MENTAL HEALTH AND THE CONSTITUTION: HOW INCARCERATING THE MENTALLY ILL MIGHT PAVE THE WAY TO TREATMENT

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“The amount of sympathy you get from having an illness is paid out like a Ponzi scheme and psychiatric disorders are all the way at the bottom.”1

Inmates with mental illnesses, including opioid addiction, face many challenges while incarcerated. Prisons and jails in their current state prove ill-equipped to address these problems. Because symptoms of these illnesses often involve suffering similar to an untreated physical injury, the inability of jails and prisons to address these inmates’ needs for treatment may violate the Eighth Amendment. Requiring correctional facilities to provide proper treatment may establish a balance between punishment and healing by exposing inmates to mental health treatments for a limited time, allowing for inmate protection, reducing recidivism, and fueling some inmates’ desires to seek additional help upon release. Due to the government’s historical involvement in depriving individuals with mental needs of necessary in-patient care, this may be the appropriate time for the United States Supreme Court to strike a balance between the punitive requirements of criminal justice and the need to treat mental illness in correctional facilities.

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INTRODUCTION

From time to time, prison reform advocates and even federal agencies may argue that a jail or prison is so poorly run that the whole locale violates the Eighth Amendment.² Complainants may be raised because the food is nearly inedible or the living conditions so oppressive and dangerous that placing anyone within the facility would constitute cruel and unusual punishment.³ These claims may prompt action on the part of the offending county or state, and the correctional facilities may then restore a modicum of civility, bringing everything back to normal.⁴ Yet for many inmates, improving the menu or eliminating the rodent infestation does not solve the problem. For individuals suffering from severe mental illnesses, being placed in a facility where their psychological needs remain unaddressed might be as cruel, if not more cruel, than allowing them to become physically injured and refusing to provide treatment.⁵ Therefore, our nation’s jails and prisons may face a constitutional reckoning fifty years in the making: the eventual requirement that these jails and prisons undertake the expensive but potentially required reforms in the treatment of mentally ill inmates.

³ See, e.g., Can Bad Food Be a Violation, supra note 2; Hughes, supra note 2; Weiss, supra note 2.
First, it is important to note why the United States Constitution might require reform. It is precisely because our society has a greater understanding of mental health problems than it did a century ago. When the Founding Fathers drafted the Eighth Amendment, the field of psychology was nonexistent. But now, the field is quite developed, with many advancements helping to explain not only the reasons some individuals become incarcerated, but also that inmates can suffer severely even when showing no apparent physical symptoms. Psychological studies suggest that this suffering may be as real and as severe as a physical injury. Hence, just as jails and prisons must provide medical care to sick or injured inmates, the United States Supreme Court may soon require jails and prisons to provide significant psychological care to alleviate the mental suffering of the afflicted inmates therein.

At first blush, providing mental health care to mentally ill inmates would seem to be a harsh burden for the Court to impose on federal, state, and local governments. After all, the United States has a very large jail and prison population compared to other nations, due in part to a large number of laws that place many people within reach of the criminal justice system. However, this

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imposition is less unjustified than it seems, because the actions of federal, state, and local governments may have greatly increased the number of mentally infirm inmates to begin with.13 As this Article will show, the 1960s saw an era of abdication of responsibility for psychologically infirm patients by state and local governments in hopes that the federal government would take up the mantle.14 The federal government became involved in taking responsibility for mental health treatment but never finished the job.15 As a result, the mentally ill lacked asylums to return to and became incarcerated at disproportionately high rates.16 Unable to find proper care in penitentiaries,17 victimized by fellow inmates and guards alike,18 and incapable of finding any voice in a democratic society,19 mentally ill inmates have suffered greatly in state and federal jails.20 Many mentally ill individuals remain untreated after leaving jails or prisons, creating a revolving door within the jails and prisons (where these individuals often return repeatedly, sometimes for want of another place to go).21

13 For example, in 1963, President John F. Kennedy began the process of moving mentally ill individuals out of state-run psychiatric hospitals, causing many of these individuals to become homeless and incarcerated, as described in more detail throughout this Article. See E. FULLER TORREY, HOW TO BRING SANITY TO OUR MENTAL HEALTH SYSTEM 1, 2 (2011), https://www.heritage.org/health-care-reform/report/how-bring-sanity-our-mental-health-system [https://perma.cc/X5RE-GLRQ]; see also Daniel Yohanna, Deinstitutionalization of People with Mental Illness: Causes and Consequences, AMA J. ETHICS (Oct. 2013), https://journalofethics.ama-assn.org/article/deinstitutionalization-people-mental-illness-causes-and-consequences/2013-10 [https://perma.cc/R957-Z9QW].
14 See TORREY, supra note 13, at 1; Yohanna, supra note 13.
15 See TORREY, supra note 13, at 1–2.
16 See id. at 2.
20 With the growth in popularity of private incarceration facilities, these problems may escalate into the private realm as well. Private Prisons, ACLU, https://www.aclu.org/issues/smart-justice/mass-incarceration/private-prisons [https://perma.cc/DE9Z-WEPH] (demonstrating that “7 percent of state prisoners and 18 percent of federal prisoners” are incarcerated by for-profit companies) (last visited Dec. 21, 2019).
This Article will address the likely constitutional requirement to expand the availability of mental health services within jails and prisons. Part I will demonstrate the extent of the national mental health problem both statistically and by way of example. This Article will explain that jail and prison staff often lack the necessary training, experience, or incentive to treat incarcerated mentally afflicted individuals with the care and respect that the United States Constitution mandates. This lack of treatment results in drastic consequences, up to, and including, the inmate’s death.\(^{22}\) Part II will present the constitutional arguments for reform, drawing on the United States Supreme Court’s jurisprudence requiring physical care for ill or injured inmates and arguing for the expansion of this jurisprudence into the realm of psychological and mental suffering. Finally, Part III will show that this change is not just constitutionally required, but that the government, having played such a large part in the reduction of mental health treatment facilities, should rightly bear the cost of alleviating the fallout.

