



DATE DOWNLOADED: Thu May 13 10:00:06 2021

SOURCE: Content Downloaded from [HeinOnline](https://heinonline.org)

Citations:

Bluebook 21st ed.

Michael Mullan, How Should Mental Illness Be Relevant to Sentencing, 88 Miss. L.J. 255 (2019).

ALWD 6th ed.

Mullan, M. ., How should mental illness be relevant to sentencing, 88(3) Miss. L.J. 255 (2019).

APA 7th ed.

Mullan, M. (2019). How should mental illness be relevant to sentencing. Mississippi Law Journal, 88(3), 255-280.

Chicago 17th ed.

Michael Mullan, "How Should Mental Illness Be Relevant to Sentencing," Mississippi Law Journal 88, no. 3 (2019): 255-280

McGill Guide 9th ed.

Michael Mullan, "How Should Mental Illness Be Relevant to Sentencing" (2019) 88:3 Miss LJ 255.

AGLC 4th ed.

Michael Mullan, 'How Should Mental Illness Be Relevant to Sentencing' (2019) 88(3) Mississippi Law Journal 255.

MLA 8th ed.

Mullan, Michael. "How Should Mental Illness Be Relevant to Sentencing." Mississippi Law Journal, vol. 88, no. 3, 2019, p. 255-280. HeinOnline.

OSCOLA 4th ed.

Michael Mullan, 'How Should Mental Illness Be Relevant to Sentencing' (2019) 88 Miss LJ 255

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at

<https://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your license, please use:

[Copyright Information](#)

HOW SHOULD MENTAL ILLNESS BE  
RELEVANT TO SENTENCING?

*Michael Mullan\**

INTRODUCTION ..... 256

I. OVERREPRESENTATION ..... 257

*A. What is the Extent of the Problem?* ..... 257

*B. Causes of Overrepresentation*..... 258

*C. Problems with Overrepresentation* ..... 262

*D. Consequences of Overrepresentation* ..... 265

II. SHOULD MENTAL ILLNESS BE A FACTOR IN  
    SENTENCING? ..... 266

III. SENTENCING GUIDELINES ..... 271

IV. RECOMMENDATIONS ..... 274

CONCLUSION..... 279

---

\* Michael Mullan is a S.J.D. candidate at American University Washington School of law. He would like to thank Mel for all the continued support.

## INTRODUCTION

In addition to the nationwide phenomenon of mass incarceration,<sup>1</sup> there exists a sub-problem in the U.S. of overrepresentation in prisons and jails of those with severe and persistent mental illnesses (SPMI).<sup>2</sup> The disproportionate imprisonment of those with mental illnesses is one driving force of mass incarceration.<sup>3</sup> Furthermore, we have reached an era characterized by the “criminalization of mental illness.”<sup>4</sup> Driving this issue is another feature of the mass incarceration era: the change in the types of institutions that incarcerate those subject to social control in American society.<sup>5</sup> With the deinstitutionalization movement, and the closure of mental health institutions (largely brought about by the 1963 Community Mental Health Act),<sup>6</sup> there has been a shift towards incarcerating the mentally ill in criminal justice institutions such as prisons and jails.<sup>7</sup> This essay will consider the role mental illness should play in sentencing and how this might reduce the disproportionate levels of prisoners with mental illness. More specifically, this

---

<sup>1</sup> See generally MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010); NAT'L RES. COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* (2014).

<sup>2</sup> Jennifer L. Skeem & Jillian K. Peterson, *Identifying, Treating and Reducing the Risk for Offenders with Mental Illness*, in *THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS* 521 (2012).

<sup>3</sup> *Focus on Mental Illness to Reduce Mass Incarceration*, TREATMENT ADVOCACY CTR. (Oct. 4, 2016), <https://perma.cc/724T-TY4R>.

<sup>4</sup> RISDON N. SLATE ET AL., *THE CRIMINALIZATION OF MENTAL ILLNESS: CRISIS AND OPPORTUNITY FOR THE JUSTICE SYSTEM* 43 (2d ed. 2013); 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); Christopher G. Fichtner & James L. Cavanaugh, Letter to the Editor, *Malignant Criminalization: From Hypothesis to Theory*, 57 PSYCHIATRIC SERV. 1511 (2006); John Junginger & Keith Claypool, Letter in Reply, 57 PSYCHIATRIC SERV. 1512 (2006).

<sup>5</sup> ALLAN V. HORWITZ, *THE SOCIAL CONTROL OF MENTAL ILLNESS* 30 (1982); Fred E. Markowitz, *Dysfunctional Social Control of Mental Illness: A Commentary on Yoon*, 72 SOC. SCI. & MED. 456, 457 (2011).

<sup>6</sup> See generally John W. Murphy & Khary K. Rigg, *Clarifying the Philosophy Behind the Community Mental Health Act and Community-Based Interventions*, 42 J. COMMUNITY PSYCHOL. 285 (2014).

<sup>7</sup> Fred E. Markowitz, *Mental Illness, Crime, and Violence: Risk, context, and social control*, 16 AGGRESSION & VIOLENT BEHAV. 36, 37–38 (2011).

essay examines the sentencing rules where the defendant has a SPMI, but he or she has failed to successfully meet the requirements of an insanity defense.

To begin, it is important to understand what we mean by SPMI. SPMI covers the more serious mental illness diagnoses such as schizophrenia, bipolar disorders, and severe forms of depression.<sup>8</sup> Generally, when the essay refers to mental illness, this means severe and persistent mental illness.

In Section I, this essay examines why overrepresentation of prisoners with severe and persistent mental illnesses occurs. Section II looks at how and why mental illness should be a factor in sentencing. Section III outlines the interaction between current federal Sentencing Guidelines and mental illness. Finally, Section IV provides viable legislative, judicial and policy changes—the most important of which is to impose a 10% reduction in sentence length for prisoners with a mental illness.<sup>9</sup>

## I. OVERREPRESENTATION

### A. What is the Extent of the Problem?

The overrepresentation (the percentage of the overall prison population with mental illness as compared to percentage of the prison population without mental illness) of prisoners with mental illness is both a qualitative and quantitative issue. Quantitatively, it is difficult to ascertain how many prisoners have a serious and persistent mental illness as this data is unfortunately not collected upon entry to the criminal justice system. Although there have been a number of studies on mental illness in the prison population,<sup>10</sup> the most reliable source of such statistics is an

---

<sup>8</sup> See generally AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed., 2013).

<sup>9</sup> 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, 5 (2016). Bagaric chooses a reduction of 10% using the reductions for other fixed reductionary factors as guideposts. He cites a 50% reduction for a defendant helping the prosecution and 25% for pleading guilty. See *id.* at 40. Bagaric believes that having a mental illness warrants 10%, a percentage reduction of seriousness in between these other factors. See *id.* at 41.

<sup>10</sup> See, e.g., E. FULLER TORREY ET AL., TREATMENT ADVOCACY CTR. & NAT'L SHERIFF'S ASS'N, JOINT REPORT: MORE MENTALLY ILL PERSONS ARE IN JAILS AND

outdated Bureau of Justice Statistics study using data collected in 2004 and in 2002. This study found that 56 percent of state prisoners, 45 percent of federal prisoners, and 64 percent of jail inmates had a mental health problem.<sup>11</sup> Other estimates range from 15 percent to 60 percent of prisoners.<sup>12</sup> It has been said that “America’s jails and prisons have become our new mental hospitals.”<sup>13</sup> There are now three to ten times more individuals with serious mental illnesses in U.S. prisons than U.S. mental hospitals.<sup>14</sup> Torrey et al., argued that we have “returned to the early nineteenth century, when mentally ill persons filled our jails and prisons.”<sup>15</sup> Historically from around 1770 to 1820, mentally ill people were traditionally dealt with through prison incarceration. As a result of a reform movement, the U.S. moved towards a “more humane treatment of mentally ill persons . . . in hospitals” until the 1970s.<sup>16</sup> We have now come full circle, whereby the primary institutions dealing with the mentally ill are prisons, rather than hospitals.<sup>17</sup>

### *B. Causes of Overrepresentation*

We now discuss what the causes are of such reliance on the prison system to act as a provider of mental health treatment. One

---

PRISONS THAN HOSPITALS: A SURVEY OF THE STATES 1 (May 2010), [hereinafter TORREY ET AL., MORE MENTALLY ILL PERSONS ARE IN JAILS], <https://perma.cc/4794-W7U6>; E. FULLER TORREY ET AL., TREATMENT ADVOCACY CTR. & NAT’L SHERIFF’S ASS’N, JOINT REPORT: THE TREATMENT OF PERSONS WITH MENTAL ILLNESS IN PRISONS AND JAILS: A STATE SURVEY 101 (Apr. 8, 2014), [hereinafter TORREY ET AL., TREATMENT OF PERSONS WITH MENTAL ILLNESS] <https://perma.cc/V2D7-YHT4>; Henry J. Steadman et al., *Prevalence of Serious Mental Illness Among Jail Inmates*, 60 PSYCHIATRIC SERVS. 761 (2009).

