums supervised persons with mental illnesses and ensured they took their medications, but when patients were discharged and released into the community, many stopped taking their medication and failed to received adequate follow-up treatment.[123] This argument assumes that medication was helpful in most or all cases, which is not necessarily true.[124] In some instances, mentally ill individuals' behavior in the community became so problematic that it arose to a criminal justice problem.[125] The lack of public psychiatric hospital beds has led to a direct increase in both homelessness and the criminalization of the mentally ill.[126]

2. Changing Views of What Influences Criminal Behavior

Criminal law is slowly embracing the underlying premises of psychiatry and psychology, which allows for both individual accountability, but also examines the biological, neurological, and social influences on criminal behavior.[127] In this way, the behavioral sciences—neuroscience in particular—are changing the way we think about the responsibility of individuals whose

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[120] Julia Schon, *Why Are California's Prisons and Streets Filled with More Mentally Ill than Its Hospitals: California's Deinstitutionalization Movement*, 59 SANTA CLARA L. REV. 269, 273 (2019).

[121] TORREY ET AL., *supra* note 109, at 7.

[122] *See* Marc F. Abramson, *The Criminalization of Mentally Disordered Behavior: Possible Side-Effect of a New Mental Health Law*, 23 HOSP. & CMTY. PSYCHIATRY 101, 104–05 (1972); *see also* Christopher G. Fichtner & James L. Cavanaugh, *Malignant Criminalization: From Hypothesis To Theory*, 57 PSYCHIATRIC SERVS. 1511 (2006); *see also* Megan L. Davidson & Jeffrey W. Rosky, *Dangerousness or Diminished Capacity? Exploring the Association of Gender and Mental Illness with Violent Offense Sentence Length*, 40 AM. J. CRIM. JUST. 353, 354 (2015); SLATE ET AL., *supra* note 18, at 43.

[123] Markowitz, *supra* note 93, at 45, 47.

[124] *See generally* Rennie v. Klein, 462 F.Supp. 1131, 1144 (D.N.J. 1978); *see also* Rogers v Okin, 634 F.2d 650, 656 (1st Cir. 1980) (holding that forcible non-consensual medicating of persons with mental illnesses who are civilly committed must be limited to emergency extreme situations where there is a substantial risk of injury to the patient or to others).

[125] *See* ERICKSON & ERICKSON, *supra* note 77, at 37.

[126] TORREY ET AL., *supra* note 109.

[127] *See generally* Harcourt, *supra* note 14, at 54–55 (noting the progression in criminal law in terms of understanding mental illness).

brains, cognitive understandings of right and wrong, and decision-making capacities are all influenced by underdeveloped parts of the brain associated with certain mental illnesses.[128] These changes impact our response to crimes influenced by mental illness symptoms such as earlier mental health interventions,[129] rather than reacting later when a crime has been committed or hospitalization is required.[130]

IV. Cause of Crime: Questioning Criminalization of Mental Illness

Some question the criminalization hypothesis[131] which argues that persons with mental illnesses end up becoming involved in the criminal justice system because they have inadequate access to mental healthcare. One study showed mental illness and its symptoms rarely directly cause a crime (approximately in only 4-12% of cases).[132] It is more likely that mental illness is indirectly related to crime, in that certain criminogenic factors affecting most criminals in our jails and prisons such as poverty, homelessness, unemployment, undereducation, drugs, lack of prosocial attachments, etc., are experienced disproportionately by this population.[133] Draine et al. argue that, in particular, "poverty moderates the relationship between serious mental illness and social problems" such as criminal behavior.[134]

A. Mental Illness as a Direct & Indirect Cause of Crime

One study has demonstrated that 8% of participants had been arrested for an offense that was caused either directly or indirectly by their mental illness.[135] When it comes to the criminalization hypothesis and to crimes that are a direct cause of a mental illness,[136] we can see the impact that certain symptoms of specific mental illnesses, like mania and severe depression with bipolar disorder, and hallucinations and delusions with schizophrenia, have on committing certain crimes.[137] Schizophrenia, bipolar disorder, and severe

[128] *See id.* at 75.
[129] *See id.* at 71–72.
[130] GROB, *supra* note 15.
[131] *See* Jeffrey Draine et al., *Roles of Social Disadvantage in Crime, Joblessness, and Homelessness Among Persons With Serious Mental Illness*, 53 PSYCHIATRIC SERVS. 565, 565 (2002).
[132] Jillian Peterson & Kevin Heinz, *Understanding Offenders with Serious Mental Illness in the Criminal Justice System*, 42 MITCHELL HAMLINE L. REV. 537, 546–47 (2016).
[133] Draine et al., *supra* note 131.
[134] *Id*.
[135] *See* John Junginger et al., *Effects of Serious Mental Illness and Substance Abuse on Criminal Offenses*, 57 PSYCHIATRIC SERVS. 879, 881 (2006).
[136] *See* Jillian K. Peterson et al., *How Often and How Consistently Do Symptoms Directly Precede Criminal Behavior Among Offenders with Mental Illness?*, 38 L. & HUM. BEHAV. 439, 439 (2014).
[137] Peterson & Heinz, *supra* note 132, at 546–48.

depression are the types of mental illness that typically qualify for an insanity defense.[138]

B. Social Control of Mentally Ill Individuals as a Cause of Crime

One of the more critical and insightful rationales put forward in an effort to explain the high rates of incarceration of mentally ill persons is the social control hypothesis. Historically, we have attempted to "control those on the margins," namely the poor, minorities and the disabled, also referred to as the 'undesirable other', and the mentally inferior.[139] More recent commentators, like Loury and Clear, believe that punishment of criminals and persons with mental illnesses has now become an *essential* part of the U.S. social contract.[140] Perlin believes that "[s]ince the mid-1970s, the dominant strategy for addressing violations of social rules has been imprisonment"[141] and nowhere is this truer than its use against persons with mental illnesses.[142] Interestingly, Clear has argued that "deficits in informal social controls that result from high levels of incarceration are, in fact, crime-promoting. The high incarceration rates in poor communities destabilize the social relationships in these places and help cause crime rather than prevent it."[143]

Building upon social control theory, it becomes apparent how prison and psychiatric confinement, and in particular, their collateral consequences[144] (related to such issues such as housing and employment)[145] operate as a way

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[138] Andrew Donohue et al., *Legal Insanity: Assessment of the Inability to Refrain*, 5 PSYCHIATRY 58, 64 (2008); Peterson et al., *supra* note 136, at 440.

[139] Appleman, *supra* note 30, at 419–21.

[140] Glenn C. Loury, *Detention, Democracy, and Inequality in a Divided Society*, 651 ANNALS AM. ACAD. POL. & SOC. SCI. 178, 180 (2014).

[141] Michael J. Perlin & John Douard, *Equality, I Spoke that Word/As if a Wedding Vow: Mental Disability Law and How We Treat Marginalized Persons*, 53 N.Y. L. SCH. L. REV. 9, 15 (2008).

[142] *See* Melissa Thompson, *Race, Class, Gender, and Mental Disorder in the Criminal Justice System*, 53 SOCIO. PERSP. 99, 100 (2010).

[143] TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE 10 **(Oxford Univ. Press, 2007).**

[144] Interestingly, as noted by Cobos, The National Conference of Commissioners of Uniform State Laws has concluded that the collateral consequences that attach to a criminal conviction are mostly felt in the civil law area. The National Conference of Commissioners said that such collateral consequences of criminal pleas arise "largely outside of the criminal justice system" and that "[c]ourt decisions have not treated them as criminal punishment, but mere civil regulation." NAT'L CONF. OF COMM'RS ON UNIFORM STATE LAWS, UNIFORM COLLATERAL CONSEQUENCES OF CONVICTION ACT 3 (2010), https://www.uniformlaws.org/viewdocument/final-act-with-comments-11?CommunityKey=74d9914f-f15e-49aa-a5b0-f15f6e5f258a&tab=librarydocuments (citing Gabriel J. Chin, *Are Collateral Sanctions Premised on Conduct or Conviction?: The Case of Abortion Doctors*, 30 FORDHAM URB. L.J. 1685, 1686 n. 10 (2003)). See Michael O'Hear, *Mass Incarceration: The Fiscal and Social Costs*, WIS. L. (June 1, 2018), https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=91& Issue=6&ArticleID=26397, for general collateral consequences, and the fiscal costs of such consequences.

[145] Elizabeth Tobin Tyler & Bradley Brockmann, *Returning Home: Incarceration, Reentry, Stigma and the Perpetuation of Racial and Socioeconomic Health Inequity*, 45 J. L. MED. & ETHICS 545, 550–52

of labeling[146] those who do not conform to ordinary behavior and ordinary norms[147] as the "deviant other."[148] Labeling an individual as an offender or mentally ill can cause the individual to "internalize the negative expectations and social practices that majoritarian society identifies as characteristically endemic to the labeled group."[149] Like crime, mental illness is seen as a form of deviance, as their behavior diverges from the expectations and experiences of the rest of society.[150] With harsh implications, mentally disordered offenders are doubly labeled as both a criminal offender and as being mentally ill.[151]

C. If Mental Illness is Rarely a Direct Cause of Crime, What Does this Mean for the Criminalization and Transinstitutionalization Hypotheses?