I. MENTAL ILLNESS

The study of mental illness, ordinarily assigned to the field of psychology, has seen a vast expansion over the past two centuries in understanding how mental health problems affect individuals.\(^ {23}\) New mental health diagnoses have led to both the development of medications to combat previously unaddressed mental health problems and the employment of thousands of counselors trained in helping patients cope with the problems they face.\(^ {24}\) Yet, the demand for psychological treatment and cures still far exceeds supply.\(^ {25}\) Individuals who need treatment often cannot afford it\(^ {26}\) or do not even recognize that they have a

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\(^{23}\) See History of Psychology, supra note 7.

\(^{24}\) Id.


problem requiring psychological attention.\textsuperscript{27} Even in situations where the patient is able to receive some care, the care may be insufficient, and when it comes to psychological treatment, a job half done is a job not done.\textsuperscript{28}

\section*{A. National Overview}

According to the National Alliance on Mental Illness, approximately one in five adults in the United States—forty-three million people—suffer from mental illness in any given year.\textsuperscript{29} Mental illnesses include depression; anxiety disorders such as “generalized anxiety disorder, social phobia, agoraphobia, and obsessive-compulsive disorder (OCD); substance abuse; and impulse control disorder (like attention deficit/hyperactivity disorder)”; schizophrenia; bipolar disorder; and others.\textsuperscript{30} Approximately “6.3 percent of the [United States] population” endures a “severe mental illness” that is defined as a “longstanding mental illness[,] typically psychosis,” which may cause prolonged moderate-to-severe disability.\textsuperscript{31} To put this number in perspective, the number of adults ages eighteen and over in the United States was approximately 253.2 million in 2018,\textsuperscript{32} and nearly 15.9 million of these adults in the United States suffered from severe mental illness.\textsuperscript{33}

The high number of individuals enduring mental illnesses places a large burden on mental health treatment centers and the psychologists, psychiatrists, and other mental health professionals who treat these illnesses.\textsuperscript{34} Experts questioned by the Treatment Advocacy Center estimate that approximately “[fifty] beds per 100,000 [individuals] would meet [mental health] needs for acute and long-term care,” but “many [individuals] who need residential treatment cannot obtain it,” because “in some states[,] the number of available beds is as low as [five beds] per 100,000 people.”\textsuperscript{35} Nationwide, one in five, or ten million adults, with a mental health condition report having an unmet need.\textsuperscript{36}

\begin{footnotes}
\item[28] See Lake & Turner, supra note 26.
\item[31] Yohanna, supra note 13.
\item[33] See Yohanna, supra note 13.
\item[34] See id.
\item[35] Id.
\end{footnotes}
Schizophrenia and bipolar disorder are examples of two long-recognized mental illnesses that qualify as severe and may be particularly associated with crime.37 “Schizophrenia is a chronic, severe, and debilitating brain disease that affects approximately [1] percent of the United States population ages eighteen and older in a given year.”38 Schizophrenia causes “deterioration in thinking, disturbances in perception, and impairments of social function[,]” with potentially severe symptoms such as hallucinations, thought and movement disorders, delusions, social withdrawal, and a lack of motivation and emotion.39 Individuals suffering from schizophrenia “attempt suicide [much] more often than the general population, and approximately [10] percent” of schizophrenics die as a result of suicide.40

Schizophrenics are also “four times more likely to engage in violent conduct” than non-schizophrenic individuals.41 In the absence of asylums or mental health facilities that can manage their illness, schizophrenics may be more likely to engage in criminal behavior, which would lead to incarceration.42 Either by way of violence or by seeking illegal substances that may help them

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39 Id.
40 Id. at 180.
41 Id.
42 For example, James Holmes, an individual with schizoaffective disorder and schizotypal personality disorder, killed or wounded seventy individuals in Colorado in 2012. Ann O’Neill et al., A Look Inside the ‘Broken’ Mind of James Holmes, CNN (last updated June 10, 2015, 4:04 PM), https://www.cnn.com/2015/06/05/us/james-holmes-theater-shootings-trial/index.html [https://perma.cc/3PDU-6UR4]; ‘Hidden in Holmes’ Mind’: Psychologist Describes Findings After Spending Hours with Aurora Movie Theater Killer, FOX NEWS (Aug. 5, 2018), https://www.foxnews.com/us/hidden-in-holmes-mind-psychologist-describes-findings-after-spending-hours-with-aurora-movie-theater-killer [https://perma.cc/3YV4-KCNX]. Moreover, Adam Lanza, likely a schizophrenic, killed twenty-eight individuals, including children as young as six years old, in a Newtown, Connecticut school shooting. Jamie Turndorf, Was Adam Lanza an Undiagnosed Schizophrenic?, PSYCHOL. TODAY (Dec. 20, 2012), https://www.psychologytoday.com/us/blog/we-can-work-it-out/201212/was-adam-lanza-undiagnosed-schizophrenic [https://perma.cc/K8UD-CF4K]. Additionally, in January 2011, Jared Loughner, suffering from untreated schizophrenia and schizotypal personality disorder for several years, killed six individuals and wounded thirteen more in Tucson, Arizona. See Peter Langman, Jared Loughner: What Kind of Psychosis?, PSYCHOL. TODAY (Jan. 16, 2011), https://www.psychologytoday.com/us/blog/keeping-kids-safe/201101/jared-loughner-what-kind-psychosis [https://perma.cc/4FYA-KGGP]. “Because Congresswoman Gabrielle Giffords . . . was among the wounded” in this shooting, the event received wide publicity. TORREY, supra note 13, at 713. However, “[w]hat was not publicized was the fact that such ‘rampage killings’ by untreated mentally ill individuals had been occurring at an average rate of two each year for the previous decade, with only the 2007 massacre at Virginia Tech receiving wide publicity.” Id.
self-medicate, schizophrenics may find themselves in state or federal custody despite the fact that both state and federal governments are not adequately prepared to address their illness.\textsuperscript{43}