<sup>11</sup> DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATS., MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES, NCJ 213600 (Sept. 2006, rev. Dec. 2006), <https://perma.cc/KAG9-QE95>.

<sup>12</sup> See PAULA M. DITTON, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS, NCJ 174463 (July 1999) <https://perma.cc/T8SJ-YRSA>; TORREY ET AL., MORE MENTALLY ILL PERSONS ARE IN JAILS, *supra* note 10, at 1; Andrew P. Wilper et al., *The Health and Health Care of US Prisoners: Results of a Nationwide Survey*, 99 AM. J. PUB. HEALTH 666, 668–72 (2009).

<sup>13</sup> TORREY ET AL., MORE MENTALLY ILL PERSONS ARE IN JAILS, *supra* note 10, at 1.

<sup>14</sup> See *id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 6.

causal factor of overrepresentation and the trend of trans-institutionalization (moving those with mental illnesses from mental health hospitals/asylums to prisons)<sup>18</sup> was the closure of asylums.<sup>19</sup> Unfortunately, many of those released from closed asylums were not afforded adequate care, support, or funding in the community.<sup>20</sup> With deinstitutionalization, it was unfortunately common for individuals to fall “outside the country’s social safety net.”<sup>21</sup> As a result, this population experienced (and continues to experience) problems of homelessness,<sup>22</sup> poverty,<sup>23</sup> addiction,<sup>24</sup> unemployment,<sup>25</sup> and associated discrimination<sup>26</sup>—

---

<sup>18</sup> PATRICIA ERICKSON & STEVEN ERICKSON, CRIME, PUNISHMENT, AND MENTAL ILLNESS 37 (2008); William H. Fisher et al., *Beyond Criminalization: Toward a Criminologically Informed Framework for Mental Health Policy and Services Research*, 33 ADMIN. & POL’Y IN MENTAL HEALTH & MENTAL HEALTH SERVS. RES. 544, 545–46 (2006); Bernard E. Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution*, 84 TEXAS L. REV. 1751, 1753 (2006); Bernard E. Harcourt, *Reducing Mass Incarceration: Lessons from the Deinstitutionalization of Mental Hospitals in the 1960s*, 9 OHIO ST. J. CRIM. L. 53, 87 (2011).

<sup>19</sup> Markowitz, *supra* note 7, at 37; Davidson & Rosky, *supra* note 4, at 357.

<sup>20</sup> GEORGE PAULSON, CLOSING THE ASYLUMS: CAUSES AND CONSEQUENCES OF THE DEINSTITUTIONALIZATION MOVEMENT 6 (2012); SLATE ET AL., *supra* note 4, at 41–42; Lisa Davis et al., *Deinstitutionalization? Where Have All the People Gone?*, 14 CURRENT PSYCHIATRY REP. 259, 260 (2012); John A. Talbott, *Deinstitutionalization: Avoiding the Disasters of the Past*, 55 PSYCHIATRIC SERV. 1112, 1112–14 (2004).

<sup>21</sup> Arthur J. Lurigio, *People with Serious Mental Illness in the Criminal Justice System: Causes, Consequences, and Correctives*, 91 PRISON J. 66S, 67S (2011).

<sup>22</sup> See U.S. DEP’T OF HOUS. & URBAN DEV., THE 2010 ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS iii, 18, 47 (2011); SLATE ET AL., *supra* note 4, at 79–82; E. FULLER TORREY, OUT OF THE SHADOWS: CONFRONTING AMERICA’S MENTAL ILLNESS CRISIS 13 (1998); D. Michaels et al., *Homelessness and Indicators of Mental Illness among Inmates in New York City’s Correctional System*, 43 HOSP. & COMMUNITY PSYCHIATRY 150, 150–55 (1992).

<sup>23</sup> See U.S. SENTENCING COMM’N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM B-8 (2004); ALEXANDER, *supra* note 1, at 18; MICHELLE FUNK ET AL., WORLD HEALTH ORGANIZATION, MENTAL HEALTH AND DEVELOPMENT: TARGETING PEOPLE WITH MENTAL HEALTH CONDITIONS AS A VULNERABLE GROUP (2010); SLATE ET AL., *supra* note 4, at 78; BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA (2006); Crick Lund et al., *Poverty and Common Mental Disorders in Low and Middle Income Countries: A Systematic Review*, 71 SOC. SCI. & MED. 517, 520 (2010); Lurigio, *supra* note 21, at 72S; Bruce Western & Becky Pettit, *Incarceration & Social Inequality*, 139 DÆDALUS 8, 14 (2010); Bernadette Rabuy & Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-Incarceration Incomes of the Imprisoned*, PRISON POLICY INITIATIVE (July 9, 2015), <https://perma.cc/PF2F-JSQQ>.

<sup>24</sup> See U.S. DEP’T OF HEALTH & HUM. SERVS., SUBSTANCE ABUSE TREATMENT FOR PERSONS WITH CO-OCCURRING DISORDERS: A TREATMENT IMPROVEMENT PROTOCOL TIP 42 (2005); KiDeuk Kim et al., URBAN INSTITUTE, RESEARCH REPORT: THE PROCESSING

the very criminogenic social determinants and factors that have such strong correlations with police contact and prison entry.<sup>27</sup> These drivers of interaction with the criminal justice system have since been experienced disproportionately by those with mental illness.<sup>28</sup>

Other causes include the manner in which criminal justice actors interact with those with mental illness. For instance, police may misinterpret behaviors associated with mental illness as threatening behavior and divert individuals into the criminal justice system as opposed to the mental health system.<sup>29</sup>

---

AND TREATMENT OF MENTALLY ILL PERSONS IN THE CRIMINAL JUSTICE SYSTEM 9-10 (March 2015); Kristin G. Cloyes et al., *Time to Prison Return for Offenders with Serious Mental Illness Released from Prison: A Survival Analysis*, 37 CRIM. JUST. & BEHAV. 175, 181 (2010); T.M. Hammett et al., *Health-Related Issues in Prisoner Reentry*, 47 CRIME & DELINQUENCY 390 (2001); James & Glaze, *supra* note 11.

<sup>25</sup> See SLATE ET AL., *supra* note 4, at 77-78; Richard C. Baron & Mark S. Salzer, *Accounting for Unemployment Among People with Mental Illness*, 20 BEHAV. SCI. L. 585, 586 (2002).

<sup>26</sup> Hammett et al., *supra* note 24; Heather Stuart, *Mental Illness and Employment Discrimination*, 19 CURRENT OPINION IN PSYCHIATRY 522 (2006). See also Cloyes et al., *supra* note 24, at 183; Davidson & Rosky, *supra* note 4; Jeffrey Draine et al., *Role of Social Disadvantage in Crime, Joblessness, and Homelessness Among Persons With Serious Mental Illness*, 53 PSYCHIATRIC SERV. 565, 566 (2002); Christopher G. Hudson, *Socioeconomic Status and Mental Illness: Tests of the Social Causation and Selection Hypotheses*, 75 AM. J. ORTHOPSYCHIATRY 1, 11 (2005); Lurigio, *supra* note 21, at 74S; Deborah K. Padgett et al., *Housing First Services for People Who Are Homeless with Co-Occurring Serious Mental Illness and Substance Abuse*, 16 RES. ON SOCIAL WORK PRACTICE 74, 74-75 (2006).

<sup>27</sup> See Mikko Aaltonen et al., *Social Determinants of Crime in a Welfare State: Do They Still Matter?*, 54 ACTA SOCIOLOGICA 161, 163 (2011); Richard Fowles & Mary Merva, *Wage Inequality and Criminal Activity: An Extreme Bounds Analysis for the United States—1975–1990*, 34 CRIMINOLOGY 163, 164 (1996); Istvan Haller, *Is There a Correlation Between Poverty and Criminality? Analysis of European Data*, 7 EUROPEAN REV. OF APPLIED SOCIOLOGY 5, 12-13 (2014); David Snow et al., *Criminality and Homeless Men: An Empirical Assessment*, 36 SOC. PROBS. 532, 532-33 (1989); Leah Pope, *Rethinking Mental Illness and its Path to the Criminal Justice System*, VERA INSTITUTE OF JUSTICE: THINK JUSTICE BLOG (Mar. 7, 2016), <https://perma.cc/NVT8-X6A9>; ALLARD K. LOWENSTEIN INTERNATIONAL HUMAN RIGHTS CLINIC, “FORCED INTO BREAKING THE LAW”: THE CRIMINALIZATION OF HOMELESSNESS IN CONNECTICUT, YALE LAW SCHOOL (2016), <https://perma.cc/C899-MPEY>.

<sup>28</sup> Sean N. Fischer et al., *Homelessness, Mental Illness, and Criminal Activity: Examining Patterns Over Time*, 42 AM. J. COMMUNITY PSYCHOLOGY 251, 261-62 (2008).