Prins makes a compelling argument that the criminalization and transinstitutionalization hypotheses are too simplistic and reductionist.[152] Under this argument, increasing institutionalization and increasing the number of

(2017); Craig Hemmens et al., *The Consequences of Official Labels: An Examination of the Rights Lost by the Mentally Ill and Mentally Incompetent Ten Years Later*, 38 CMTY. MENTAL HEALTH J. 129, 138 (2002); Velmer S. Burton, *The Consequences of Official Labels: A Research Note on Rights Lost by the Mentally Ill, Mentally Incompetent, and Convicted Felons*, 26 CMTY. MENTAL HEALTH J. 267, 267 (1990); J. McGregor Smyth, Jr., *From Arrest to Reintegration: A Model for Mitigating Collateral Consequences of Criminal Proceedings*, 24 CRIM. JUST. 42, 42, 54 (2009); Wendy Pogorzelski et al., *Behavioral Health Problems, Ex-Offender Reentry Policies, and the "Second Chance Act"*, 95 AM. J. PUB. HEALTH 1718, 1718 (2005); HUM. RTS. WATCH, NO SECOND CHANCE: PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING 1 (2004), https://www.hrw.org/reports/2004/usa1104/usa1104.pdf; Antonio Cobos, *Healthcare Licensing And Credentialing: Foreseeability Of Upstream And Downstream Collateral Consequences*, 14 TEX. TECH. ADMIN. L.J. 57, 74 (2012) (citing *Padilla v. Kentucky*, 130 S. Ct. 1473, 1487–88 (Alito, J., concurring)); Evelyn Malave, *Prison Health Care After The Affordable Care Act: Envisioning An End To The Policy Of Neglect*, 89 N.Y.U. L. REV. 700, 712 (2014); Aastha Uprety, *How Criminal Background Checks Can Prevent People With Disabilities from Finding Stable Housing*, EQUAL RTS. CTR. (Sept. 19, 2019), https://equalrightscenter.org/criminal-record-disability-housing/; Robin Selwitz, *Obstacles to employment for returning citizens in D.C.*, D.C. POL'Y CTR. (Aug. 17, 2018) https://www.dcpolicycenter.org/publications/barriers-to-employment-for-returning-citizens-in-d-c/; Melissa Li, *From prisons to communities: Confronting re-entry challenges and social inequality*, AM. PSYCH. ASS'N: THE SES INDICATOR (Mar. 2018), https://www.apa.org/pi/ses/resources/indicator/2018/03/prisons-to-communities.

[146] Bruce G. Link et al., *The Effectiveness of Stigma Coping Orientations: Can Negative Consequences of Mental Illness Labeling be Avoided?*, 32 J. HEALTH & SOC. BEHAV. 302, 302 (1992); Bard, *supra* note 114, at 1, 25.

[147] THOMAS J. SCHEFF, BEING MENTALLY ILL: A SOCIOLOGICAL THEORY 45, 54 (Aldine de Gruyter ed., 3d ed. 1966).

[148] PAUL ROOT WOLPE, EXPLAINING SOCIAL DEVIANCE 93 (The Teaching Company 1994); *see* Appleman, *supra* note 30.

[149] MICHAEL L. PERLIN, THE JURISPRUDENCE OF THE INSANITY DEFENSE 422 (Carolina Acad. Press 1994).

[150] Bard, *supra* note 114, at 1, 25.

[151] H. Richard Lamb et al., *The Police and Mental Health*, 53 PSYCHIATRIC SERVS. 1266, 1266–67, 1269 (2002).

[152] *See* Seth J. Prins, *Does Transinstitutionalization Explain the Overrepresentation of People with Serious Mental Illnesses in the Criminal Justice System?*, 47 CMTY. MENTAL HEALTH J. 716, 716, 720 (2011).

psychiatric beds and access to mental healthcare will have a minimal effect on the number of persons with mental illnesses in the criminal justice system. A more nuanced approach is required, otherwise we are wasting expensive resources that should instead be put into community-based treatment and invested in education, poverty alleviation, employment, housing, and other social programs that would be more effective.[153] Prins believes that other factors are at play may explain the disproportionate representation in areas such as high arrest rates, lack of housing, and underfunded community treatment.[154]

D. Interventions & Reforms Thus Far

Most interventions in this debate have failed to work when we consider the disproportionate representation of persons with mental illnesses in our jails and prisons.[155] When we consider the driving force of most of these new interventions (such as police diversion programs, transition planning, specialized probation and parole, and mental health courts) are the criminalization and transinstitutionalization hypotheses, perhaps our underlying understandings of this problem are not as solid as some believe.

Intervention programs usually focus solely on mental illness symptoms and treatment, but these programs have been proven to be ineffective at reducing recidivism.[156] To be effective at recidivism reduction, these interventions need to be more comprehensive, addressing not only mental health treatment, but also the true underlying causes of crime including poverty and other socioeconomic forces.[157] These programs should require cooperation between criminal justice, medical, and social services' actors. "While these programs are expensive, they will ultimately save costs."[158] One such comprehensive reentry program in Maryland that brought about a "5.6% drop in arrest rates resulted in a savings of $7.2 million for the state. A cost-benefit analysis showed . . . [a] state . . . return of $3 for every $1 spent on the program."[159]

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[153] *Id.*

[154] *Id.* at 717. The same can be said for the higher incarceration rates of other minority groups such as persons of color and Native Americans. Devah Pager et al., *Sequencing Disadvantage: Barriers to Employment Facing Young Black and White Men with Criminal Records*, 623 ANNALS AM. ACAD. POL. & SOC. SCI. 195, 197, 199 (2009); U.S. COMM'N ON C.R., BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS 44 (2018), https://www.usccr.gov/pubs/2018/12-20-Broken-Promises.pdf.

[155] Prins, *supra* note 152, at 717.

[156] Peterson & Heinz, *supra* note 132, at 558–59.

[157] *Id.* at 558, 560.

[158] *Id.* at 562.

[159] *Id.* at 562–63 (citing JOHN ROMAN ET AL., IMPACT AND COST-BENEFIT ANALYSIS OF THE MARYLAND REENTRY PARTNERSHIP INITIATIVE 18 (Urb. Inst. Just. Pol'y Ctr. ed., 2007)).

V. The Disproportionate Effects of the Criminal Justice System on Mentally Ill Individuals

A. Policing and Arrests of Mentally Ill Persons

One way that the government exhibits its social control over this vulnerable population, in addition to prisons, jails, asylums, and labeling, is through the police arresting persons with mental illnesses. In fact, mentally ill persons are seven times more likely to be arrested than their able-bodied counterparts.[160] One study has shown 42-50% of persons with mental illnesses will be arrested in their lifetime.[161] And, another study found that persons with mental illnesses are 20% more likely to be arrested than persons without a mental illness.[162] These individuals' initial arrests will be recorded and "may influence the actions of the police in subsequent encounters with the individual and reinforce the tendency to choose the criminal justice system over the mental health system. The mentally ill person has now been criminalized."[163] Their arrest and the conviction that may follow will have lasting effects on their life and livelihood, partly due to the collateral consequences that come with a conviction.[164] It is also worth noting, as Myers explains, that "people with severe mental illness are at least sixteen times more likely to be killed during a police encounter than other individuals."[165] Even more striking, it is estimated that between a third and a half of persons killed by police have a mental illness.[166] This is most likely due to the disproportionately high arrest

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[160] Carly A. Myers, Note, *Police Violence Against People with Mental Disabilities: The Immutable Duty Under the ADA to Reasonably Accommodate During Arrest*, 70 VAND. L. REV. 1393, 1395 (2017).

[161] Jennifer Fischer, *The Americans with Disabilities Act: Correcting Discrimination of Persons with Mental Disabilities in the Arrest, Post-Arrest, and Pretrial Processes*, 23 L. & INEQ. 157, 165 (2005).

[162] Linda A. Teplin, *Criminalizing Mental Disorder: The Comparative Arrest Rate of the Mentally Ill*, 39 AM. PSYCH. 794, 798 (1984).

[163] H. Richard Lamb & Linda E. Weinberger, *The Shift of Psychiatric Inpatient Care from Hospitals to Jails and Prisons*, 33 J. AM. ACAD. PSYCHIATRY & L. 529, 531 (2005).

[164] U.S. COMM'N ON C.R., COLLATERAL CONSEQUENCES: THE CROSSROADS OF PUNISHMENT, REDEMPTION, AND THE EFFECTS ON COMMUNITIES 22–23, 77 (2019), https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf.

[165] Myers, *supra* note 160.