Bipolar disorder—another mental illness that can contribute to a higher rate of incarceration, drug use, and additional mental health problems—results in extreme mood swings, ranging from mania to severe depression.\textsuperscript{44} A bipolar individual often cycles from one extreme mood to the other.\textsuperscript{45} As with schizophrenia, bipolar disorder affects about 1 percent of the U.S. population and can be a severe detriment for someone confined to a jail or prison cell with inmates who are less than understanding and corrections staff that do not take measures to ensure the individual receives the care and protection he or she needs.\textsuperscript{46} Symptoms of the disorder include euphoria, grandiosity, irresponsibility, hopelessness, excessive sleeping or difficulty sleeping, self-criticism, and persistent thoughts of death or suicide.\textsuperscript{47} Bipolar individuals have a higher risk of violence than do schizophrenics.\textsuperscript{48} Treatments for both disorders include “antipsychotic medication, rehabilitation, cognitive behavior therapy, and self-help groups,” which may not be available while confined to a jail or prison.\textsuperscript{49}

A few other types of mental disorders bear mentioning, as they also relate to an increased likelihood of incarceration for those who live with them and should require the state and federal entities responsible for that incarceration to provide them with protections.\textsuperscript{50} Schizoaffective disorder is characterized primarily by concurrent symptoms of schizophrenia and a mood disorder, such as bipolar disorder.\textsuperscript{51} Schizoaffective disorder is rare, affecting approximately 0.3 percent of the population.\textsuperscript{52} Another mental illness, schizotypal personality dis-
order, presents with unusual beliefs and fears, including paranoia and difficulty forming and maintaining relationships.\textsuperscript{53}

While the manifestation of these and other psychological disorders can lead to criminal activity, a jury or judge may not always acquit an individual with a psychiatric illness.\textsuperscript{54} The insanity defense in criminal law does not lead to an acquittal of the defendant unless the individual is determined to be unable to (1) appreciate the criminality of his or her conduct or conform his or her conduct to the requirements of the law,\textsuperscript{55} or (2) determine the difference between right and wrong at the time of the act.\textsuperscript{56} The insanity defense may also lead to an acquittal if the individual displayed an irresistible impulse to commit the criminal act,\textsuperscript{57} depending on the jurisdiction.\textsuperscript{58} In fact, while some jurisdictions require the prosecution to prove sanity beyond a reasonable doubt once the defense raises the insanity defense, other jurisdictions actually shift the burden to the defendant.\textsuperscript{59} When the burden of proof shifts, the burden may not be beyond a reasonable doubt, but it may be as high as clear and convincing evidence, which is no small task in a criminal system where the defendant ordinarily bears no burden at all.\textsuperscript{60}

Even if the defendant successfully shows his or her own insanity, this demonstration does not set the defendant free: while he or she avoids the criminal conviction, the court typically orders the defendant’s confinement to a mental health treatment facility where the defendant may or may not be declared sane (and released) at some point in the future.\textsuperscript{61} This outcome does not always

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\item\textsuperscript{55} This rule describes the Model Penal Code Test for criminal insanity. Id.
\item\textsuperscript{56} Under the M'Naghten Rule, a criminal defendant must either (1) not understand what he or she did, or (2) be unable to distinguish right from wrong. Id.
\item\textsuperscript{57} This rule describes the Irresistible Impulse Test. Id.
\item\textsuperscript{58} Some jurisdictions use the M'Naghten Rule, while others use the Model Penal Code Test or the Irresistible Impulse Test. Some jurisdictions consider the Irresistible Impulse Test in combination with the M'Naghten Rule. New Hampshire alone follows the Durham Rule, which holds that if a defendant’s “mental disease or defect” was the reason the individual committed the crime, “the defendant is not guilty [due to] insanity.” Id.
\item\textsuperscript{59} Charlene Sabini, Affirmative Defenses, NALS (June 21, 2017), https://www.nals.org/blogpost/1359892/279125/affirmative-defenses [https://perma.cc/VUSN-Q4BY].
\item\textsuperscript{60} 18 U.S.C. § 17(b) (2018). In a majority of states, the defendant has the burden of proof and must prove insanity by a preponderance of the evidence. See Kourosh Akhbari, Insanity Defenses, LEGAL MATCH, https://www.legalmatch.com/law-library/article/insanity-defenses.html (last updated July 12, 2018). In a minority of states, the prosecution has the burden of proof and must prove sanity beyond a reasonable doubt. In federal court and in Arizona, the defendant has the burden of proof and must prove insanity by clear and convincing evidence. Id.; ARIZ. REV. STAT. ANN. § 13-502(C) (2019).
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equal release. In fact, it is entirely possible that in some cases the defendant may perceive it to his or her benefit to plead guilty as charged (or accept a plea offer) rather than attempt to establish his or her own insanity. This reasonable belief is because the individual may fear indefinite confinement to a mental health institution as opposed to a very definite (and sometimes curtailed) sentence he or she might receive for a minor crime. This fear and uncertainty might be particularly salient, since in many confinements to mental health treatment facilities on the grounds of legal insanity, the standards for obtaining release, access to counsel, or both, are highly unclear. Hence, the accused may elect the evil he or she knows (jail or prison) rather than the evil he or she does not know (institutionalization).