<sup>29</sup> Amy N. Kerr et al., *Police Encounters, Mental Illness, and Injury: An Exploratory Investigation*, 10 J. POLICE CRISIS NEGOTS. 116, 119 (2010); Conor Friedersdorf, *Think Twice Before Calling the Cops on the Mentally Ill*, THE ATLANTIC, (May 15, 2015) <https://perma.cc/JSA3-49VG>.

Interestingly, Lurigio argued that the harsh policies implemented by the police and other criminal justice actors are primarily to blame for the criminalization of poverty and disproportionate levels of incarceration for this sub-population, particularly America's draconian drug laws.<sup>30</sup> The war on drugs has had a disproportionately harsh impact on those with mental illnesses.<sup>31</sup> This is due to concurrent characteristics that put persons at risk of using drugs and engaging in criminality and due to concurring drug and alcohol dependence amongst the mentally ill.<sup>32</sup>

As stated above, the treatment by police of those with mental illnesses is also to blame. For instance, the issue of police targeting those with mental illness has been raised in some reports and articles in the literature.<sup>33</sup> Furthermore, police, as frontline responders, act as gatekeepers to both the criminal justice system, and at the same time, to mental health services.<sup>34</sup> At times, police fail to recognize symptoms of mental illness and misinterpret this behavior,<sup>35</sup> and in doing so, use their discretion<sup>36</sup> to divert the individual into the criminal justice system as opposed to other options such as civil commitment.<sup>37</sup> More generally, those with mental illnesses may be more susceptible to coercive police tactics, with a higher likelihood to acquiesce and give false statements.<sup>38</sup> It is no wonder then that those with mental illnesses are at a heightened risk of experiencing wrongful convictions.<sup>39</sup>

<sup>30</sup> Lurigio, *supra* note 21, at 73S–74S.

<sup>31</sup> See Keith Humphreys & Julian Rappaport, *From the Community Mental Health Movement to the War on Drugs*, 48 AM. PSYCHOLOGIST 892 (1993).

<sup>32</sup> See Skeem & Peterson *supra* note 2, at 521; see generally U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 24; Hammett et al., *supra* note 24.

<sup>33</sup> See e.g., Amanda Geller et al., *Aggressive Policing and the Mental Health of Young Urban Men*, 104 AM. J. PUB. HEALTH 2321, 2325 (2014).

<sup>34</sup> Amy C. Watson et al., *Understanding How Police Officers Think About Mental/Emotional Disturbance Calls*, 37 INT'L J. L. & PSYCHIATRY 351, 351 (2014).

<sup>35</sup> Davidson & Rosky, *supra* note 4, at 354.

<sup>36</sup> Jennifer Wood et al., *Police Interventions with Persons Affected by Mental Illnesses: A Critical Review of Global Thinking and Practice*, CENTER FOR BEHAV. HEALTH SERVS. & CRIMINAL JUSTICE RESEARCH 10 (2011), available at <https://perma.cc/7FHN-JF2U>.

<sup>37</sup> *Id.* at 11.

<sup>38</sup> Allison D. Redlich, *Mental Illness, Police Interrogations, and the Potential for False Confession*, 55 PSYCHIATRIC SERV. 19, 20 (2004); Allison D. Redlich et al., *Self-Reported False Confessions and False Guilty Pleas among Offenders with Mental Illness*, 34 LAW HUM. BEHAV. 79, 81-82 (2010).

<sup>39</sup> Redlich et al., *Self-Reported False Confessions*, *supra* note 38, at 81, 89.



Finally, and most importantly for the purposes of this essay, it is argued that current sentencing laws and practices are a root cause of the problem. The punitive nature of the current sentencing regime is largely to blame.<sup>40</sup> It appears that judges are not aware or not willing to use the discretion afforded to them to award lesser sentences to those with mental illnesses, particularly in cases where the defendant fails to establish an insanity defense but has a mental illness.<sup>41</sup> In fact, mental illness, in some cases, has acted as an aggravating circumstance, rather than a mitigating factor.<sup>42</sup> For instance, the factors laid out in §3553(a) of the Sentencing Guidelines include circumstances that “protect the public from further crimes of the defendant.”<sup>43</sup> Here mental illness acts as an aggravating factor, via the apparent “inherent” future dangerousness and stigma associated with mental illnesses.<sup>44</sup> One study, by Davidson and Rosky, found longer sentences were given if a defendant had a mental illness.<sup>45</sup> The case law around the discretion to consider mental illness as either a mitigating or aggravating factor is arbitrary in this regard.

### C. Problems with Overrepresentation

Having disproportionate numbers of individuals with mental illness in our prisons and jails brings about an array of negative results, such as overcrowding and deterioration of prisoners’ mental health.<sup>46</sup> Primarily, such incarceration of those with

---

<sup>40</sup> BRUCE A. ARRIGO ET AL., *THE ETHICS OF TOTAL CONFINEMENT: A CRITIQUE OF MADNESS, CITIZENSHIP AND SOCIAL JUSTICE* 60-92 (2011).

<sup>41</sup> *Developments in the Law – The Law of Mental Illness*, 121 HARV. L. REV. 1114, 1133–1144 (2008).

<sup>42</sup> Michael L. Perlin & Keri K. Gould, *Rashomon and the Criminal Law: Mental Disability and the Federal Sentencing Guidelines*, 22 AM. J. CRIM. L. 431, 435 (1995).

<sup>43</sup> U.S. SENTENCING GUIDELINES MANUAL § 4A1.3 (U.S. SENTENCING COMM’N 2016).

<sup>44</sup> See SLATE ET AL., *supra* note 4, at 56; Patrick W. Corrigan et al., *From Whence Comes Mental Illness Stigma?*, 49 INT. J. SOC. PSYCHIATRY 142, 142-43 (2003); Davidson & Rosky, *supra* note 4, at 355–357; Thomas E. Fluent & Melvin Guyer, *Mental Illness and Sentencing Length in Supervised Release Revocation*, 35 J. AM. ACAD. PSYCHIATRY & L. 122, 123-24 (2007); Markowitz, *supra* note 7, at 39. In fact, Skeem and Peterson found that little evidence exists for the assumption that mental illness causes crime. Skeem & Peterson *supra* note 2, at 523–525.

<sup>45</sup> Davidson & Rosky, *supra* note 4, at 374. See also Bagaric, *supra* note 9, at 6.

<sup>46</sup> TORREY ET AL., *TREATMENT OF PERSONS WITH MENTAL ILLNESS*, *supra* note 10, at 6, 14.

mental illnesses (as opposed to treating them through alternatives to prison such as inpatient or outpatient mental care), contributes to mass incarceration greatly. If it was possible to divert those with mental illnesses out of our prisons and jails and into mental hospitals, this would result in a significant reduction in prison numbers.<sup>47</sup> Furthermore, having such large numbers of individuals with mental illness in prison costs a large amount of expenditure covered by the taxpayer.<sup>48</sup> Kondo states that “[t]he cost of incarcerating mentally ill offenders is exorbitantly high. In 1996, the Bureau of Justice Statistics reported that national spending [on inmates with mental illness] was \$22 billion for state prisons and another \$2.5 billion for federal prisons, for a total annual expenditure of \$24.5 billion.”<sup>49</sup> In comparison, the average cost per prisoner generally is \$31,286 per year (i.e. including those having mental illnesses and those that do not).<sup>50</sup> According to one study, a prisoner *with* a mental illness can cost the state 20 times as much as crisis treatment and counseling.<sup>51</sup> This is particularly important in today’s political and economic climate. The increased cost of housing a prisoner with mental illness is due to costs associated with medication, hospitalization,<sup>52</sup> misconduct,<sup>53</sup> and recidivism.<sup>54</sup> In terms of managing prisons and safety concerns, those with mental illness are much more likely to be involved in

---

<sup>47</sup> See generally Anastasia Cooper, *The Ongoing Correctional Chaos in Criminalizing Mental Illness: The Realignment’s Effects on California Jails*, 24 HASTINGS WOMEN’S L. J. 339 (2013).

<sup>48</sup> TORREY ET AL., TREATMENT OF PERSONS WITH MENTAL ILLNESS, *supra* note 10, at 7; KIM ET AL., *supra* note 24, at 11–14; Newt Gingrich & Van Jones, *Mental Illness Is No Crime*, CNN (May 27, 2015) <https://perma.cc/35U6-YJZB>.

<sup>49</sup> LeRoy L. Kondo, *Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders*, 28 AM. J. CRIM. L. 255, 272 (2001).

<sup>50</sup> CHRISTIAN HENRICHSON & RUTH DELANEY, THE VERA INSTITUTE OF JUSTICE: CENTRE ON SENTENCING AND CORRECTIONS, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 9 (2012) <https://perma.cc/QKG9-EQHH>.

<sup>51</sup> ARKANSAS PUBLIC POLICY PANEL, A BRIEF COST ANALYSIS OF ARKANSAS MENTAL HEALTH AND PRISON REFORM 1 (2015), <https://perma.cc/KJN2-472V>.