[166] See City & County of San Francisco v. Sheehan, 135 S. Ct. 1765, 1771 (2015); Hainze v. Richards, 207 F.3d 795, 797 (5th Cir. 2000); Gohier v. Enright, 186 F.3d 1216, 1218 (10th Cir. 1999), for legal cases where a person with a disability was critically injured or fatally killed by the police. *See* DAVID M. PERRY & LAWRENCE CARTER-LONG, THE RUDERMAN WHITE PAPER ON MEDIA COVERAGE OF LAW ENFORCEMENT USE OF FORCE AND DISABILITY 1 (2016), https://rudermanfoundation.org/wp-content/uploads/2017/08/MediaStudy-PoliceDisability_final-final.pdf; Eric Lichtblau, *Justice Department Will Track Use of Force by Police Across the Nation*, N.Y. Times (Oct. 14, 2016), https://www.nytimes.com/2016/10/14/us/justice-department-track-police-shooting-use-force.html; Alex Emslie & Rachael Bale, *More Than Half of Those Killed by San Francisco Police Are Mentally Ill*, KQED (Sept. 30, 2014), https://www.kqed.org/news/147854/half-of-those-killed-by-san-francisco-police-are-mentally-ill. While these media estimates are helpful, reliable governmental data on the death rates of persons with mental illnesses by police is not forthcoming. This is due to the fact that the Death in Custody

rates and poor police procedures[167] and training[168] in dealing with the mentally ill. Often, the police misunderstand the symptomatic behavior of persons with mental illnesses and then, misinterpret these behaviors as aggression.[169]

In regard to reasonable accommodations, unfortunately the United States Supreme Court in *City & County of San Francisco v. Sheehan*[170] refused to establish a test to ascertain when police can and should put in place reasonable accommodations under the ADA during an arrest situation. The circuit courts are currently split on this issue,[171] necessitating Supreme Court clarification at some point in the future.[172] In response to this divide, Levin, in his role as academic, proposes a new practical test which she calls a "sliding scale test." Under this test, the police would be obliged to provide increased accommodations to persons with *all* disabilities, which would include persons with mental illness, as a situation becomes more secure and less dangerous.[173]

The 9th Circuit, in *Vos v. City of Newport Beach*, recently extended the applicability of the Title II reasonable accommodation requirement of the ADA to situations of police shootings and wrongful death.[174] The court was clear in pointing out the need to first recognize mental illnesses, and second, accommodate for mental illnesses during a situation where the mentally ill person (in this case schizophrenia) is clearly suffering from a psychotic

Reporting Act does not require police to record the disability status of victims. *See* Taylor Pugliese, Note, *Dangerous Intersection: Protecting People with Mental Disabilities from Police Brutality During Arrests Using the Americans with Disabilities Act*, 46 Hofstra L. Rev. 765, 767–68 (2017).

[167] *See* Fischer, *supra* note 161, at 169–72; *see also* Michael Avery, *Unreasonable Seizures of Unreasonable People: Defining the Totality of Circumstances Relevant to Assessing the Police Use of Force Against Emotionally Disturbed People*, 34 COLUM. HUM. RTS. L. REV. 261, 264–65 (2003).

[168] Lamb et al., *supra* note 151, at 1269; Judy Hails & Randy Borum, *Police Training and Specialized Approaches for Responding to People with Mental Illness*, 49 CRIME & DELINQ. 52, 52 (2003) (calling for more widespread and detailed de-escalation training for all police officers after finding a positive response to availability of crisis intervention training); DORIS A. FULLER ET AL., TREATMENT ADVOC. CTR., OVERLOOKED IN THE UNDERCOUNTED: THE ROLE OF MENTAL ILLNESS IN FATAL LAW ENFORCEMENT ENCOUNTERS 1 (2015), https://www.treatmentadvocacycenter.org/storage/documents/overlooked-in-the-undercounted.pdf; PAMILA LEW ET AL., CAL. MENTAL HEALTH SERVS. AUTH., AN OUNCE OF PREVENTION: LAW ENFORCEMENT TRAINING AND MENTAL HEALTH CRISIS INTERVENTION 11 (2014), http://www.disabilityrightsca.org/pubs/CM5101.pdf.

[169] Harold Braswell, *Why do police keep seeing a person's disability as a provocation?*, WASH. POST (Aug. 25, 2014), https://www.washingtonpost.com/posteverything/wp/2014/08/25/people-with-mental-disabilities-get-the-worst-and-least-recognized-treatment-from-police/.

[170] *See* City & Cnty. of San Francisco v. Sheehan, 135 S.Ct. 1765, 1775 (2015).

[171] *See* Paras V. Shah, *A Use of Deadly Force: People with Mental Health Conditions and Encounters with Law Enforcement*, 32 HARV. HUM. RTS. J. 208, 212–13 (2019) (discussing circuit split).

[172] *See id.* at 212.

[173] Robyn Levin, *Responsiveness to Difference: ADA Accommodations in the Course of an Arrest*, 69 STAN. L. REV. 269, 299 (2017).

[174] Vos v. City of Newport Beach, 892 F.3d 1024, 1037 (9th Cir. 2018).

break.[175] Because Vos was acting in an aggressive manner, the court held that the fatal shooting was not unlawful due to the qualified immunity of the officers.[176] Importantly, the court noted that police knowledge of a suspect's mental illness might reduce the need for deadly force.[177] It also stated that a reasonable accommodation of specialized help should be used when a suspect's mental illness is at issue, such as de-escalation tactics.[178]

Along with the higher arrest rates, approximately 10% of police calls involve someone with a mental illness.[179] Finally, certain police misconceptions about persons with mental illnesses, including the myth of dangerousness, can also be blamed for the high arrest rates of mentally ill persons.[180] It is worth acknowledging that the police are often misinformed, and are therefore unable to recognize that a member of the public who they are interacting with, has a mental illness.[181] Draine et al. believe that one cause of the higher arrest rates of those with mental illnesses is the drastic misunderstanding by police of symptoms.[182] Meanwhile, Markowitz believes that it is not only due to police discriminatory behavior toward persons with mental illnesses, but also due to the greater likelihood of "arrest-generating behavior."[183]Additionally, there are numerous barriers inhibiting proper police response, including a lack of sufficient training to identify and accommodate mental disabilities, resource and time constraints, and the widespread misperception that "persons with a mental illness are more prone to violence."[184] Furthermore, police are more likely to patrol and enforce laws within the deprived social environments where persons with mental illnesses tend to live.[185] Another more humane and therapeutic rationale for arresting individuals with mental illnesses comes in the form of "mercy bookings" whereby police arrest an individual with a mental illness with the intention of getting them into treatment.[186]

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[175] *Id.* at 1036.

[176] *Id.* at 1035–36.

[177] *Id.* at 1034.

[178] *Id.* at 1037.

[179] Avery, *supra* note 167; Randy Borum et al., *Police Perspectives on Responding to Mentally Ill People in Crisis: Perceptions of Program Effectiveness*, 16 BEHAV. SCI. & L. 393, 393–94 (1998); FULLER ET AL., *supra* note 168.

[180] Fischer, *supra* note 161, at 171–72.

[181] Amy C. Watson et al., *Police Responses to Persons With Mental Illness: Does the Label Matter?*, 32 J. AM. ACAD. PSYCHIATRY & L. 378, 383 (2004); Draine et al., *supra* note 131, at 566; Teplin, *supra* note 162, at 799.

[182] Draine et al., *supra* note 131, at 566.

[183] Markowitz, *supra* note 93, at 50.

[184] *See* Fischer, *supra* note 161, at 172; Myers, *supra* note 160, at 1395–96.

[185] *See generally* LINDA A. TEPLIN, NAT'L INST. OF JUST. J., KEEPING THE PEACE: POLICE DISCRETION AND MENTALLY ILL PERSONS 9 (2000) (noting that law enforcement is more prevalent in areas of mental illness).

[186] *See* Markowitz, *supra* note 93, at 49.

"Police are now one of the main sources of referral of persons into mental health treatment," which, in turn, has led to an increase in mentally ill inmates in the U.S. criminal justice system.[187]

B. High Levels of Mental Illness in the Criminal Justice System

We now turn to the disproportionate rates of mental illness in the U.S. criminal justice system. The most reliable quantification of the rates of criminal justice inmates having mentally ill inmates is a study conducted by the Department of Justice's Bureau of Justice Statistics, which collected data between 2002 and 2004.[188] This study found that 56% of state prisoners, 45% of federal prisoners, and 64% of jail inmates had a recent history or symptoms of a mental illness.[189] Another, more recent, Bureau of Justice Statistics 2017 study showed that almost 15% of U.S. prisoners and over 25% of jail inmates have a serious mental illness.[190] We can see the disproportionality of prisoners who have a mental illness, when we compare the previously mentioned studies on the general U.S. population with general prevalence rates of approximately 20%. Now, there are likely three to ten times *more* individuals with serious mental illnesses in U.S. prisons than U.S. mental hospitals.[191] In fact, it has been said that "America's jails and prisons have become our new mental hospitals."[192] We should also consider the numbers associated with civil confinement. According to the Prison Policy Initiative:

> 22,000 people are involuntarily detained or committed to state psychiatric hospitals and civil commitment centers. Many of these people are not even convicted, and some are held indefinitely. 9,000 are being evaluated pre-trial or treated for incompetency to stand trial; 6,000 have been found not guilty by reason of insanity or guilty but mentally ill…[193]

It is important to note the increasing percentage of civilly committed individuals who are of a "forensic" nature. In other words, such individuals are being committed to mental institutions due to a criminal justice decision. To this end, a recent report has found that the overall national trend lines show

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[187] *See id.*

[188] DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUST. STATS., NCJ 213600, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1 (2006).

[189] *Id.*

[190] JENNIFER BRONSON & MARCUS BERZOFSKY, BUREAU OF JUST. STATS., NCJ 250612, INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS AND JAIL INMATES, 2011-12, at 1 (2017).

[191] E. FULLER TORREY ET AL., TREATMENT ADVOC. CTR., THE TREATMENT OF PERSONS WITH MENTAL ILLNESS IN PRISONS AND JAILS: A STATE SURVEY 6 (2014), https://www.treatmentadvocacycenter.org/storage/documents/treatment-behind-bars/treatment-behind-bars.pdf.

[192] TORREY ET AL., *supra* note 109, at 1.