However, the more troubling case may be a situation where the individual has a severe mental illness but does not technically meet the definition of insane under the law. These individuals may be particularly unlucky, since they cannot avoid a conviction based on their condition. Furthermore, while mental health problems may be mitigating at sentencing, they do not automatically

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62 See id.
63 See id.
64 See id.
65 See id.
66 See id.
67 Different states have different tests to determine whether an individual is legally insane. For example, the M'Naghten Rule “focuses on whether a criminal defendant knew the nature of the crime or understood right from wrong at the time [the crime] was committed.” For the court to declare a defendant legally insane under this test, the defendant must meet one of those two criteria. The M'Naghten Rule, FINDLAW, https://criminal.findlaw.com/criminal-procedure/the-m-naghten-rule.html [https://perma.cc/6TYU-MPZU] (last visited Dec. 28, 2019). The Model Penal Code Test focuses on whether the defendant was able to either appreciate the criminality of his or her conduct or conform his or her conduct to the requirements of the law. Therefore, under the Model Penal Code Test, a legally insane defendant must have either (1) been diagnosed with a mental defect and did not know right from wrong, or (2) “lack[] the ability to control an impulse that led to the incident.” The Model Penal Code Test for Legal Insanity, FINDLAW, https://criminal.findlaw.com/criminal-procedure/the-model-penal-code-test-for-legal-insanity.html [https://perma.cc/3BGQ-8RXZ] (last visited Dec. 28, 2019). The Durham Rule for legal insanity holds that a criminal defendant is legally insane and cannot be convicted of a crime “if the act was the result of a mental disease or defect the defendant had at the time of the [crime].” The “Durham Rule”, FINDLAW, https://criminal.findlaw.com/criminal-procedure/the-durham-rule.html [https://perma.cc/XSD9-J4HA] (last visited Dec. 28, 2019). Finally, the Irresistible Impulse Test requires a defendant to prove (1) “[t]he existence of [a] mental illness,” and (2) “[t]hat the mental illness caused the inability to control [his or her] actions or conform [his or her] conduct to the law.” The Irresistible Impulse Test, FINDLAW, https://criminal.findlaw.com/criminal-procedure/the-irresistible-impulse-test.html [https://perma.cc/62NP-JH6Z] (last visited Dec. 28, 2019).
68 See The M’Naghten Rule, supra note 67.
result in avoiding incarceration. Individuals sentenced to imprisonment in a jail or prison who end up accepting a plea offer involving hard time from the government can be at an extreme disadvantage while incarcerated, since for them, the incarceration can be far more burdensome due to the lack of psychological treatment.

When it comes to other mental illnesses, such as addiction to opioids, the criminal justice system struggles even more to preserve the Eighth Amendment rights of incarcerated individuals. A variety of problems addicts face, including criminality, may be traced to the opioid epidemic. After all, possession of controlled substances is a crime in every jurisdiction, and addicted individuals seek these substances because of their addiction. Those persons who are incarcerated and thereby separated from either opioids, or the treatment they have been receiving for their addiction, present a special scenario for departments of corrections, as opioid addiction may present with significant physical symptoms when the opioids are unobtainable. In recent years, failure to account for these symptoms has led to drastic consequences.

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70 See Jailing People with Mental Illness, supra note 11.
73 See id.
75 Eighteen-year-old Victoria Herr, an honors student, talented artist, and writer, was arrested in March 2015 after police found drugs in the apartment she shared with her boyfriend. Pennsylvania County to Pay $4.75M in Jailed Teen’s Heroin Withdrawal Death, CBS NEWS (Oct. 25, 2018, 1:18 PM), https://www.cbsnews.com/news/victoria-herr-pennsylvania-county-to-pay-4-75m-in-jailed-teens-heroin-withdrawal-death/ [https://perma.cc/39SS-PTHQ] [hereinafter Pennsylvania County to Pay $4.75M]; Tron, supra note 22. Taken to a prison in Lebanon County, Pennsylvania, Ms. Herr confessed to the prison staff that she used ten bags of heroin per day and was afraid the withdrawal process would be difficult. Id. After she experienced severe withdrawal symptoms, including uncontrolled vomiting, the prison took no action to provide Ms. Herr with medical treatment, instead accusing her of faking her condition. Id. After spending just four days in jail, she collapsed and went into cardiac arrest as a result of her withdrawal symptoms and the prison’s refusal to provide her with medical treatment. Id. Equally unsettling, in 2014, twenty-six-year-old Madoline Pitkin died in an Oregon jail after enduring seven days of opioid withdrawal and after making four written pleas for medical assistance that the jail allegedly denied. Maxine Bernstein, Record $10 Million Judgment Awarded in Washington County Jail Heroin Withdrawal Death, OREGON LIVE (last updated Dec. 7, 2018), https://www.oregonlive.com/crime/2018/12/record-10-million-judgement-awarded-against-corizon-health-in-death-of-washington-county-jail-inmate.html [https://perma.cc/9SMJ-MREJ]. No one came to Ms. Pitkin’s assistance, with jail staff ranking her withdrawal symptoms as mild. Id. Her fourth plea read: “This is a 3rd or
For example, in 2017, Nevada police jailed twenty-seven-year-old Kelly Coltrain for outstanding traffic tickets. When the jail admitted Ms. Coltrain, she immediately told the jail staff about her opioid addiction and the withdrawal-induced seizures she experienced. However, instead of providing her with medical treatment, the jail guards gave her a mop to clean up her own vomit. After suffering for four days in jail without treatment, Ms. Coltrain died—a direct result of her severe withdrawal symptoms. This incident demonstrates the extreme callousness of the jail guards. It is true that jail or prison guards may sometimes hear false or embellished stories about particular inmates’ suffering, which may be why these guards were more inclined to disbelieve Ms. Coltrain. Yet, adequate training and inmate monitoring should have led the guards to conclude that Ms. Coltrain desperately needed medical assistance from observing basic physiological signs such as malnourishment, inability to keep down foods or liquids, or obvious seizures. Unfortunately, Ms. Coltrain’s case is hardly the only one where failure of jail staff to address a mental illness with physical manifestations resulted in death.