<sup>52</sup> *Prison Health Care: Costs and Quality*, THE PEW CHARITABLE TRUST (2017), available at <https://perma.cc/X6PB-DNXS>.

<sup>53</sup> TORREY ET AL., TREATMENT OF PERSONS WITH MENTAL ILLNESS, *supra* note 10, at 7, 14–15; Jamie Fellner, *A Corrections Quandary: Mental Illness and Prison Rules*, 41 HARV. C.R.-C.L. L. REV. 391 (2006); Hans Toch & Kenneth Adams, *ACTING OUT: MALADAPTIVE BEHAVIOR IN CONFINEMENT* (2002).

<sup>54</sup> KIM ET AL., *supra* note 24, at v.

physical attacks on other prisoners and staff.<sup>55</sup> Additionally, they are at a much higher risk of victimization,<sup>56</sup> with 1 in 12 male prisoners with mental illnesses suffering sexual victimization and even rates higher for female inmates.<sup>57</sup> They are also disproportionately punished by solitary confinement<sup>58</sup>, suffer from suicides at a higher rate,<sup>59</sup> and to experience violent disciplinary action by prison staff.<sup>60</sup> All of the above often results in a “[d]eterioration in the psychiatric condition,”<sup>61</sup> and in turn, the prisoner with a mental illness experiences a harsher sentence.<sup>62</sup> Fundamentally, these issues also contribute to the higher recidivism rates for prisoners with mental illness.<sup>63</sup>

---

<sup>55</sup> TORREY ET AL., TREATMENT OF PERSONS WITH MENTAL ILLNESS, *supra* note 10, at 7.

<sup>56</sup> TORREY, *supra* note 22, at 31-35; Paul Taylor & Sian Williams, *Sentencing Reform and Prisoner Mental Health*, 211 PRISON SERV. J. 43, 44 (2014).

<sup>57</sup> Nancy Wolff et al., *Rates of Sexual Victimization in Prison for Inmates With and Without Mental Disorders*, 58 PSYCHIATRIC SERVS. 1087, 1089-90 (2007).

<sup>58</sup> ARRIGO ET AL., *supra* note 40; TORREY ET AL., TREATMENT OF PERSONS WITH MENTAL ILLNESS, *supra* note 10, at 7, 16-17; Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. Am. Acad. of Psychiatry & L. 104, 105 (2010); Ashley Halvorsen, *Solitary Confinement of Mentally Ill Prisoners: A National Overview & How the ADA Can Be Leveraged to Encourage Best Practice*, 27 SOUTHERN CALIF. INTERDISC. L. J. 205, 206, 217 (2017), <https://perma.cc/4ZQE-4FRE>.

<sup>59</sup> TORREY ET AL., TREATMENT OF PERSONS WITH MENTAL ILLNESS, *supra* note 10, at 7, 17; J. Richard Goss et al., *Characteristics of Suicide Attempts in a Large Urban Jail System with an Established Suicide Prevention Program*, 53 PSYCHIATRIC SERVS. 574, 576 (2002).

<sup>60</sup> Halvorsen, *supra* note 58, at 215, n. 95.

<sup>61</sup> TORREY ET AL., TREATMENT OF PERSONS WITH MENTAL ILLNESS, *supra* note 10, at 7, 15. This is largely due to the fact that prisoners who have SPMI do not receive adequate, or any, mental healthcare. Michele Westhoff, *An Examination of Prisoners' Constitutional Right to Healthcare: Theory and Practice*, 20 HEALTH LAW. 1, 4 (2008). One study found that 83-89% of those in prison with SPMI did not receive treatment. Gregory L. Acquaviva, *Mental Health Courts: No Longer Experimental*, 36 SETON HALL L. REV. 971, 979 (2006).

<sup>62</sup> E. Lea Johnston, *Vulnerability and Just Desert: A Theory of Sentencing and Mental Illness*, 103 J. Crim. L. & Criminology 147, 174 (2013).

<sup>63</sup> TORREY ET AL., TREATMENT OF PERSONS WITH MENTAL ILLNESS, *supra* note 10, at 7, 18; Jacques Baillargeon et al., *Psychiatric Disorders and Repeat Incarcerations: The Revolving Prison Door*, 166 AM. J. PSYCHIATRY 103, 103 (2009); Cloyes et al., *supra* note 24, at 176-77, 183; KIM ET AL., *supra* note 24, at v.

### *D. Consequences of Overrepresentation*

The primary and most alarming result of the overrepresentation of the mentally ill is that the criminal justice system is punishing those with mental illness on the basis of their mental illness. Additionally, the criminal justice system is “treating” those with mental illness inappropriately or in some instances, not treating them for their conditions at all.<sup>64</sup> Such individuals should be diverted away from the criminal justice system, which restricts their access to adequate healthcare, puts them at greater risk of abuse,<sup>65</sup> and deteriorates their mental illness.<sup>66</sup> Furthermore, from a penal policy perspective, by imprisoning those who do not deserve to be there or who would be more adequately treated elsewhere, we are contributing to prison overcrowding.<sup>67</sup> Again, similar to the disproportionate imprisonment of blacks, any disproportionate criminalizing of certain groups in society can not only lead to sustainability of these disproportionate practices, but also lead to greater questions on the legitimacy of the criminal justice system as a whole.<sup>68</sup> Also, if we are over-criminalizing and punishing those with prison sentences who do not deserve them, we are saying something about the society that we live in (our national self-image), but also expressing what we think about those with mental illness.<sup>69</sup> By disproportionately imprisoning those with mental illness we are perpetuating and contributing to the myth of dangerousness that attaches to those with mental illnesses.<sup>70</sup> Another concern is

---

<sup>64</sup> Rose Carmen Goldberg, *The Antidotes to the Double Standard: Protecting the Healthcare Rights of Mentally Ill Inmates by Blurring the Line between Estelle and Youngberg*, 16 YALE J. HEALTH POL'Y L. & ETHICS 111, 117–18 (2016).

<sup>65</sup> TORREY ET AL., TREATMENT OF PERSONS WITH MENTAL ILLNESS, *supra* note 10, at 6–7, 15.

<sup>66</sup> *Id.*; Jane Dullum, *Sentencing Offenders with Disabilities*, 17 SCANDINAVIAN J. DISABILITY RES. 60, 60 (2015).

<sup>67</sup> TORREY ET AL., TREATMENT OF PERSONS WITH MENTAL ILLNESS, *supra* note 10, at 7, 14.

<sup>68</sup> RONALD H. WEICH & CARLOS T. ANGULO, *Leadership Conference on Civil Rights & Leadership Conference Education Fund*, in JUSTICE ON TRIAL: RACIAL DISPARITIES IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 43, 46 (2000); Marc Mauer, *Addressing Racial Disparities in Incarceration*, 91 PRISON J. 87S, 96S (2011).

<sup>69</sup> WEICH & ANGULO, *supra* note 68, at 50.

<sup>70</sup> Markowitz, *supra* note 7, at 38–39. It is also worth noting that Article 8 of the Convention on the Rights of Persons with Disabilities requires that such stereotypes and prejudices regarding persons with disabilities be addressed. Astrid Birgden,

whether the U.S. is in compliance with international human rights law, particularly if the U.S. goes on to ratify the Convention on the Rights of Persons with Disabilities (CRPD).<sup>71</sup> The current disproportionate incarceration and mistreatment of the mentally ill in prisons may fall foul of Article 13 on Access to justice, Article 14 on the Liberty and security of person, Article 25 on adequate mental health care, and Article 15 on Freedom from torture or cruel, inhuman or degrading treatment or punishment.<sup>72</sup> Additionally, we add the usual “collateral consequences”<sup>73</sup> to a population already disadvantaged by housing, employment, and education discrimination.<sup>74</sup>

## II. SHOULD MENTAL ILLNESS BE A FACTOR IN SENTENCING?

For mental illness to be relevant, we must view it through the lens of the current sentencing framework based upon limited judicial discretion and sentencing guidelines with mandatory minimum sentences. Since 2005, when the U.S. Supreme Court’s ruling in *U.S. v Booker*, federal judges’ adherence the Federal Sentencing Guidelines is advisory, rather than compulsory.<sup>75</sup> Although *Booker* allows sentencing federal judges more discretion, this opportunity has yet to be fulfilled. In regards to mental illness, it appears that institutionally, federal judges treat the guidelines as quasi-compulsory. This section argues that sentencing judges be made aware of a convicted defendant’s

---

*Enabling the Disabled: A Proposed Framework to Reduce Discrimination Against Forensic Disability Clients Requiring Access to Programs in Prison*, 42 MITCHELL HAMLINE L. REV. 637, 656 (2016).

<sup>71</sup> CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD), UNITED NATIONS, 2515 U.N.T.S. 3. (May 3, 2008).