[193] *See* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Mar. 19, 2019), https://www.prisonpolicy.org/reports/pie2019.html.

a "76 percent increase in the number of forensic patients in state hospitals from 1999 to 2014."[194]

While most commentators focus on the incarceration rates of persons with mental illnesses, it is also worth considering the broader footprint of the criminal justice system that impacts this vulnerable population in the form of criminal justice supervision through probation and parole. In terms of the broader criminal justice system, incorporating those on parole and probation in addition to prison and jail inmates, there are approximately 6,613,500 people under the control of the criminal justice system at the end of 2016.[195] An older study in 2009 estimated that the "number of people under correctional supervision in the USA recently reached an all-time high of 7.3 million."[196] In terms of a broader analysis of the complete criminal justice footprint, 26.6% of probationers in one study reported having some mental illness.[197] During a congressional debate on persons with mental illnesses in the criminal justice system, one congressman estimated that "[o]n any given day, at least 284,000 schizophrenic and manic depressive individuals are incarcerated, and 547,800 are on probation."[198] Furthermore, "a meta-analysis of 62 studies suggests that 14% of offenders suffer from a major mental illness. If so, then there are over one million individuals with mental illness in the USA in jail, in prison, on probation, or on parole." [199]

C. Reasons for the High Number of Mentally Ill Individuals in the Criminal Justice System

The underlying issues surrounding the disproportionate representation of persons with mental illnesses in U.S. prisons and jails are not amenable to simple explanations.[200] The previously discussed theories of criminalization and deinstitutionalization err on the side of being too simplistic and mask the more complex, underlying causes of the imprisonment of persons with mental illnesses. As explained above, certain criminogenic factors can help explain why there are such high numbers of persons with mental illnesses involved in the criminal justice system. These include poor education,[201]

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[194] *See* Amanda Wik et al., *Forensic Patients In State Psychiatric Hospitals: 1999–201*6, 25 CNS SPECTRUMS 196, 199 (2020).

[195] DANIELLE KAEBLE & MARY COWHIG, BUREAU OF JUST. STATS., NCJ 251211, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2016, at 1 (2018).

[196] Skeem et al., *supra* note 109, at 110.

[197] John F. Crilly et al., *Mental Health Services Use and Symptom Prevalence in a Cohort of Adults on Probation*, 60 PSYCHIATRIC SERVS. 542, 543 (2009).

[198] Bard, *supra* note 114, at 2.

[199] Skeem et al., *supra* note 109, at 110.

[200] Draine et al., *supra* note 131.

[201] Véronique Dupéré et al., *Revisiting the Link Between Depression Symptoms and High School Dropout: Timing of Exposure Matters*, 62 J. ADOLESCENT HEALTH 205, 205 (2018). See Sarah Marsh, *Number of*

university dropouts due to mental health problems trebles, THE GUARDIAN (May 23, 2017), https://www.theguardian.com/society/2017/may/23/number-university-dropouts-due-to-mental-health-problems-trebles, for similar linkages between mental illness and U.K. university drop-out rates**.** Historically, students with disabilities, including those with mental illnesses have been disciplined and sometimes refused admission to U.S. schools. Erica Bell, *Disciplinary Exclusion of Handicapped Students: An Examination of the Limitations Imposed by the Education For All Handicapped Children Act of 1975*, 51 FORDHAM L. REV. 168, 175–76 (1982). Legislation such as the Education of All Handicapped Children Act of 1975 largely brought the exclusion of those with disabilities to a halt. *Id*. at 177–78. But the school-to-prison pipeline is still a significant problem for those with mental illnesses and for students of color. Matt Leistra, *Mental Health and The School to Prison Pipeline*, SHARED JUST. (Dec. 5, 2017), http://www.sharedjustice.org/domestic-justice/2017/12/5/mental-health-and-the-school-to-prison-pipeline; Marisol Garcia, *Disrupting the School-to-Prison Pipeline*, AM. BAR ASS'N (Sept. 24, 2018), https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2018/fall-2018-disrupting-the-school-to-prison-pipeline. This problem is exacerbated if both of these discriminated labels are combined, i.e. students who are colored and also have a disability such as a mental illness. U.S. COMM'N ON C.R. TO PRESIDENT DONALD J. TRUMP BEYOND SUSPENSIONS: EXAMINING SCHOOL DISCIPLINE POLICIES AND CONNECTIONS TO THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS OF COLOR WITH DISABILITIES 4 (2019). In one instance, a twelve-year-old black student was hand-cuffed and sent to a juvenile detention center after refusing to go to class, even though he had a known mental illness along with an individualized education program. Jessica Bliss, *A Mother's Saga: School, Police, Arrests and a Son with a Mental Illness*, THE TENNESSEAN (Sept. 10, 2018), https://www.tennessean.com/story/news/2018/09/10/mental-illness-child-arrests-metro-nashville-publicschool-police-passage/1012290002. Additionally, a recent settlement occurred between the U.S. Department of Justice and Wicomico County regarding education in the Maryland county. Settlement Agreement Between the U.S. and Wicomico County Public Schools (Jan. 19, 2017) (on file with the Civil Rights Division, Educational Opportunities Section). Wicomico County was criticized for its discriminatory discipline of its students of color and students with disabilities and also for arresting its students based on behavior that was symptomatic of their mental illnesses. Tim Prudente, *Wicomico schools settle with feds after complaints of discrimination*, BALTIMORE SUN (Feb. 1, 2017), https://www.baltimoresun.com/education/bs-md-wicomico-doj-agreement-20170201-story.html. As part of the agreement, Wicomico County agreed to provide the Justice Department with up-to-date detailed data on its disciplinary actions against students. It also agreed to form a crisis intervention team in each school district and establish mental health services for all students. Settlement Agreement Between the U.S. and Wicomico County Public Schools, *supra* note 201, at 12, 35, 46. The harsh treatment of students with mental illnesses reached an all-time low according to a report by the U.S. Department of Education, which reported that a teacher, who was aware of the student's mental illness and of the student's previous attempts of suicide, proceeded to taunt the student in a crowded school hallway and told the student that s/he should kill him/herself. U.S. DEP'T OF EDUC., OFF. FOR C.R., SECURING EQUAL EDUCATION OPPORTUNITY 38 (2016), https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf. Olivia Herrington also underlines the importance of providing mental healthcare within the school setting when she states that "[s]tudents are 21 times more likely to use a school health center's mental health services than similar services offered elsewhere in a community, since they feel more comfortable when they are familiar with the setting in which they receive care." Olivia Herrington, *Out of Detention: How to Stop the School-to-Prison Pipeline*, HARV. POL. REV. (Mar. 2, 2015), https://clbb.mgh.harvard.edu/out-of-detention-how-to-stop-the-school-to-prison-pipeline. In order to take advantage of this behavior, Nancy Heitzeg explains that "[s]chools must utilize their mental health experts—school psychologists, counselors and social workers—to research and develop discipline policies and positive behavior training strategies." Nancy A. Heitzeg, F. ON PUB. POL'Y, EDUCATION OR INCARCERATION: ZERO TOLERANCE POLICIES AND THE SCHOOL TO PRISON PIPELINE 17 (2009), https://files.eric.ed.gov/fulltext/EJ870076.pdf.

unemployment,[202] unstable housing,[203] homelessness,[204] poverty,[205] addiction issues,[206] and discrimination.[207] Regarding reforms of the system, another

[202] *See* Virginia M. Mulkern & Ronald W. Manderscheid, *Characteristics of Community Support Program Clients in 1980 and 1984*, 40 HOSP. & CMTY. PSYCHIATRY 165, 165 (1989); *see also* Richard C. Baron & Mark S. Salzer, *Accounting for Unemployment Among People with Mental Illness*, 20 BEHAV. SCI. & L. 585, 585 (2002). Stable employment itself has been found to have a positive effect on certain mental illnesses. LE'ANN DURAN ET AL., COUNCIL OF STATE GOV'TS JUST. CTR., INTEGRATED REENTRY AND EMPLOYMENT STRATEGIES: REDUCING RECIDIVISM AND PROMOTING JOB READINESS 2 (2013), http://csgjusticecenter.org/wp-content/uploads/2013/09/Final.Reentry-and-Employment.pp_.pdf.

[203] E. Fuller Torrey, *250,000 mentally Ill are Homeless.140,000 seriously mentally Ill are Homeless*, MENTAL ILLNESS POL'Y ORG., https://mentalillnesspolicy.org/consequences/homeless-mentally-ill.html (last visited Oct. 27, 2020); TREATMENT ADVOC. CTR., SERIOUS MENTAL ILLNESS AND HOMELESSNESS 1 (2016), https://www.treatmentadvocacycenter.org/storage/documents/backgrounders/smi-and-homelessness.pdf; Gale Holland, *Q&A: Mental illness and homelessness are connected. But not how you might think*, L.A. TIMES (Aug. 7, 2017), https://www.latimes.com/local/la-me-mentally-ill-homeless-20170807-htmlstory.html.

[204] Ellen L. Bassuk et al., *Is Homelessness a Mental Health Problem?*, 141 AM. J. PSYCHIATRY 1546, 1546 (1984); U.S. DEP'T OF HOUS. & URB. DEV, OFF. OF CMTY. PLANNING & DEV., THE 2010 ANNUAL HOMELESSNESS ASSESSMENT REPORT TO CONGRESS 1 (2011), https://www.huduser.gov/portal/sites/default/files/pdf/2010HomelessAssessmentReport.pdf; David Michaels et al., *Homelessness and Indicators of Mental Illness Among Inmates in New York City's Correctional System*, 43 HOSP. & CMTY. PSYCHIATRY 150, 150 (1992).