Furthermore, an estimated 60 percent of current United States prisoners are addicted to opioids or other drugs, and United States institutions imprison approximately one-third of those with opioid addictions each year. Almost all inmates with untreated addictions (approximately 95 percent) “return to using drugs within three years” after release from jail or prison. During an individual’s first two weeks after release from incarceration, his or her risk of dying

4th call for help. I haven’t been able to keep food, liquids, meds down in 6 days . . . I feel like I am very close to death. Can’t hear, seeing lights, hearing voices. Please help me.” Id. (internal quotation marks omitted). Her family sued the jail, and her case settled in 2018 for $10 million. Id.

Bonvillian, supra note 22.

Id.

Id.

See id.

Id.

Id.

See Kelley Smith, Warden: Inmates ‘Lie’ About ISP Conditions, NEWS DISPATCH (June 29, 2018), https://www.thenewsdashc.c/om/news/article_a26869e9-6de7-5d00-8554-c1e03a2196c5.html [https://perma.cc/JD89-V2K8].


See, e.g., supra note 75.


Id.
from a drug overdose is thirteen times higher than the risk among non-incarcerated individuals.86

These victims are far from the only individuals who have suffered in United States or state custody because of inadequate treatment for a mental illness.87 “Only a fraction of . . . [jails and prisons] offer medication as part of a treatment plan . . . .”88 The lack of treatment for these individuals is unacceptable because it imposes suffering upon them that can be torturous and result in an agonizing death.89 Since the Eighth Amendment does not permit torturing of even the worst criminals, surely this inhumane treatment should not be imposed on someone who neglected to pay a traffic ticket or proved unfortunate enough to be arrested on a non-distributive drug possession charge.90 An individual with mental health problems should never walk into a jail or prison and expect to die within days due to the jail or prison’s mishandling of medical or psychological problems.91 Once the state or federal government takes away a person’s liberty to seek medical or psychological help, it is only natural that these governments take on the responsibility of providing it.

While many examples of mistreating the mentally ill in jails or prisons might be gleaned from the dozens of class-action lawsuits pending against state and federal facilities,92 a recent suicide by a person of interest in government

86 Id.
88 Pennsylvania County to Pay $4.75M, supra note 75.
89 See Opioids, supra note 74.
90 U.S. CONST. amend VIII; see also Wilkerson v. Utah, 99 U.S. 130, 136 (1878) (“It is safe to affirm that punishments of torture . . . are forbidden by the Eighth Amendment to the Constitution.”).
91 Cf. U.S. CONST. amend VIII.
custody stands out: the case of Jeffrey Epstein.\textsuperscript{93} Epstein, charged with a litany of sexual assault crimes and connected to major business and political figures, exhibited suicidal proclivities upon admittance to the jail.\textsuperscript{94} He even attempted suicide on an occasion, which led to his placement on suicide watch within the jail.\textsuperscript{95} The government had tremendous incentive to ensure that Epstein did not commit suicide because of the wealth of information he likely possessed against other individuals involved in sexual abuse scandals.\textsuperscript{96} Epstein could prove a valuable witness in the investigation, arrest, and prosecution of other individuals involved in the scheme to sexually abuse several victims.\textsuperscript{97} Even without constitutional considerations, the government had immense incentives to provide Epstein with the psychological and medical care he needed to remain alive and lucid so as to identify other perpetrators.\textsuperscript{98}

But that is not what happened.\textsuperscript{99} Despite significant incentives to keep Epstein alive, the government failed.\textsuperscript{100} At least according to several reports, Epstein successfully hanged himself with his own bed sheets after being removed

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\footnote{\textsuperscript{94} Gold et al., \textit{supra} note 93 (“Mr. Epstein had apparently tried to kill himself three weeks earlier . . . Mr. Epstein was placed on a 24-hour suicide watch . . .”).}

\footnote{\textsuperscript{95} Id.}

\footnote{\textsuperscript{96} See Coaston et al., \textit{supra} note 93; Stewart, \textit{supra} note 93 (“Mr. Epstein knew an astonishing number of rich, famous and powerful people . . . [and] also claimed to know a great deal about these people . . .”).}

\footnote{\textsuperscript{97} See Coaston et al., \textit{supra} note 93; Stewart, \textit{supra} note 93.}

\footnote{\textsuperscript{98} See Coaston et al., \textit{supra} note 93; Stewart, \textit{supra} note 93.}