<sup>72</sup> *Id.* at 11. This is particularly likely when we consider the argument made in this essay, and by Johnston and Bagaric, that prisoners with mental illness are at greater risk of abuse and experience prison more harshly. See, e.g., *Keenan v. United Kingdom*, 2001-III Eur. Ct. H.R. 93, 135–136; *McGlinchey v. United Kingdom*, 2003-II Eur. Ct. H.R. 183, 201; *Price v. United Kingdom*, 2001-VII Eur. Ct. H.R. 153, 165.

<sup>73</sup> Alice P. Green, *The Disproportionate Impact of the Criminal Justice System on People of Color in the Capital Region*, CENTER FOR LAW AND JUSTICE (Feb. 2012) <https://perma.cc/V9L6-7L8M> (explaining the concept of “collateral consequences” and the impact of a criminal conviction).

<sup>74</sup> See text of this essay at text to footnotes 14–21.

<sup>75</sup> *United States v. Booker*, 543 U.S. 220, 222 (2005).

mental illness and should consider the mental illness in the sentencing decision.

First, mental health is relevant to culpability. People with mental illness may lack the same culpability as those without mental illness,<sup>76</sup> and their sentences should reflect this.<sup>77</sup> As such, mental illness should act as a mitigating factor in sentencing law.

It is important at this juncture to examine how the key theories of punishment (incapacitation, deterrence, rehabilitation, and retribution) apply to individuals with mental illnesses.<sup>78</sup> Incapacitation theory focuses on protecting society from violent criminals.<sup>79</sup> For instance, prison physically prevents offenders from committing further crimes. It appears that incapacitation plays a role in the sentencing judge's mind in certain cases where mental illness acts as an aggravating factor due to fears around the likely future dangerousness of those with mental illness.<sup>80</sup> The deterrence theory also focuses on preventing future crime and recidivism, advocating for proportionate sentencing to the seriousness of the crime and likelihood of reoffending.<sup>81</sup> The deterrence theory is relevant to those with mental illness, as this theory of punishment relies on individuals' being capable of making rational choices when it comes to crime, which is often not the case for those with mental illness. The rehabilitation theory is

---

<sup>76</sup> See KIM ET AL., *supra* note 24, at 15 (discussing the "unique set of circumstances" related to determining culpability of mentally ill individuals).

<sup>77</sup> See Davidson & Rosky, *supra* note 4, at 355-56 (discussing mental illness as a sentencing determinant). See generally Robert R. Miller, *Diminished Capacity—Expanded Discretion: Section 5K2.13 of the Federal Sentencing Guidelines and the Demise of the "Non-Violent Offense,"* 46 VILL. L. REV. 679 (2001) (discussing the historical and jurisprudential foundations of downward departures for diminished capacity under the Federal Sentencing Guidelines).

<sup>78</sup> See, e.g., Georgia Lee Sims, *The Criminalization of Mental Illness: How Theoretical Failures Create Real Problems in the Criminal Justice System*, 62 VAND. L. REV. 1053, 1063-75 (2009) (discussing how the current justice system fails to meet the four justifications for criminal sanctions when people with severe mental illness are involved).

<sup>79</sup> See Sharon G. Garner & Thomas L. Hafemeister, *Restorative Justice, Therapeutic Jurisprudence, and Mental Health Courts: Finding a Better Means to Respond to Offenders with a Mental Disorder*, 22 DEVS. MENTAL HEALTH L. 1, 3 (2003).

<sup>80</sup> Samantha Long, *Critique of the Sentencing Principles Currently Applicable to Offenders with Mental Disorders*, 25 IRISH CRIM. L. J. 2, 33 (2015).

<sup>81</sup> See Kevin M. Carlsmith et al., *Why Do We Punish? Deterrence and Just Deserts as Motives for Punishment*, 83 J. PERSONALITY & SOC. PSYCOL. 284, 285-86 (2002) (providing an overview of the deterrence theory).

most applicable and advantageous to individuals with mental illnesses. Like the previous theory of punishment, it too focuses on reducing crime, but instead the reduction in crime is a direct result of offenders' modified behaviour.<sup>82</sup> As such, the rehabilitation theory provides a strong justification for opting for the provision of adequate healthcare and diversionary programs, instead of prison time to offenders with mental illness.<sup>83</sup> Finally, retribution theory, the dominant theory of punishment during the era of the war on crime and drugs, focuses on the just deserts—the notion that people who commit crimes deserve punishment.<sup>84</sup> This theory of punishment is rarely applicable to those with mental illnesses as they have reduced culpability for the crimes committed.<sup>85</sup>

We can see here how, theoretically, mental illness is relevant to all of the justifications for punishment and should be equally relevant to the sentencing decision. However, in practice, mental illness does not factor into a judge's consideration of what an appropriate sentence should be. Bagaric offers a viable solution under the U.S. system of sentencing, severely restricting judicial discretion.<sup>86</sup> By allocating a fixed reduction of 10% in cases where a mental illness is found, disparity will be reduced and the inherent difference in culpability will be recognized.<sup>87</sup> Bagaric believes that proving the link between mental illness and committing the crime should be discontinued as it is too difficult to prove and does not add much to the equation. Instead, it should be assumed that mental illness played a role in the commission of the crime.<sup>88</sup>

One countervailing factor to Bagaric's solution is how mental illness is proven at the time of the commission of the crime,

---

<sup>82</sup> Long, *supra* note 80, at 33.

<sup>83</sup> Michelle Edgely, *Common Law Sentencing of Mentally Impaired Offenders in Australian Courts: A Call for Coherence and Consistency*, 16 PSYCHIATRY PSYCHOLOGY L. 2 (2009), at 246.

<sup>84</sup> Richard S. Frase, *Just Sentencing: Principles and Procedures for a Workable System*, Research Paper No. 13-14 (2013).

<sup>85</sup> See MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 596-97 (1997).

<sup>86</sup> Bagaric, *supra* note 9.

<sup>87</sup> *Id.* at 5.

<sup>88</sup> *Id.* at 6.

particularly given the complexity of mental illness.<sup>89</sup> From a harm perspective, the same amount of harm is caused to the victim, regardless of whether the offender has a mental illness.<sup>90</sup> From an equality perspective, should we disregard disability completely, having those with mental illnesses receive the same treatment as those without? Surprisingly, certain segments of the disability community advocate for equal treatment (such as Christopher Slobogin and Tina Minkowitz), calling for the abolition of disability-specific defenses, including the insanity defense.<sup>91</sup>

Interestingly, in other jurisdictions such as Australia, individuals may receive a harsher sentence due to their mental illness on the basis of future dangerousness.<sup>92</sup> In certain instances, this occurs in the U.S., often reinforcing negative racial stereotypes (in a similar manner to the “black criminal”).<sup>93</sup> Similar to the problem of the “black criminal” and young African-American males, people with mental illness are statistically more likely to commit crimes, but is this a result of their inherent criminality or due to systemic problems (such as police profiling, systemic prejudices or structural issues such as poverty)?<sup>94</sup> On the other hand, generally speaking, ordinary defendants do receive higher sentences if they pose a higher risk of future threat to society. Is mental illness a reasonable indicator of future

---

<sup>89</sup> See generally Brian J. Pollock, *Kansas v. Hendricks: A Workable Standard for “Mental Illness” or a Push Down the Slippery Slope Toward State Abuse of Civil Commitment?*, 40 ARIZ. L. REV. 319 (1998).

<sup>90</sup> Bagaric, *supra* note 9, at 38.

<sup>91</sup> See Tina Minkowitz, *Rethinking Criminal Responsibility from a Critical Disability Perspective: The Abolition of Insanity/Incapacity Acquittals and Unfitness to Plead, and Beyond*, 23 GRIFFITH L. REV. 3, 434-66 (2014); Christopher Slobogin, *An End to Insanity: Recasting the Role of Mental Disability in Criminal Cases*, 86 VA. L. REV. 1199 (2000) (arguing for the elimination of the insanity defense and that mental illness should be relevant in assessing culpability only as warranted by general criminal law doctrines concerning mens rea, self-defense, and duress).

<sup>92</sup> See NORVAL MORRIS, *MADNESS AND THE CRIMINAL LAW* 171-72 (1982) (calling for such practice to be introduced to the United States); Bagaric, *supra* note 9, at 27.

<sup>93</sup> Anita Bernstein, *What’s Wrong with Stereotyping?*, 55 ARIZ. L. REV. 655, 660 (2013).