[205] *Serious Mental Illness Among Adults Below the Poverty Line*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (Nov. 15, 2016), https://www.samhsa.gov/data/sites/default/files/report_2720/Spotlight-2720.html (noting that 2.5 million adults who have a mental illness live below the poverty line); Arthur J. Lurigio, *People with Serious Mental Illness in the Criminal Justice System: Causes, Consequences, and Correctives*, 91 PRISON J. 66, 72 (2011); Crick Lund et al., *Poverty and common mental disorders in low and middle income countries: A systematic review*, 71 SOC. SCI. & MED. 517, 524 (2010); MICHELLE FUNK ET AL., WORLD HEALTH ORG., MENTAL HEALTH AND DEVELOPMENT: TARGETING PEOPLE WITH MENTAL HEALTH CONDITIONS AS A VULNERABLE GROUP 23 (2010), http://www.who.int/mental_health/policy/mhtargeting/en/; BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 36 (Russell Sage Found. 2006); Bruce Western & Becky Pettit, *Incarceration & social inequality*, 139 DÆDALUS J. AM. ACAD. ARTS & SCI. 8, 8 (2010) (discussing how America's carceral system has created a new social group, in part defined by poverty); Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POL'Y INITIATIVE (July 9, 2015), www.prisonpolicy.org/reports/income.html (finding incarcerated people had a lower pre-incarceration income than non-incarcerated people); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 234 (2010) (arguing that the criminal justice system deepens and perpetuates patterns of poverty); U.S. SENT'G COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 113–134 (2004) (exploring racial, ethnic, and gender disparities in federal sentencing); Nora Groce et al., *Disability and Poverty: The need for a more nuanced understanding of implications for development policy and practice*, 32 Third World Q. 1493, 1499 (2011) (exploring the connection between mental illnesses and employment status).

[206] CHRISTOPHER J. MUMOLA & JENNIFER C. KARBERG, BUREAU OF JUST. STATS., NCJ213530, DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS, 2004 (2006) (tracking drug dependence in correctional facilities);

Keith Humphreys & Julian Rappaport, *From the Community Mental Health Movement to the War on Drugs*, 48 AM. PSYCH. 892, 895 (1993) (exploring the connection between jails and substance abuse treatment in the context of the War on Drugs); JAMES & GLAZE, *supra* note 188, at 3; KIDEUK KIM ET AL., URBAN INST., THE PROCESSING AND TREATMENT OF MENTALLY ILL PERSONS IN THE CRIMINAL JUSTICE SYSTEM: A SCAN OF PRACTICE AND BACKGROUND ANALYSIS 9–10, (2015); Theodore M. Hammett et al., *Health-Related Issues in Prisoner Reentry*, 47 CRIME & DELINQ. 390, 390 (2001); SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., SUBSTANCE USE DISORDER TREATMENT FOR PERSONS WITH CO-OCCURRING DISORDERS 170 (2020); *see generally* SARRA L. HEDDEN ET AL., SUBSTANCE ABUSE AND

commentator, has stated that "[d]iversion programs not only improve public safety and public health, but they are also consistent with the purpose of the Americans with Disabilities Act (ADA) and with the landmark decision in *Olmstead v. L.C.*"[208] Currently there is an ongoing lawsuit in New York[209] in which the plaintiffs allege that the authorities have violated the ADA's integration mandate by continuing to place them in prison after they have served

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MENTAL HEALTH SERVICES ADMINISTRATION, BEHAVIORAL HEALTH TRENDS IN THE UNITED STATES: RESULTS FROM THE 2014 NATIONAL SURVEY ON DRUG USE AND HEALTH 3 (2015) (discussing the prevalence of behavioral health disorders such as substance abuse in the United States).

[207] Vetta L. Sanders Thompson et al., *Stigmatization, Discrimination, and Mental Health: The Impact of Multiple Identity Status*, 74 AM. J. ORTHOPSYCHIATRY 529, 530 (2004); Patrick Corrigan et al., *Perceptions of Discrimination Among Persons With Serious Mental Illness*, 54 PSYCHIATRIC SERVS. 1105, 1105–06 (2003); Heather Stuart, *Mental Illness and Employment Discrimination*, 19 CURRENT OPINION PSYCHIATRY 522, 522 (2006); Lurigio, *supra* note 205; Deborah K. Padgett et al., *Housing First Services for People Who Are Homeless with Co-Occurring Serious Mental Illness and Substance Abuse*, 16 RSCH. SOC. WORK PRACTICE 74, 75 (2006); *see generally* Draine et al., *supra* note 131 (emphasizing that research on mental illness in relation to crime fails to recognize that the experience of those individuals is contextualized in disadvantaged social settings); *see* Davidson & Rosky, *supra* note 122; *see* Christopher G. Hudson, *Socioeconomic Status and Mental Illness: Tests of the Social Causation and Selection Hypotheses*, 75 AM. J. ORTHOPSYCHIATRY 3, 3 (2005). One form of discrimination includes the ban on some of the population of persons with mental illnesses to vote. U.S. COMM'N ON C.R., COLLATERAL CONSEQUENCES, *supra* note 164, at 156. Thirteen states bar voting by those who are "under guardianship" i.e. a court finding of incompetency or incapacity must be established. These thirteen states are Alabama, Arizona, Louisiana, Massachusetts, Minnesota, Missouri, Oklahoma, South Carolina, South Dakota, Tennessee, Utah, Virginia, and West Virginia. BLAZEN CTR. FOR MENTAL HEALTH L. ET AL., VOTE: IT'S YOUR RIGHT – A GUIDE TO VOTING RIGHTS OF MENTAL DISABILITIES 12 n.45 (2018). Twenty-two states and D.C. require a specific finding of lacking the capacity to vote. These states are Alaska, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Iowa, Kentucky, Maryland, Maine, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, Texas, Washington, Wisconsin, and Wyoming. *Id.* at 12–13 n.46. Four states have laws that bar voting by individuals who are "non compos mentis," although what is meant by this term varies across the states. These four states are Nebraska, Hawaii, Rhode Island, and Mississippi. *Id.* at 13 n.47. Nebraska law defines "non compos mentis" as meaning "mentally incompetent." NEB. REV. STAT. § 32-312 (2020).

Hawaii has taken the term to mean a specific incapacity to vote. HAW. REV. STAT. § 11-23(a) (2018). Under Mississippi law, the term "unsound mind" includes "persons non compos mentis." MISS. CODE ANN. § 1-3-57 (2020). While Rhode Island doesn't define what the term means, Rhode Island's state election board overturned a local election officials' decision to bar two individuals from voting based on the fact that they were found to be not guilty by reason of insanity. BLAZEN CTR. FOR MENTAL HEALTH L. ET AL., *supra* note 207, at 13 n.47 (citing David Scharfenberg, *Election Board Won't Take Away Men's Vote*, PROVIDENCE J. (May 29, 2008), http://www.projo.com/news/content/INSANE_VOTERS_05-29-08_3HAA708_v17.349e81a.html). Seven states use outdated and insulting terms such as "idiots," "insane persons," and "of unsound mind" to determine who is barred from voting based on incompetency. The states whose laws use such terms are Alaska, Arizona, Kentucky, Minnesota, Mississippi, Montana, and Ohio. These laws are rarely enforced as they are very difficult to understand and apply. BLAZEN CTR. FOR MENTAL HEALTH L. ET AL., *supra* note 207, at 13 n.48. A similar ban, that is more widespread restriction on voting rights, applies to felons across the United States. Christopher Uggen & Jeff Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 AM. SOCIO. REV. 777, 781 (2002).

[208] SARAH LIEBOWITZ ET AL., ACLU, A WAY FORWARD: DIVERTING PEOPLE WITH MENTAL ILLNESS FROM INHUMANE AND EXPENSIVE JAILS INTO COMMUNITY-BASED TREATMENT THAT WORKS 2 (2014).

[209] *See* Ashley Southall, *Mentally Ill Prisoners Are Held Past Release Dates, Lawsuit Claims*, N.Y. TIMES (Jan. 23, 2019), https://www.nytimes.com/2019/01/23/nyregion/prisoners-mentally-ill-la wsuit.html.

their respective prison sentences and are only being held in prison because of the lack of mental health housing programs in the community.[210]

In this regard, we must contextualize the imprisonment of persons with mental illnesses within their socially disadvantaged background.[211] When we look at the so-called 'central eight' criminogenic factors that explain criminal behavior risk of all offenders, those with mental illnesses often experience these factors too, at minimum, the same, or most often to a greater, degree than those offenders who do not have a mental illness. These central eight risk factors are: (1) history of antisocial behavior; (2) antisocial personality pattern; (3) antisocial cognition; (4) antisocial associates;[212] (5) troubled

[210] *See* Class Action Complaint, M.G. v. Cuomo, No. 7:19-cv-006393-CS (S.D.N.Y. Jan. 23, 2019).

[211] *See* Draine et al., *supra* note 131.

[212] For example, some authors believe that imprisonment can act as a breeding ground for future criminal behavior. Here, the individual who is incarcerated is exposed to a network of offenders who they may not have met outside of prison and may conspire to commit crime outside the prison walls. Clemmer calls this the "prisonization" of inmates. *See* DONALD CLEMMER, THE PRISON COMMUNITY 299 (1958).