\footnote{\textsuperscript{99} See Benner, \textit{supra} note 93 (“[T]he death of Jeffrey Epstein . . . resulted from ‘a perfect storm of screw-ups,’ rather than any nefarious act.”).}

\footnote{\textsuperscript{100} See id.}
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from suicide watch.\textsuperscript{101} Epstein was able to commit suicide despite the fact that two guards were on duty to prevent it and despite the fact that two cameras were trained on his cell to observe his behavior.\textsuperscript{102} Both of the guards apparently fell asleep or became distracted by online shopping, and both cameras malfunctioned.\textsuperscript{103} Epstein was also supposed to be assigned a cellmate who might have alerted guards if there was trouble, but the jail guards failed to do that, too.\textsuperscript{104} Epstein’s suicide left the government without a crucial witness in a set of circumstances that have spawned yet another federal investigation.\textsuperscript{105} In addition to highlighting just how unprepared jails and prisons might truly be to handle suicidal or otherwise mentally ill inmates, Epstein’s case demonstrates that if an individual becomes incarcerated with strong suicidal ideations, his death is almost assured.\textsuperscript{106} If likely the most important person in government custody could not receive the care he needed to prevent self-harm,\textsuperscript{107} then where does that leave other mentally ill individuals? We should note that Epstein’s case is not an Eighth Amendment case, since pre-trial incarceration is not punishment under the Eighth Amendment, but qualifies for protection under the Fourteenth and Fifth Amendments instead.\textsuperscript{108} However, Epstein’s pre-trial incarceration did not materially differ from punishment, and the government’s failure to prevent his suicide leads to questions about inmate care in general.\textsuperscript{109} After all, many individuals serve their post-sentence time in jails just like the one where Epstein received his pre-sentence and pre-trial incarceration. If the guards could not protect Epstein from himself despite all the incentives to do so,\textsuperscript{110} how can they protect anyone else?

\textsuperscript{101} Gold et al., supra note 93 (“Mr. Epstein . . . was found dead on Aug. 10, having hanged himself from a bunk bed with a strip of bedsheets.”); Hosenball, supra note 93 (“He had been taken off suicide watch prior to his death.”).

\textsuperscript{102} Allyn, supra note 93; Hosenball, supra note 93.

\textsuperscript{103} Allyn, supra note 93; Gold et al., supra note 93; Hosenball, supra note 93.

\textsuperscript{104} See Allyn, supra note 93 (“Epstein’s cell mate had been transferred, leaving Epstein alone in his unit.”); Benner, supra note 93 (“The Justice Department was still investigating . . . why [Epstein] did not have a cellmate the night he hanged himself . . . .”); Gold et al., supra note 93 (“[T]he day before Mr. Epstein was found dead, his cellmate was transferred out in a ‘routine, prearranged transfer’ . . . .”).

\textsuperscript{105} Hosenball, supra note 93.

\textsuperscript{106} See Benner, supra note 93 (“Suicide rates [in the federal prison system] nearly doubled between the 2016 fiscal year and the 2018 fiscal year . . . .”).

\textsuperscript{107} See id.; Stewart, supra note 93.


\textsuperscript{109} See, e.g., Benner, supra note 93 (“[T]he Bureau of Prisons faced ‘significant challenges in ensuring the safety and security of prison staff and inmates.’ ”).

\textsuperscript{110} See id.; Stewart, supra note 93 (“Mr. Epstein knew an astonishing number of rich, famous and powerful people . . . [and] also claimed to know a great deal about these people . . . .”).
II. CONSTITUTIONALITY

The Eighth Amendment to the United States Constitution states: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” The United States Supreme Court eventually saw fit to extend the requirement that prisoners receive humane treatment to the states by incorporating portions of the Eighth Amendment to apply to the states through the Due Process Clause of the Fourteenth Amendment. Hence, today the Cruel and Unusual Punishment Clause prohibits barbaric methods of punishment and applies to both the federal government and the states.

While frequently invoked in cases involving the death penalty, the Eighth Amendment also comes into play when the conditions of incarceration prove too adverse for inmates. In fact, it is under the prohibition against cruel and unusual punishment that jails and prisons may be so inadequate in their treatment of inmates that they may be required to release prisoners by court order until the jail or prison implements improvements.

The Eighth Amendment may address general concerns of incarcerated living, such as unpalatable food, extreme heat or cold, or physical punishments imposed by guards. These

111 U.S. Const. amend VIII (emphasis added).
112 See U.S. Const. amend XIV; Robinson v. California, 370 U.S. 660, 667 (1962). There may be some questions regarding the application of various constitutional amendments outside of the United States—for example, to individuals in American detention centers outside of the country. Artem M. Joukov & Samantha M. Caspar, Comrades or Foes: Did the Russians Break the Law or New Ground for the First Amendment?, 39 Pace L. Rev. 43, 70–71 (2018). However, such questions do not hinder the analysis in the vast majority of cases regarding cruel and unusual punishment for individuals suffering from mental illness.
116 Ingraham v. Wright, a 1977 Supreme Court case, held that “unnecessary and wanton infliction of pain” constitutes cruel and unusual punishment... Ingraham v. Wright, 430 U.S. 651, 670 (1977) (internal citation omitted). Nine years later, in Whitley v. Albers, the Supreme Court clarified this standard slightly, stating that an action that may seem similar to an unconstitutional “unnecessary and wanton infliction of pain” may actually be constitutional, so long as the infliction of pain is committed in a good faith effort to restore discipline to the individual, rather than maliciously with the intention of causing harm. Whitley v. Albers, 475 U.S. 312, 320–21 (1986). Under the standard established in Whitley, the Supreme Court held that a prison violates a prisoner’s Eighth Amendment right when a prison handcuffs the prisoner to a hitching post for seven hours, taunts the prisoner, and denies the prisoner restroom breaks. Hope v. Pelzer, 536 U.S. 730, 737–38 (2002). The Court explained that the prison’s treatment of the prisoner exceeded what was necessary to restore order, thereby violating the Eighth Amendment. Id. at 738. Perhaps most relevant, in Estelle v. Gamble, the Supreme Court held that a prison may violate an individual’s Eighth Amendment right based on factors related to an individual’s confinement. Estelle v. Gamble, 429 U.S. 97, 104–05 (1976). In this case, the Court held that a prison guard’s deliberate indifference to a prisoner’s serious illness or injury constitutes cruel and unusual punishment, violating the Eighth Amendment. Id.
Mental Health and the Constitution