<sup>94</sup> JAMES A. CHAMBERS, *AN ASSESSMENT OF BLACK CRIME, DELINQUENCY, AND THE CRIMINAL JUSTICE SYSTEM* 125 (2002); Mauer, *supra* note 68, at 96S.



dangerousness, and is it fair to do so?<sup>95</sup> Studies show there is insufficient data to come to this conclusion.<sup>96</sup>

Secondly, mental illness is relevant to the sentencing decision as it dramatically changes the offender's prison experience. For those with mental illnesses, incarceration is not only more likely, but is a vastly different and harsher experience.<sup>97</sup> Here, mental illness is relevant to sentencing when considered through the lens of harm.<sup>98</sup> In other words, vulnerability as a result of mental illness should factor into a court's evaluation of the severity of a contemplated penalty to ensure that an offender is not over-punished. "Only by treating an offender differently (i.e., by recognizing his susceptibility to serious harm) will he be treated equally (i.e., similarly to those without major mental disorders who are equally blameworthy)."<sup>99</sup> American criminal law jurisprudence strives to achieve parity and equality of punishment through our sentencing regimes—defendants who commit similar crimes under similar circumstances should experience similar levels of punishment.<sup>100</sup> However, prison inmates with pre-existing mental illnesses are more likely to experience physical and sexual assault, behavioral issues, solitary confinement, and exacerbation of their mental illness.<sup>101</sup> As a result, it is reasonably

---

<sup>95</sup> See, e.g., Perlin & Gould, *supra* note 42, at 444 (describing a "notorious Florida case" where "a trial judge concluded that due to the defendant's mental disability . . . 'the only assurance society can receive that [the defendant] never again commits to another human being what he did to [the brutally murdered decedent] is that the ultimate sentence of death be imposed.'").

<sup>96</sup> Melissa Schaefer Morabito & Kelly M. Socia, *Is Dangerousness a Myth? Injuries and Police Encounters with People with Mental Illnesses*, 14 CRIMINOLOGY & PUB. POL'Y 253, 254 (2015).

<sup>97</sup> See generally Bagaric, *supra* note 9; E. Lea Johnston, *Conditions of Confinement at Sentencing: The Case of Seriously Disordered Offenders*, 63 CATH. U. L. REV. 625, 626-27 (2014) [hereinafter Johnston, *Conditions of Confinement at Sentencing*]; E. Lea Johnston, *Vulnerability and Just Desert: A Theory of Sentencing and Mental Illness*, 103 J. CRIM. L. & CRIMINOLOGY 147, 147 (2013) [hereinafter Johnston, *Vulnerability and Just Desert*] (establishing that "offenders with serious mental illnesses are more likely than non-ill offenders to suffer physical and sexual assaults, endure housing in solitary confinement, and experience psychological deterioration" while incarcerated).

<sup>98</sup> See Johnston, *Vulnerability and Just Desert*, *supra* note 97, at 185-86.

<sup>99</sup> *Id.* at 151.

<sup>100</sup> See generally Donald Braman, *Criminal Law and the Pursuit of Equality*, 84 TEX. L. REV. 2097 (2006).

<sup>101</sup> SLATE ET AL., *supra* note 4, at 421-426 (discussing the challenges posed by prisoners with serious mental illness); TORREY, *supra* note 22, at 32-33; Fellner, *supra*

foreseeable that an individual with a mental illness sentenced to time in prison experiences a harsher sentence than their fellow inmates without mental illnesses. Given the likelihood of this increased harm occurring, the length of sentences imposed should be reduced to manifest an equitable level of suffering or harm. In this way, the essay is cognizant of the lived experience of prison for prisoners with mental illness, and what this means for sentencing. This has led some commentators, such as Johnston and Bagaric, to call for mental illness to act as a mitigating factor for another reason—based on the predicted additional harm they suffer by virtue of their mental health status.<sup>102</sup>

### III. SENTENCING GUIDELINES

The U.S. Federal Sentencing Guidelines prescribe certain penalties based upon criminal history (which is assigned a certain score) and the severity of the offense (factors of the crime, such as the use of a firearm, are assigned a certain score).<sup>103</sup> Judges calculate the appropriate sentence using a combination of the defendant's criminal history and the nature of the crime.<sup>104</sup> A sentencing judge may stray from the calculated penalties through

---

note 53; Johnston, *Conditions of Confinement at Sentencing*, *supra* note 97, at 636-43 (discussing treatment, housing, and vulnerability of prisoners with serious mental illness).

<sup>102</sup> Bagaric, *supra* note 9, at 5-6 (calling for a future reduction of up to 50% in such instances where mental illness is likely to bring about a harsher punishment); Johnston, *Conditions of Confinement at Sentencing*, *supra* note 97, at 626, 628 (advocating that factoring "offender vulnerability" into the sentencing process is not enough and that judges should have latitude to extend sentence tailoring options that consider the needs of mentally ill prisoners, obviate unjustifiable hardships, and reduce the extent to which their disorders exacerbate the severity of their prison experiences).

<sup>103</sup> U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (U.S. SENTENCING COMM'N 2018). It is interesting to note the timing of the introduction of the Federal Sentencing Guidelines, in that it co-existed with anti-insanity defense sentiment after the trial of John Hinckley, Jr., and also close in time to deinstitutionalization of mental institutions. See Shari N. Spitz, *Psychiatric and Psychological Examinations for Sentencing: An Analysis of Caselaw from the Second Circuit in Comparison with Other Federal Circuits and the Governing Federal Statutes*, 6 QUINNIPIAC HEALTH L. J. 133, 137 (2003).

<sup>104</sup> Charles Doyle, *How the Federal Sentencing Guidelines Work: An Abridged Overview*, CONGRESSIONAL RESEARCH SERVICE R41697 1 (2015), available at <https://perma.cc/AJ8S-MW86>.

the use of adjustments (increasing the penalty) and departures (decreasing the penalty).<sup>105</sup>

In federal courts, the presence of mental illness may only operate in one direction—i.e. a downward departure with a mitigating effect.<sup>106</sup> However, mental illness is rarely relevant in determining if a departure is warranted. According to *U.S. v. McBroom*,<sup>107</sup> there are a number of exceptions to this rule under the guidelines. Current sentencing judges should take advantage of the following three avenues that allow for the use of mental illness to reduce the penalty given:

§ 5H1.3<sup>108</sup> - mental and emotional conditions can be relevant to the sentencing decision. This section states that “mental and emotional conditions may be relevant in determining whether a departure is warranted, if such conditions, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines.” If this is found in a given case, the judge can impose an ‘outside the range’ penalty.

§ 3553(a)(1)<sup>109</sup> - This section requires the consideration of the history and characteristics of the offender. Again, mental illness could be found to be relevant here.

§ 5K2.13<sup>110</sup> - This applies to cases of diminished capacity and allows for a downward departure from the guideline penalty range. But it only applies if the offender was suffering from a significantly reduced mental capacity at the time of the offense and this substantially contributed to commission of the crime.

---

<sup>105</sup> LUCIEN B. CAMPBELL & HENRY J. BEMPORAD, AN INTRODUCTION TO FEDERAL GUIDELINE SENTENCING 6 (8th ed., 2004).

<sup>106</sup> See *U.S. v. Portman*, 599 F.3d 633, 638 (7th Cir. 2010); *U.S. v. Pinson*, 542 F.3d 822, 838-39 (10th Cir. 2008).

<sup>107</sup> *U.S. v. McBroom*, 124 F.3d 533 (3d Cir. 1997).

<sup>108</sup> U.S. SENTENCING GUIDELINES MANUAL §5H1.3 (U.S. SENTENCING COMM’N 2016).

<sup>109</sup> 18 U.S.C. § 3553(a)(1) (2018).

<sup>110</sup> U.S. SENTENCING GUIDELINES MANUAL §5K2.13 (U.S. SENTENCING COMM’N 2016).

Unfortunately, sentencing judges rarely apply these sections of the sentencing guidelines to downward departures, according to Perlin and Gould.<sup>111</sup>

The Sentencing Guidelines may provide for mental illness as an aggravating factor, as Gomex explains that “the wording of the § 3553(a) factors appears to encourage higher sentencing” including the factors designed “to protect the public from further crimes of the defendant.”<sup>112</sup> The future dangerousness associated with individuals with mental illnesses may be used to increase sentences, acting as an aggravator and warranting higher sentences.<sup>113</sup> See for example, *U.S. v. Hines*, where the district court “stressed that Hines posed an *extraordinary danger* to the community because of his serious emotional and psychiatric disorders.”<sup>114</sup> Similarly, in *U.S. v. Strange*, the sentencing court dealt a lengthier sentence based on the future dangerousness of a defendant diagnosed with schizophrenia.<sup>115</sup> In contrast, the Sixth Circuit in *U.S. v. Moses* vacated a defendant’s lengthier sentence given as a result of his dangerousness and mental illness.<sup>116</sup> The *Moses* court stated that diversion into civil commitment was more appropriate.<sup>117</sup> Another case where mental illness acted as a mitigating factor is *U.S. v. Speight*, where again the defendant was schizophrenic.<sup>118</sup> As illustrated above, the case law on the subject is unpredictable—some judges ignore mental illness, others consider it a mitigating factor, and others perceive it as an aggravating factor.<sup>119</sup>

Finally, under current federal law, the sentencing judge may not only reduce sentence length but may also modify the type of

---

<sup>111</sup> Perlin & Gould, *supra* note 42, at 447 (“Departures from the Guidelines based on mental disability have been few,” citing *U.S. v. Speight* as an exception).

<sup>112</sup> *Developments in the Law*, *supra* note 41, at 1139 (quoting 18 U.S.C. § 3553(a)(2)(C)).