See generally Heather M. Harris et al., *Do Cellmates Matter? A Causal Test of the Schools of Crime Hypothesis with Implications for Differential Association and Deterrence Theories*, 56 CRIMINOLOGY: INTERDISC. J. 87, 87 (2018) (finding that prison peer effects in French prisons are null or deterrent rather than criminogenic); AURÉLIE OUSS, PRISON AS A SCHOOL OF CRIME: EVIDENCE FROM CELL-LEVEL INTERACTIONS 1 (2011) (studying impact of cellmate interaction on probability of type of crime committed post-release); Shaankar Vedantam, *When Crime Pays: Prison Can Teach Some To Be Better Criminals*, NPR (Feb. 1, 2013), https://www.npr.org/2013/02/01/169732840/when- crime-pays-prison-can-teach-some-to-be-better-criminals (reporting on a study that shows average illegal earnings go up in individuals who have spent time in prison); Avinash Singh Bhati & Alex R. Piquero, *Estimating the Impact of Incarceration on Subsequent Offending Trajectories: Deterrent, Criminogenic, or Null Effect?*, 98 J. CRIM. L. & CRIMINOLOGY 207, 215–16 (2007) (discussing sometimes divergent effects of prison peer education on illegal activities and likelihood of committing crime); DON STEMEN, VERA INST. OF JUST., THE PRISON PARADOX: MORE INCARCERATION WILL NOT MAKE US SAFER 5 (2017), https://www.vera.org/publications/for-the-record- prison-paradox-incarceration-not-safer (arguing that increasing prison populations will not lower crime rates and may increase crime rates in certain communities); Francis T. Cullen et al., *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48, 58 (2011) (finding that incarceration does not lower chances of recidivism); Anna Aizer & Joseph J. Doyle, Jr., *Juvenile Incarceration, Human Capital and Future Crime: Evidence from Randomly-Assigned Judges*, 130 Q.J. ECON. 759, 799–800 (2015) (discussing the impact of incarceration on juveniles as one that increases probability of committing crimes as an adult); Melanie Reid, *The Culture of Mass Incarceration: Why "Locking Them Up and Throwing Away the Key" Isn't a Humane or Workable Solution for Society, and How Prison Conditions and Diet can be Improved*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 251, 254–55 (2015) (arguing that the culture of mass incarceration does not provide opportunities for prisoners in different situations to improve their outcomes post-release); John Gleissner, *Some Reasons Why Incarceration Does Not Work Very Well*, JOBSDOMAIN (Sept. 3, 2020), http://jobsdomain.org/some-reasons-why-incarceration-does-not-work-very-well-2/ ("Instead of making people less prone to commit crimes, prisons increase the likelihood that convicts will commit more crimes upon the completion of their sentences."); Brittany Thiessen, *Provide More Assistance and Support to Ex-Offenders*, CHANGE.ORG, https://www.change.org/p/provide-more-assistance-and-support-to-exoffenders (last visited Nov. 1, 2020) (noting that prisoners "often leave with more knowledge about avoiding detection after committing a criminal act"); CHARLES DAOUST, JUST. ACTION, THE PARADOX IN INCARCERATION AND CRIME 18–19 (2008), http://www.justiceaction.org.au/images/stories/CmpgnPDFs/prisonscausecrime.pdf ("[F]urther criminal contects may be developed."); David Harding, *Do Prisons Make Us Safer?*, SCI. AM. (June 21, 2019), https://www.scientificamerican.com/article/do-prisons-make-us-safer/ ("[P]risoners may learn from other prisoners how to be better criminals."); Donald Clemmer, *Observations on Imprisonment as a Source of Criminality*, 41 J. CRIM. L. &

CRIMINOLOGY 311, 316–17 (1950) (noting the "criminalistic ideology in the prison community"); Lynne Vieraitis et al., *The Criminogenic Effects of Imprisonment*, 6 CRIMINOLOGY & PUB. POL'Y 589, 593 (2007) (noting that prison "may provide inmates with an education in crime"); JOHN SCHMITT & KRIS WARNER, CTR. FOR ECON. & POL'Y RSCH., EX-OFFENDERS AND THE LABOR MARKET 8 (2010), ttp://cepr.net/documents/publications/ex-offenders-2010-11.pdf (noting inmates are provided with "new social networks that make criminal activity more likely); PAUL GENDREAU ET AL., THE EFFECTS OF PRISON SENTENCES ON RECIDIVISM 4–5 (1999), https://www.prisonpolicy.org/scans/gendreau.pdf (discussing the belief that prisons are "schools of crime"); Allison Schrager, *In America, Mass Incarceration Has Caused More Crime Than It's Prevented*, QUARTZ (July 22, 2015), https://qz.com/458675/in-america-mass-incarceration-has-caused-more-crime-than-its-prevented/ (noting the risk that small offenders can become career criminals due to extended time in prison); *see* JEFF SMITH, MR. SMITH GOES TO PRISON: WHAT MY YEAR BEHIND BARS TAUGHT ME ABOUT AMERICA'S PRISON CRISIS 131, 241 (2015) (noting "the prison system is practically designed to encourage the terrible outcomes we get," such as recidivism); J. ROBERT LILLY ET AL., CRIMINOLOGICAL THEORY: CONTEXT AND CONSEQUENCES 140 (7th ed. 1995) (describing prisons as a breeding ground for crime); Dorothy R. Jaman et al., *Parole Outcome As A Function of Time Served*, 12 BRITISH J. CRIMINOLOGY 5, 6–7, 26, 30 (1972) (theorizing that shorter prison sentences are more effective because the longer an individual is in prison, the more likely he or she is to "acquire the attitudes and values that characterize the prison culture"); Eric Schlosser, *The Prison-Industrial Complex*, THE ATLANTIC (Dec. 1998), https://www.theatlantic.com/magazine/archive/1998/12/the-prison-industrial-complex/304669/ ("[P]risons can be 'factories for crime.'"); Nigel Walker, *The unwanted effects of long-term imprisonment*, *in* PROBLEMS OF LONG-TERM IMPRISONMENT 196 (Anthony E. Bottoms & Roy Light eds., 1987); Peter J. Carrington, *Crime and Social Network Analysis*, *in* THE SAGE HANDBOOK OF SOCIAL NETWORK ANALYSIS 240 (John Scott & Peter J. Carrington eds., 2014); Joanna M. Weill, Incarceration and Social Networks: Understanding the Relationships That Support Reentry 103 (Dec. 2016) (Ph. D. dissertation, University of California Santa Cruz) (on file with the California Digital Library, University of California) (noting that formerly incarcerated persons are more likely to have a network of formerly incarcerated individuals). However, it should be noted that this "school of crime" hypothesis is questionable and largely unsubstantiated by empirical data. For example, in a Swedish study of 3810 prisoners, only two percent of the study's participants subsequently committed a crime with a former inmate they knew from prison. *See* Lena Roxell, *Co-Offending Among Prison Inmates*, 91 PRISON J. 366, 375 (2011); *see also* Stanton E. Samenow, *Do Prisons Really Make Offenders Worse?*, PSYCH. TODAY (Apr. 9, 2011), https://www.psychologytoday.com/us/blog/inside-the-criminal-mind/201104/do-prisons-really-make-offenders-worse**;** STEPHEN FARRALL & ADAM CALVERLEY, UNDERSTANDING DESISTANCE FROM CRIME 75–77 (2005); Albert J. Reiss, Jr. & David P. Farrington, *Advancing Knowledge About Co-offending: Results from A Prospective Longitudinal Survey of London Males*, 82 J. CRIM. L. & CRIMINOLOGY 360, 393–94 (1991). Having said that, there is some support for the argument that prisons are a breeding ground for radicalization and terrorist crimes. COUNCIL OF EUROPE, PRISON: A BREEDING GROUND FOR RADICALISATION AND VIOLENT EXTREMISM? 21 (2018). More generally, it is well documented that positive social bonds are essential for reducing crime, reducing recidivism and improving mental health. *See* Jennifer E. Cobbina et al., *Men, Women, and Postrelease Offending: An Examination of the Nature of the Link Between Relational Ties and Recidivism*, 58 CRIME & DELINQ. 331, 347 (2012); *see also* Derek A. Kreager et al., *Toward a Criminology of Inmate Networks*, 33 JUST. Q. 1000, 1009 (2016). *Cf.* Warren Dennis, *Prisons as Schools of Crime - a Myth Debunked?*, 2 BRITISH J. FORENSIC PRAC. 19, 21–22 (2000).

family and marital relationships;[213] (6) problems with school and/or work; (7) leisure and/or recreation problems; and (8) substance abuse.[214] These central eight risk factors can act as an indirect link between criminal behavior and mental illness, rather than mental illness symptoms directly causing crimes, which occurs in much fewer crimes.[215] Mental illness, in some cases, has acted as an aggravating circumstance at trial, rather than a mitigating factor, contributing to the disproportionate numbers of prisoners with mental illness.[216] In fact, a study found longer sentences were given if a defendant had a mental illness.[217] Similarly, in regards to forensic psychiatric institutionalization, insanity acquittees have been found to spend almost double the amount of time in confinement, i.e., longer time spent in psychiatric hospitals, rather than prison.[218] One of the more concerning potential causes of the

[213] There is an increased likelihood of poor mental health if that individual has had a parent spend time in prison. JOSEPH MURRAY ET AL., CAMPBELL SYSTEMATIC REVS., EFFECTS OF PARENTAL IMPRISONMENT ON CHILD ANTISOCIAL BEHAVIORS AND MENTAL HEALTH: A SYSTEMATIC REVIEW 57 (2009); TODD R. CLEAR ET AL., U.S. DEP'T OF JUST., PREDICTING CRIME THROUGH INCARCERATION: THE IMPACT OF RATES OF PRISON CYCLING ON RATES OF CRIME IN COMMUNITIES 11–12 (2014); Lauren Aaron & Danielle H. Dallaire, *Parental Incarceration and Multiple Risk Experiences: Effects on Family Dynamics and Children's Delinquency*, 39 J. YOUTH & ADOLESCENCE 1471, 1472 (2010) (describing how children with incarcerated parents are at a higher risk for mental illness and often experience troubled family relationships); Stewart Gabel & Richard Shindlebecker, *Characteristics of Children Whose Parents Have Been Incarcerated*, 44 HOSP. & CMTY. PSYCHIATRY 656, 656–57 (1993) (describing how children with incarcerated parents are significantly more likely to experience family dysfunction and parental substance abuse).