problems can affect virtually every occupant of a prison or jail. The Eighth Amendment can, or at least should, also extend to unaddressed severe mental health problems of incarcerated persons.\textsuperscript{117}

To illustrate, in \textit{Brown v. Plata}, the Justices of the United States Supreme Court faced a case outlining extremely deficient conditions within California prisons.\textsuperscript{118} The underlying evidence included a California prison system that operated at approximately 200 percent capacity for more than a decade.\textsuperscript{119} The overcrowding led to significant problems in the way prisons treated their inmates, implicating the Eighth Amendment.\textsuperscript{120} The mistreatment involved ignoring the inmates’ physical and mental health.\textsuperscript{121} For example, California prisons sometimes locked suicidal prisoners in small cages approximately the size of a telephone booth (without toilets).\textsuperscript{122} The sanitation conditions within the prisons were appalling, requiring up to fifty-four prisoners to share a single toilet on at least one occasion.\textsuperscript{123} The dangers caused by these conditions proved significant: preventable deaths occurred every week, with an average of less than six days between preventable deaths.\textsuperscript{124}

Inmates either lived in cells too small for human habitation or were cramped into a gymnasium in packs of several hundred where they would receive monitoring from “two or three correctional officers.”\textsuperscript{125} The mental health care at these facilities proved almost nonexistent: an inmate who found himself or herself in the unfortunate position of seeking the aid of a psychologist or psychiatrist could expect a twelve month wait.\textsuperscript{126} Suicide rates climbed to 80 percent higher than the national average, with 72.1 percent of the deaths ruled as preventable.\textsuperscript{127} In addition, those with physical injuries, independent of, or in addition to, psychological problems, found little respite in the medical care facilities.\textsuperscript{128} California’s prisons sometimes held as many as fifty inmates in a twelve foot by twenty foot cage.\textsuperscript{129} These despicable conditions and delays in treatment led to deaths for common, curable physical ailments.\textsuperscript{130} Some prisoners would die of an illness presenting with abdominal pain after a delay in medical care lasting one month.\textsuperscript{131} Other prisoners would complain of severe

\textsuperscript{117} See, e.g., \textit{Brown}, 563 U.S. at 502.
\textsuperscript{118} Id. at 499.
\textsuperscript{119} Id. at 502.
\textsuperscript{120} Id. at 507.
\textsuperscript{121} Id. at 502.
\textsuperscript{122} Id. at 503.
\textsuperscript{123} Id. at 502.
\textsuperscript{124} Id. at 505 n.4.
\textsuperscript{125} Id. at 502.
\textsuperscript{126} Id. at 504.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} Id. at 505.
\textsuperscript{131} Id.
chest pain, only for the prison to leave the individuals untreated until they succumbed to their ailments. One patient died of testicular cancer after the prison doctors’ failure to recognize the illness despite seventeen months of pain complaints. Even survivors still suffered prolonged, unnecessary pain and discomfort that the prisons could have avoided if the prisons were not so overcrowded.

Though the prisoners ultimately prevailed in their lawsuit, *Brown v. Plata* presents a good example of why state and federal jails and prisons treat inmates so poorly: there is almost no real recourse. The inmates within California prisons had been seeking improvements for more than a decade, and California still failed to act. This problem persists across the country, since inmates within jails and prisons may have limited access to counsel and limited resources, a limited education, a limited understanding of their rights, and limited voting rights. Even when their case reaches the highest court in the United States, prisoners can only achieve a population reduction *within two years*, and even then can only hope to find the prison containing 37.5 percent too many inmates. While the outcome in *Brown v. Plata* is certainly an improvement, consider all of the prisoners that have suffered in California prisons over the past decades and those whose sentence will be over before they see any improvement.