<sup>113</sup> Fatma Marouf, *Assumed Sane*, 101 CORNELL L. REV. ONLINE 25, 37 (2016); Ellen Byers, *Mentally Ill Criminal Offenders and the Strict Liability Effect: Is There Hope for a Just Jurisprudence in an Era of Responsibility/Consequences Talk?*, 57 ARK. L. REV. 447, 522 (2004).

<sup>114</sup> *U.S. v. Hines*, 26 F.3d 1469, 1477 (9th Cir. 1994).

<sup>115</sup> *U.S. v. Strange*, No. 89-5826, 1989 WL 156588, at \*1 (6th Cir. Dec. 28, 1989).

<sup>116</sup> *U.S. v. Moses*, 106 F.3d 1273, 1273 (6th Cir. 1997).

<sup>117</sup> See *id.* at 1280-81.

<sup>118</sup> See generally *U.S. v. Speight*, 726 F. Supp. 861 (D.D.C. 1989).

<sup>119</sup> Perlin & Gould, *supra* note 42, at 433-35, 444.

sentence served. Skeem and Peterson point to 18 U.S.C. § 3563—empowering federal courts to “provide as further conditions of a sentence of probation. . . that the defendant . . . undergo available medical, psychiatric or psychological treatment.”<sup>120</sup> Judges should take advantage of provisions like 18 U.S.C. § 3563.

#### IV. RECOMMENDATIONS

As a public policy matter, similar to the relationship of drugs and crime, all stakeholders are encouraged to examine mental illness as a public health matter (rather than a penal policy issue) and to examine it through a rehabilitative lens.<sup>121</sup> Although recommendations in the literature focus elsewhere (such as police Crisis Intervention Training<sup>122</sup> and investments in areas such as education,<sup>123</sup> healthcare,<sup>124</sup> and housing<sup>125</sup>),<sup>126</sup> this article focuses on rendering mental illness relevant at the sentencing stage if proven, as called for by Weinstock, et al. in the early 1990s.<sup>127</sup>

The U.S. should adopt the approach put forward by Bagaric and make a definitive percentage decrease of 10% in every case where mental illness is proven.<sup>128</sup> This is based on mentally ill offenders’ reduced culpability.<sup>129</sup> As Davidson and Rosky explain, “[f]rom this perspective, offenders with a mental illness may be perceived as less blameworthy than offenders without a mental

---

<sup>120</sup> Skeem & Peterson, *supra* note 2, at 523.

<sup>121</sup> ERICKSON & ERICKSON, *supra* note 18, at 7.

<sup>122</sup> Megan Testa, *Imprisonment of the Mentally Ill: A Call for Diversion to the Community Mental Health System*, 8 ALB. GOV’T L. REV. 405, 431 (2015).

<sup>123</sup> CRIMINAL JUSTICE STANDARDS ON MENTAL HEALTH 7-1.7 (AM. BAR. ASS’N 2016).

<sup>124</sup> TORREY ET AL., TREATMENT OF PERSONS WITH MENTAL ILLNESS, *supra* note 10, at 8, 105-07; Lurigio, *supra* note 21, at 67S.

<sup>125</sup> Nicola Hancock, Jennifer Smith-Merry, & Kirsty McKenzie, *Facilitating People Living with Severe and Persistent Mental Illness to Transition from Prison to Community: A Qualitative Exploration of Staff Experiences*, 12 INT’L J. MENTAL HEALTH SYS. art. no. 45, 2018, at 3-5, available at <https://perma.cc/ANE8-6NWX>; NAT’L HEALTH CARE FOR THE HOMELESS COUNCIL, CRIMINAL JUSTICE, HOMELESSNESS & HEALTH, 2012 POLICY STATEMENT (Nashville, TN), <https://perma.cc/Z7UH-VRMB>.

<sup>126</sup> Lurigio, *supra* note 21, at 66S (correctly pointing out that we must “focus on the amelioration of criminogenic factors, not simply on treating mental illness among [people with serious mental illness] in the criminal justice system.”).

<sup>127</sup> R. Weinstock, G.B. Leong, & A.L. Halpern, *Psychiatry and the Federal Sentencing Guidelines*, 15 AM. J. FORENSIC PSYCHIATRY 67, 67-68 (1994).

<sup>128</sup> Bagaric, *supra* note 9, at 5.

<sup>129</sup> See *id.* at 35-41 (arguing reduced culpability can justify a relatively minor reduced penalty).

illness due to their inability to fully understand the wrongfulness of their behavior.”<sup>130</sup> Bagaric calls for a further reduction of up to 50% if the offender is likely to experience a harsher sentence by virtue of their mental illness.<sup>131</sup>

In addition, and as part of the same legislative reform, sentencing judges shall consider alternatives to prison in such cases and provide explicit written reasons if the judge fails to opt for alternatives to a prison sentence.<sup>132</sup> In this way, this article calls for the fixed approach advocated for by Bagaric but also for the individualized approach called for by Wolff.<sup>133</sup> More broadly speaking, given the complexity of mental illness, Perlin and Gould point out the poor level of understanding of mental illness on the part of the judiciary, outside the context of the insanity defense.<sup>134</sup> As such, judicial training on the role that mental illness plays at the sentencing stage of a trial should be introduced.<sup>135</sup> This is particularly true when we consider the tools to make mental illness relevant to the sentencing decision which exist under the current law and guidelines, but are just not being utilized.

Finally, we should encourage the judiciary to take advantage of current opportunities to use mental illness as a mitigating factor. In addition to the three avenues outlined above (§§ 5H1.3, 3553(a)(1), and 5K2.13) more generally, a sentencing judge may depart from the Guidelines if there is an aggravating or

---

<sup>130</sup> Davidson & Rosky, *supra* note 4, at 355.

<sup>131</sup> Bagaric, *supra* note 9, at 5-6.

<sup>132</sup> See e.g., Rachel Schneider, *A Role for the Courts: Treating Physician Evidence in Social Security Disability Determinations*, 3 U. CHI. L. SCH. ROUNDTABLE 391, 400-02 (1996) (identifying the existence of this written rationale component in administrative law where Administrative Law Judges in the context of disability benefits must provide written reasons for departing from the treating physician rule).

<sup>133</sup> Hon. Michael A. Wolff, *Evidence-Based Judicial Discretion: Promoting Public Safety Through State Sentencing Reform*, 83 N.Y.U. L. REV. 1389, 1405, 1408-09 (2008).

<sup>134</sup> See Perlin & Gould, *supra* note 42, at 433 (arguing that sentencing judges lack any “real understanding of the role of mental disability, short of an exculpating insanity defense, in criminal behavior”). See also Fiona Sampson, *Mandatory Minimum Sentences and Women with Disabilities*, 39 OSGOODE HALL L. J. 589 (2001) (asserting the concerns of women with disabilities that mandatory minimum sentences disadvantage them as criminal defendants and as murder victims).

<sup>135</sup> See generally JOHN S. GOLDKAMP & CHERYL IRONS-GUYN, *EMERGING JUDICIAL STRATEGIES FOR THE MENTALLY ILL IN THE CRIMINAL CASELOAD: MENTAL HEALTH COURTS IN FORT LAUDERDALE, SEATTLE, SAN BERNARDINO, AND ANCHORAGE, U.S. DEP’T JUST. NCJ 182504* (2000), <https://perma.cc/X5T2-74FT>.

mitigating circumstance “not adequately taken into consideration by the Sentencing Commission in formulating the guidelines,”<sup>136</sup> and if it advances the objectives of incapacitation, deterrence, rehabilitation, and retribution which we have outlined above. A downward departure is permitted when a defendant “suffers from a ‘significantly reduced mental capacity’ and neither violence in the offense nor the offender’s criminal history indicates a need to protect the public.”<sup>137</sup> Federal district judges should make use of these opportunities in the current law and sentencing guidelines which allow for mental illness to act as a mitigating factor. However, what is currently lacking under the current law and sentencing regime is the clear procedure to opt for non-custodial sentences, such as community placement and supervision.<sup>138</sup> This ought to be a part of the legislative reform advocated for above.

In order for the federal judiciary to make suitable sentencing decisions, they require both a statutory mandate, as suggested above, and sufficient background information in each case.<sup>139</sup> The presentence report provides an opportunity to inform the sentencing judge.<sup>140</sup> This ensures that the sentencing court has all the information concerning the mental health status of the offender. For example, Washington state law requires the court to order a presentence report before imposing a sentence where mental illness may be at issue.<sup>141</sup> Absent similar legislative-led enforcement, according to the American Probation and Parole Association, the presentence report should cover the offender’s medical history.<sup>142</sup> So, once again, the current system makes

---

<sup>136</sup> U.S. SENTENCING GUIDELINES MANUAL §1(4) b.

<sup>137</sup> *Developments in the Law – The Law of Mental Illness*, *supra* note 41, at 1135 (quoting U.S. SENTENCING GUIDELINES MANUAL § 5K2.13).