[214] *See* D.A. Andrews et al., *The Recent Past and Near Future of Risk and/or Need Assessment*, 52 CRIME & DELINQ. 7, 11 (2006)*; see also* James Bonta et al., *The Prediction of Criminal and Violent Recidivism Among Mentally Disordered Offenders: A Meta-Analysis*, 123 PSYCHOL. BULL. 123, 124 (1998) (describing how "age, criminal history, anti-social peers, and substance abuse" can be "predictors for criminal conduct"); Arthur J. Lurigio, *Examining Prevailing Beliefs About People with Serious Mental Illness in the Criminal Justice System*, *in* 75 FED. PROB. J. (2011) (describing how homelessness, crime, undereducation, and unemployment exert pressures on people with serious mental illness (PSMI) to become engaged in criminal behavior); Junginger et al., *supra* note 135 (indicating that substance abuse was a more likely causal factor for criminal offending than mental illness); Hudson, *supra* note 207, at 16 (describing how the poorer one's socioeconomic conditions are, the higher one's risk is for mental disability and psychiatric hospitalization).

[215] *See* Peterson & Heinz, *supra* note 132, at 547 (describing how symptoms of mental illness only cause crime in a small minority of cases).

[216] *See* Michael L. Perlin & Keri K. Gould, *Rashomon and the Criminal Law: Mental Disability and the Federal Sentencing Guidelines*, 22 AM. J. CRIM. L. 431, 433–35 (1995).

[217] Davidson & Rosky, *supra* note 122, at 374 (finding that males with mental illness reported longer sentences than non-mentally ill men); Mirko Bagaric, *A Rational (Unapologetically Pragmatic) Approach to Dealing with the Irrational - The Sentencing of Offenders with Mental Disorders*, 29 HARV. HUM. RTS. J. 1, 6 (2016) ("[M]entally ill offenders are, in fact, sentenced more harshly than other offenders."); Victoria Harris & Christos Dagadakis, *Length of incarceration: Was there parity for mentally ill offenders?*, 27 INT'L J. L. & PSYCHIATRY 387, 391 (2004) (finding that mentally ill offenders were incarcerated for a longer period of time for felony crimes).

[218] Joseph H. Rodriguez et al., *The Insanity Defense Under Siege: Legislative Assaults and Legal Rejoinders*, 14 RUTGERS L.J. 397, 403–04 (1983) (describing how defendants with mental illness spend more time in confinement than other criminal defendants); *see also* Grant T. Harris et al., *Length of Detention in Matched Groups of Insanity Acquittees and Convicted Offenders*, 14 INT'L J. L. & PSYCHIATRY 223, 234 (1991) ("[I]nsanity acquittees stayed locked up significantly longer than did their convicted

high rates of imprisoning persons with mental illnesses is that persons with mental illnesses are more vulnerable to false confessions, wrongful arrest,[219] and wrongful convictions.[220] These trends may be partly attributable to the poor representation of these clients by counsel.[221] It may also be caused by the inability of some persons with mental illnesses to assist their own lawyers in establishing a defense to the criminal charge and their inadequate understanding of police questioning, court procedures and plea deals.[222]

VI. Prison Conditions and Legal Ramifications Affecting Mentally Ill Prisoners

Dostoyevsky once alleged that "the degree of civilization of a country can be judged by entering its prisons."[223] Unfortunately, our current U.S. society would be deemed quite uncivilized if assessed by the way it treats its prisoners, and in particular by the way it treats its prisoners who have mental illnesses. When a person is convicted and has a mental illness that does not rise to the level of criminal insanity, they are sent to prison.[224] However, despite the partial reluctant move back towards a rehabilitative prison system, today's prisons are particularly dangerous for inmates who have a mental illness. Often, the prison environment exacerbates the inmate's mental illness and the symptoms for those with pre-existing mental illnesses.[225] The prison environment can also lead to the development of new mental illnesses for those with underlying genetic vulnerabilities.[226] Mentally ill inmates are more likely to be sent to solitary confinement, which has catastrophic consequences for their mental health[227] due to the heightened likelihood of these

counterparts.").

[219] *See, e.g.*, Rachel E. Brodin, *Remedying a Particularized Form of Descrimination: Why Disabled Plaintiffs Can and Should Bring Claims for Police Misconduct Under the Americans with Disabilities Act*, 154 U. PA. L. REV. 157, 162–63 (2005) (describing a wrongful arrest based on a person's mental illness).

[220] Allison D. Redlich, *Mental Illness, Police Interrogations, and the Potential for False Confessions*, 55 PSYCHIATRIC SERVS. 19, 19 (2004).

[221] Michael L. Perlin, *The Insanity Defense: Nine Myths That Will Not Go Away*, *in* THE INSANITY DEFENSE: MULTIDISCIPLINARY VIEWS ON ITS HISTORY, TRENDS, AND CONTROVERSIES 15–16 (Mark D. White ed., 2016); Michael L. Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 L. & HUM. BEHAV. 39, 43 (1992).

[222] Peterson & Heinz, *supra* note 132, at 550.

[223] Ilya Vinitsky, *Dostoyevsky Misprisioned: "The House of the Dead" and American Prison Literature*, L.A. REV. OF BOOKS (Dec. 23, 2019), https://lareviewofbooks.org/article/dostoyevsky-misprisioned-the-house-of-the-dead-and-american-prison-literature/.

[224] *See* Stephen Lally, *Drawing a Clear Line Between Criminals and the Criminally Insane*, WASH. POST (Nov. 23, 1997), https://www.washingtonpost.com/wp-srv/local/longterm/aron/expert1123.htm.

[225] Peterson & Heinz, *supra* note 132, at 551; SLATE ET AL., *supra* note 18, at 7; Liat Ben-Moshe, *Prisons as the "New Asylums,"* asylum, Winter 2014, at 17; John J. Gibbons & Nicholas Katzenbach, *Confronting Confinement: A Report of the Commission on Safety and Abuse in America's Prisons*, 22 WASH. U. J. L. & POL'Y 385, 472 (2006).

[226] Mark J. Heyrman, *Mental Illness in Prisons and Jails*, 7 U. CHI. L. SCH. ROUNDTABLE 113, 116 (2000).

[227] Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A*

inmates being disciplined in prison.[228] These factors, in addition to the facts that they are disproportionately sexually[229] and physically abused by other prisoners and correctional officers,[230] overcrowding,[231] the stressful nature of prison,[232] and that they receive inadequate or no mental healthcare while incarcerated,[233] mean that inmates with mental illnesses are at "a very high risk of harm and death" while incarcerated.[234] Not only is the lack of healthcare and the placement of people with mental illnesses in prisons unfair, "confinement without treatment is against society's interest, because a large number of prisoners are eventually released and returned to society."[235] Studies have shown that ex-prisoners who have a mental illness are "significantly more likely to fail the terms of their probation and parole" and "around twice as likely to have their parole suspended."[236] Part of this problem is their poor treatment in prison, but also the additional technical requirements that parolees and probationers with mental illnesses often have attached to their probation or parole, such as the requirement to remain on medication or attend certain types of treatment.[237]

Despite the widespread calls for decarceration of persons with mental illnesses, there is a small subpopulation of persons with mental illnesses that are undeterrable and that subpopulation of individuals should be confined, just in a much more humane way than the current prison confinement method.[238]

VII. Public Perceptions About Mentally Ill Persons

The social and criminal justice mistreatment of persons with mental illnesses is largely caused by societal myths[239] surrounding those with mental

Challenge for Medical Ethics, 38 J. AM. ACAD. PSYCHIATRY & L. 104, 104–05 (2010); Peterson & Heinz, *supra* note 132, at 538–39.

[228] Peterson & Heinz, *supra* note 132, at 551.

[229] BUREAU OF JUST. STATISTICS, U.S. DEP'T OF JUST., NCJ 241399, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2011-12, at 25 (2013).

[230] Markowitz, *supra* note 93, at 49; E. Fuller Torrey, *Jails and Prisons—America's New Mental Hospitals*, 85 AM. J. PUB. HEALTH 1611, 1612 (1995).

[231] Bard, *supra* note 114, at 2.

[232] Heyrman, *supra* note 226.

[233] HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 94 (2003); Harcourt, *supra* note 14, at 56.

[234] Gostin, *supra* note 4, at 911.

[235] Bard, *supra* note 114, at 3.

[236] Peterson & Heinz, *supra* note 132, at 539 (citing Nina Messina et al., *One Year Return to Custody Rates Among Co-Disordered Offenders*, 22 BEHAV. SCI. & L. 503, 515 (2004)).

[237] *Id.* at 551.

[238] *See* Bard, *supra* note 114, at 5–7.

[239] Perlin, *supra* note 221, at 2; Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RSRV. L. REV. 599, 603 (1989).

illnesses, such as perceived dangerousness and incompetency.[240] Furthermore, these myths "continue to dominate political and social discourse."[241] Some believe that mental illness is the 'ultimate stigma.'[242] This belief is often caused by the media's coverage of stories involving persons with mental illnesses, which has a tendency to be sensationalized.[243] This mental illness stigma is defined as "an attribute that is deeply discrediting and leads the person to be reduced…from a whole and usual person to a tainted or discounted one." Mental illness, like the stigma surrounding a criminal conviction, is categorized as a "blemish of individual character."[244] The impact of mental illness stigma on this population should not be underestimated.[245] In particular, the manner in which it acts as a major barrier to mental healthcare[246] with 35-50% of people with a mental illness in high-income countries receiving no mental health treatment.[247]

In particular, the myth of dangerousness plays a particularly harmful role in the legal justice system, both civil and criminal.[248] Perceived

[240] Gostin, *supra* note 4.

[241] Perlin, *supra* note 221, at 2–3.

[242] GERHARD FALK, STIGMA: HOW WE TREAT OUTSIDERS 39 (Prometheus Books 2001).

[243] Nisha Mehta et al., *Public attitudes towards people with mental illness in England and Scotland, 1994–2003*, 194 BRIT. J. PSYCHIATRY 278, 278 (2009); PERLIN, *supra* note 149, at 172–73 (citing Wahl & Roth, *Television Images of Mental Illness: Results of a Metropolitan Washington Media Watch*, 26 J. BROADCASTING 559, 601 (1982)); Steven E. Hyler et al., *Homicidal Maniacs and Narcissistic Parasites: Stigmatization of Mentally Ill Persons in the Movies*, 42 HOSP. & CMTY. PSYCHIATRY 1044, 1044 (1991).

[244] Brian K. Ahmedani, *Mental Health Stigma: Society, Individuals, and the Profession*, 8 J. SOC. WORK VALUES ETHICS 1, 2 (2011); ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 13 (Penguin Books 1963).

[245] For instance, the mental illness stigma acts as a barrier to wider social integration. *See* STEPHEN P. HINSHAW, THE MARK OF SHAME: STIGMA OF MENTAL ILLNESS AND AN AGENDA FOR CHANGE ix-x (2007). In particular, the mental illness stigma can be a barrier to housing. *See* JOY HAMMEL ET AL., RENTAL HOUSING DISCRIMINATION ON THE BASIS OF MENTAL DISABILITIES: RESULTS OF PILOT TESTING vii (2017); *see also* Steven P. Segal et al., *Neighborhood Types and Community Reaction to the Mentally Ill: A Paradox of Intensity*, 21 J. HEALTH & SOC. BEHAV. 345, 345 (1980); Stewart Page, *Effects of the Mental Illness Label in 1993: Acceptance and Rejection in the Community*, 7 J. HEALTH & SOC. POL'Y 61, 64–65 (1995). The mental illness stigma can also act as a barrier to employment. *See* Terry Krupa et al., *Understanding the stigma of mental illness in employment*, 33 WORK 413, 413 (2009); Elaine Brohan & Graham Thornicroft, *Stigma and discrimination of mental health problems: workplace implications*, 60 OCCUPATIONAL MED. 414, 414 (2010); James E. Bordieri & David E. Drehmer, *Hiring Decisions for Disabled Workers: Looking at the Cause*, 16 J. APPLIED SOC. PSYCH. 197, 198 (1986); Bruce Link, *Mental Patient Status, Work, and Income: An Examination of the Effects of a Psychiatric Label*, 47 AM. SOCIO. REV. 202, 203-04 (1982); Naz Beheshti, *Stigma About Mental Health Issues In The Workplace Exists: Here's What Companies Can Do About It*, FORBES (May 8, 2019), https://www.forbes.com/sites/nazbeheshti/2019/05/08/stigma-about-mental-health-issues-in-the-workplace-exist-heres-what-companies-can-do-about-it/#755efc5f31e7.

[246] PATRICK W. CORRIGAN & PETRA KLEINLEIN, ON THE STIGMA OF MENTAL ILLNESS: PRACTICAL STRATEGIES FOR RESEARCH AND SOCIAL CHANGE 28 (Patrick W. Corrigan ed., 2005).

[247] WORLD HEALTH ORG., MENTAL HEALTH, POVERTY AND DEVELOPMENT 3 (2009).

[248] Patrick W. Corrigan et al., *Challenging Two Mental Illness Stigmas: Personal Responsibility and Dangerousness*, 28 SCHIZOPHRENIA BULL. 293, 295 (2002) ("Several studies have found a specific relationship between perceiving persons with serious mental illness as dangerous and fearing them. Fear about a

dangerousness based on a defendant's mental illness has led to mental illness acting as an aggravating rather than a mitigating factor in many criminal trials. It has also been used as a justification for civil commitment to a psychiatric hospital. This population, aside from sex offenders,[249] are the only persons who can be institutionalized without committing a crime[250] or being committed after serving their prison sentence—again, justified by their perceived danger to themselves and society.[251] In reality, those who have a mental illness are "no more dangerous than other populations, and … the vast majority of violence is committed by persons without mental illness."[252]

Given the stigmatizing effect of the continuous media inaccuracies and that the "media are the most common sources of information about mental illnesses,"[253] it is important to note the role the media can play in influencing public opinion, attitudes, and policies towards persons with mental illnesses. Particularly, the media's coverage of mass shootings[254] is perpetuating the myth of dangerousness that surrounds this population.[255] In fact, those who have a "mental illness are actually less likely to be violent."[256]

CONCLUSION

Persons with mental illness are incarcerated at disproportionate rates in prisons and jails across the United States. We have traced the treatment of persons with mental illnesses across history, from being a familial or community responsibility, through institutionalization and deinstitutionalization, and finally ending with transinstitutionalization. The transinstitutionalization

person's dangerousness, in turn, yields avoidant behaviors."); CORRIGAN & KLEINLEIN, *supra* note 246, at 16–17; David B. Feldman & Christian S. Crandall, *Dimensions of Mental Illness Stigma: What About Mental Illness Causes Social Rejection?*, 26 J. SOC. & CLINICAL PSYCH. 137, 139–40 (2007).

[249] *See* Andrew J. Harris et al., *Sex Offending and Serious Mental Illness*, 37 CRIM. JUST. & BEHAV. 596, 599 (2010) (noting that "sexually violent predators" will be involuntarily committed).

[250] *See* Gostin, *supra* note 4.

[251] *Id.* at 907.

[252] *Id.* at 906.

[253] Zexin Ma, *How the media cover mental illnesses: a review*, 117 HEALTH EDUC. 90, 90 (2017); Andrew B. Borinstein, *Public Attitudes Toward People with Mental Illness*, 11 HEALTH AFFAIRS 187, 189 (1992). Kim & Stout found that the era of social media and mass participation in the media is having a positive impact on reducing the stigma put forward by the traditional sources of media. Hyojin Kim & Patricia A. Stout, *The Effects of Interactivity on Information Processing and Attitude Change: Implications for Mental Health Stigma*, 25 HEALTH COMMC'N 142, 150–51 (2010).

[254] McGinty et al., found that most people learn about mental illness from the media's coverage of mass shootings and that, as opposed to mental health diagnosis, other factors are more casually related to gun violence, such as gun access. Emma E. McGinty et al., *News Media Framing of Serious Mental Illness and Gun Violence in the United States, 1997-2012*, 104 AM. J. PUB. HEALTH 406, 406, 410–11 (2014).

[255] Peterson & Heinz, *supra* note 132, at 539–40; Emma E. McGinty et al., *Effects of News Media Messages About Mass Shootings on Attitudes Toward Persons With Serious Mental Illness and Public Support for Gun Control Policies*, AM. J. PSYCHIATRY 170 494, 495 (2013).

[256] Peterson & Heinz, *supra* note 132, at 541.

movement, whereby large amounts of inpatients with mental illnesses moved out of psychiatric institutions, into the streets, and then into the criminal justice system, has left disproportionate numbers of mentally ill prisoners. That being said, certain causes of imprisonment for mentally ill individuals are not as clear-cut and simple as they may first appear. However, the impact of social control as administered through the criminal justice apparatus, such as policing, imprisonment, and subsequent labeling should not be underestimated as a predominant cause of the high rates of imprisonment of this population. In order to reverse the trend towards the mass incarceration of those with mental illnesses, we, as a society, should be concerned with calls for a return to the asylum.[257] Our focus should be on providing community-based treatment and to the same extent, focusing on interventions that address the socio-economic causes of crime such as poverty, unemployment, undereducation and addiction issues.

[257] Dominic A. Sisti et al., *Improving Long-term Psychiatric Care: Bring Back the Asylum*, 313 J. AM. MED. ASS'N 243, 244 (2015); Editorial, *The Crazy Talk About Bringing Back Asylums*, N.Y. TIMES (June 2, 2018), https://www.nytimes.com/2018/06/02/opinion/trump-asylum-mental-health-guns.html; Benedict Carey, *Trump Wants More Asylums – and Some Psychiatrists Agree*, N.Y. TIMES (Mar. 5, 2018), https://www.nytimes.com/2018/03/05/health/mental-illness-asylums.html; Howard Husock & Carolyn D. Gorman, *The Case to Bring Back the Asylum*, WALL ST. J. (May 18, 2018), https://www.wsj.com/articles/the-case-to-bring-back-the-asylum-1526658277; Hanna Kozlowska, *Should the U.S. Bring Back Psychiatric Asylums?*, THE ATLANTIC (Jan. 27, 2015), https://www.theatlantic.com/health/archive/2015/01/should-the-us-bring-back-psychiatric-asylums/384838/; Lloyd Sederer, *No Asylum for Asylums*, U.S. NEWS & WORLD REP. (May 20, 2015), https://www.usnews.com/opinion/blogs/policy-dose/2015/05/20/bringing-back-asylums-will-not-help-mentally-ill-people.