<sup>138</sup> 2009 CRIMINAL JUSTICE TRANSITION COAL., *Introduction to SMART ON CRIME: RECOMMENDATIONS FOR THE NEXT ADMINISTRATION AND CONGRESS* ix, x (2008) (describing community placement and supervision as viable alternatives to incarceration).

<sup>139</sup> THE SENTENCING PROJECT, *MENTALLY ILL OFFENDERS IN THE CRIMINAL JUSTICE SYSTEM: AN ANALYSIS AND PRESCRIPTION* 16 (2002) (recommending judges have information on offenders’ mental health status available).

<sup>140</sup> MORRIS, *supra* note 92, at 131.

<sup>141</sup> COUNCIL OF STATE GOVERNMENTS, *CRIMINAL JUSTICE/MENTAL HEALTH CONSENSUS PROJECT* 116-17 (2002), <https://perma.cc/MP99-S7SM>.

<sup>142</sup> *See id.* at 117 (citing the Position Statement of the American Probation and Parole Association).

sufficient information available, and so sentencing judges should take advantage of these reports.

Davidson and Rosky argue that the current political climate is ripe for a shift to viewing mental illness as a public health matter in wider support for criminal justice reform.<sup>143</sup> Advocates of this position should frame the debate in terms of the improvements in recidivism<sup>144</sup> and cost savings<sup>145</sup> manifested by making mental illness relevant to the sentencing decision. We are currently in a state of flux where criminal justice reform is finally receiving bipartisan and public support.<sup>146</sup> We are seeing a shift away from retribution toward rehabilitation.<sup>147</sup> Ensuring criminal justice reform incorporates changes to its treatment of the mentally ill is vital.

Another element of legislative and policy reform should center on the gathering of data. Rumpf, et al., call for intake screening, whereby the existence of mental illness would be noted.<sup>148</sup>

---

<sup>143</sup> See Davidson & Rosky, *supra* note 4, at 353. See also Katherine Beckett, et al., *The End of an Era? Understanding the Contradictions of Criminal Justice Reform*, 664 ANNALS AM. ACAD. POL. SOC. SCI. 1, 238-59 (2016); Angela J. Thielo, et al., *Rehabilitation in a Red State: Public Support for Correctional Reform in Texas*, 15 CRIMINOLOGY & PUB. POL'Y 1, 137-70 (2016); Kevin M. Drakulich & Eileen M. Kirk, *Public Opinion and Criminal Justice Reform: Framing Matters*, 15 CRIMINOLOGY & PUB. POL'Y 1, 171-77 (2016).

<sup>144</sup> Thielo et al., *supra* note 142, at 161.

<sup>145</sup> *Id.* at 139; HENRICHSON & DELANEY, CTR. SENTENCING & CORRECTIONS, *supra* note 50, at 11-13; Joan Petersilia & Francis T. Cullen, *Liberal but Not Stupid: Meeting the Promise of Downsizing Prisons*, 2 STAN. J. CRIM. L. & POL'Y 1 (2015); David Dagan & Steven M. Teles, *Locked In? Conservative Reform and the Future of Mass Incarceration*, 651 ANNALS AM. ACAD. POL. SOC. SCI. 1, 266-76 (2014); TORREY ET AL., TREATMENT OF PERSONS WITH MENTAL ILLNESS, *supra* note 10, at 8, 107 (calling for cost studies to be undertaken).

<sup>146</sup> Justin George, *Can Bipartisan Criminal-Justice Reform Survive in the Trump Era?*, THE NEW YORKER, June 6, 2017, <https://perma.cc/QG9E-XJCE>; Alex Swoyer, *Bipartisan Support for Criminal Justice Reform Builds in Senate*, THE WASHINGTON TIMES, June 26, 2018, <https://perma.cc/7H4K-JJVS>; Robert Blizzard, *Key Findings from a National Survey of 800 Registered Voters January 11-14, 2018*, JUSTICE ACTION NETWORK (2018), available at <https://perma.cc/KNA2-WDVA>; BENENSON STRATEGY GROUP, SMART JUSTICE CAMPAIGN POLLING ON AMERICANS' ATTITUDES ON CRIMINAL JUSTICE, ACLU (2017) <https://perma.cc/FN72-XPVD> (finding wide support for reforming the criminal justice system from the point of view of improving its treatment of the mentally ill).

<sup>147</sup> *Developments in the Law – The Law of Mental Illness*, *supra* note 41, at 1176.

<sup>148</sup> TORREY ET AL., TREATMENT OF PERSONS WITH MENTAL ILLNESS, *supra* note 10, at 8, 107 (recommending prisons establish careful intake screening procedures); Lurigio,



Finally, the expansion of mental health courts is another possible avenue for reform. In mental health courts, specialist judges deal with defendants who have a proven mental illness, and tend to have a wider range of choices when it comes to not only the length of penalties, but also the type of penalties.<sup>149</sup> These courts should lead mental illness sentencing reform. The purpose of mental health courts is to divert, where appropriate, offenders with mental illnesses away from the criminal justice system.<sup>150</sup> The judges in such courts have authority to enforce compulsory and supervised community treatment plans.<sup>151</sup> Kim, et al., examined the various pilot programs and concluded there is mixed evidence as to their effectiveness, but argue that such courts are a promising approach.<sup>152</sup> Elsewhere, a study by McNiel and Binder found that mental health courts bring about better recidivism rates.<sup>153</sup> In fact, in a review of the literature, Honegger found that the majority of studies found lower recidivism rates when tried in a mental health court.<sup>154</sup> However, given their mixed results and limited availability,<sup>155</sup> the wider reforms called for in this article, such as a fixed reduction in sentences of the

---

*supra* note 21, at 77S; H. J. Rumpf et al., *Screening for Mental Health: Validity of the Mhi-5 Using Dsm-Iv Axis I Psychiatric Disorders as Gold Standard*, 105 PSYCHIATRY RES. 3, 243-53 (2001).

<sup>149</sup> Ray Bradley & Cindy Brooks Dollar, *Examining Mental Health Court Completion: A Focal Concerns Perspective*, 54 SOC. Q. 4, 647(2013).

<sup>150</sup> See KIM, ET AL., *supra* note 24, at 27-30 (describing the operations and effectiveness of mental health courts); TORREY ET AL., TREATMENT OF PERSONS WITH MENTAL ILLNESS, *supra* note 10, at 8, 106 (recommending solutions to maintain functioning mental health treatment systems including the implementation and promotion of jail diversion programs such as mental health courts).

<sup>151</sup> Laura Honegger, *Does the Evidence Support the Case for Mental Health Courts? A Review of the Literature*, 39 L. HUM. BEHAV. 5, 478 (2015).

<sup>152</sup> KIM ET AL., *supra* note 24, at 27-30 ("MHCs seem to be a promising approach to diverting mentally ill offenders from the criminal justice system, and the success of MHCs is cautiously suggested by several evaluation studies; however, again, further research is needed.").

<sup>153</sup> Bradley & Dollar, *supra* note 148, at 649; Dale E. McNiel & Renée L. Binder, *Effectiveness of a Mental Health Court in Reducing Criminal Recidivism and Violence*, 164 AM. J. PSYCHIATRY 1395, 1401 (2007); Christine M. Sarteschi et al., *Assessing the Effectiveness of Mental Health Courts: A Quantitative Review*, 39 J. CRIMINAL JUSTICE 1, 12-20 (2011).

<sup>154</sup> Honegger, *supra* note 150, at 483.

<sup>155</sup> SAMHSA's GAINS Center, *Adult mental health treatment courts database*, (2013), <https://www.samhsa.gov/gains-center/mental-health-treatment-court-locator/adults> (the most recent count was 347 nationwide).

mentally ill, should not be limited to these specialty courts, but should become engrained in all criminal courts.

### CONCLUSION

This article posits that those with mental illness form a large portion of the current prison population. Their overrepresentation in prison provides its own cohort of problems such as overcrowding and higher costs. Their experience of prison is also unique to other inmates, given their vulnerabilities to further harm. This article argues that the higher likelihood of additional harm to inmates with mental illness requires an appropriate sentence reduction for these individuals. The sentence should be reduced by a fixed rate of 10% to acknowledge the reduced blameworthiness associated with having a mental illness at the commission of a crime.<sup>156</sup> These are the primary ways that mental illness should be made relevant to the sentencing decision. The reform proposals in this article offer recommendations that require changes to the current system, but also importantly offer recommendations that may be incorporated under the current Guidelines regime. The steps outlined above will result in more appropriate trans-institutionalization, deinstitutionalization, and reduced mass incarceration.<sup>157</sup> The reform proposals will save money for the taxpayer, through more efficient and effective sentencing, and produce fair and equitable sentences.

---

<sup>156</sup> Bagaric, *supra* note 9, at 5.

<sup>157</sup> See H. Richard Lamb & Linda E. Weinberger, *Some Perspectives on Criminalization*, 41 J. AM. ACAD. PSYCHIATRY L. 287, 292 (2013).