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132 *Id.*
133 *Id.*
134 *Id.* at 505–06.
141 *Felon Voting Rights*, supra note 19.
142 The California Supreme Court held in *Brown v. Plata* that jail and prison facilities may not exceed 137.5 percent of their design capacity. See *Brown v. Plata*, 563 U.S. 493, 509–10 (2011).
143 Cf. *id.*
Eighth Amendment promised them. When coupled with the fact that individuals suffering in prisons and jails are not necessarily credible witnesses to their own experiences, finding help can prove almost impossible unless and until outside evidence can establish the problems without relying on inmates’ sworn accounts.144

Of course, Brown v. Plata is only the culmination of expanding case law regarding prisons violating the Eighth Amendment rights of prisoners.145 What makes this case notable is the explicit focus on mental health problems in portions of the majority opinion.146 When it comes to failing to address physical health problems, the United States Supreme Court has long been of one voice: prisons and jails must provide adequate protections for inmate health or risk violating the United States Constitution.147 Yet Brown v. Plata seemed to extend these prior holdings to mental health risk as well.148 The Court explicitly addressed the mistreatment of mentally ill individuals, noting the large number of suicides, the cruel use of suicide prevention cages to confine individuals with suicidal ideations, and the large number of other instances involving the mistreatment of mentally ill individuals.149 The Court noted that perhaps the gravest outcome of mental illness in confinement, suicide, exceeded the national average by 80 percent in California prisons.150 The composition of the United States Supreme Court has changed with two nominees (and counting) made by President Trump, so it is difficult to say whether this trend will continue.151 Yet, as we will point out, the well-established precedent of the Court, upholding the rights of mistreated prisoners in correctional facilities, should logically extend to inmates suffering from severe mental health problems if it has not already.152

146 See Brown, 563 U.S. at 502–07.
148 Brown, 563 U.S. at 503 (“Prisoners in California with serious mental illness do not receive minimal, adequate care.”).
149 Id. at 501. (“For years the medical and mental health care provided by California’s prisons has fallen short of minimum constitutional requirements and has failed to meet prisoners’ basic health needs.”).
150 Id. at 504.
152 See, e.g., Pesce v. Coppinger, 355 F. Supp. 3d 35, 39 (D. Mass. 2018). In that case, the first case of its kind, a federal trial judge in Boston ordered a county jail to permit an inmate to take prescribed methadone for his opioid addiction. Id. Judge Denise J. Casper of the U.S. District Court in Massachusetts issued a preliminary injunction, stating that the inmate was
In Estelle v. Gamble, the United States Supreme Court held that it would be inappropriate to punish a prisoner who injured his back for refusing to continue unloading bales of hay (if the plaintiff could prove the necessary facts). The Court wrote: “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain[]’ proscribed by the Eighth Amendment.” The Court recognized what should have been obvious to the prison guards: continuing to subject an injured prisoner to physical labor that he could not perform was a cruel imposition, and if the prisoner could establish these facts, he may be entitled to recover for the prison’s violation of the Cruel and Unusual Punishment Clause. After all, to an injured person, even mundane assignments might appear draconian due to the pain they cause. Hence, the existence of physical health problems prevented the imposition of tasks that would exacerbate them or cause the inmate undue pain.

Several consistent decisions followed. In Helling v. McKinney, the Court explained that exposing an inmate to secondhand smoke violates his rights if done deliberately and if he can prove that this is not a risk that society has ordinarily chosen to undertake. Farmer v. Brennan also embraced the concept that prison staff owe a duty of care toward prisoners. There, the Court considered the case of Farmer suing the federal prison where he was incarcerated for failing to keep Farmer secure from other inmates that sexually assaulted him. Farmer was a “transsexual” individual, a term that the United States Supreme Court defined in the 1990s quite differently than it might today, seeming to equate transsexuality with a mental illness. The Court wrote:

Petitioner, who is serving a federal sentence for credit card fraud, has been diagnosed by medical personnel of the Bureau of Prisons as a transsexual, one who has “[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex,” and who typically seeks medical treatment, including hormonal therapy and

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likely to prevail in his argument that the prison’s refusal to provide him with his prescribed medication for opioid withdrawal symptoms violated the Eighth Amendment. Id. at 38–39.
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Id. at 100, 104.
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Id. at 104 (internal citation omitted).
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See id. at 104–05.
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See id. at 103 (“An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such a failure may actually produce physical ‘torture or a lingering death’ . . . .”) (quoting In Re Kemmler, 136 U.S. 436, 447 (1890)).
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See id.
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Helling, 509 U.S. at 25.
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Id. at 35–36.
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Id. at 829–30.
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See id. at 829.
surgery, to bring about a permanent sex change. For several years before being convicted and sentenced in 1986 at the age of 18, petitioner, who is biologically male, wore women’s clothing (as petitioner did at the 1986 trial), underwent estrogen therapy, received silicone breast implants, and submitted to unsuccessful ‘black market’ testicle-removal surgery. Petitioner’s precise appearance in prison is unclear from the record before us, but petitioner claims to have continued hormonal treatment while incarcerated by using drugs smuggled into prison, and apparently wears clothing in a feminine manner, as by displaying a shirt ‘off one shoulder.’ The parties agree that petitioner ‘projects feminine characteristics.’ The practice of federal prison authorities is to incarcerate preoperative transsexuals with prisoners of like biological sex, and over time authorities housed petitioner in several federal facilities, sometimes in the general male prison population but more often in segregation.165

By apparently classifying transsexual individuals as mentally ill, the Court was essentially considering a case of protecting a prisoner with a mental illness from other prisoners.166 The Court adopted the standard that staff within departments of corrections do have a duty to protect some prisoners from others.167 Furthermore, exhibiting “deliberate indifference” to this duty and to the wellbeing of the incarcerated individual(s) affected can lead to a successful lawsuit for violating the Cruel and Unusual Punishment Clause of the Eighth Amendment.168

What this Eighth Amendment jurisprudence suggests is that when an individual has cancer or diabetes and ends up in jail, the jail must provide the individual with the medication and treatment necessary to control his or her illness, as refusing to provide medication or treatment is unconstitutional.169 As a matter of logic, this protection should extend to individuals who enter a jail or prison with mental illnesses. However, if an individual has an addiction to opioids (for example)—an illness that may also become deadly without the proper care or medication—and is taking an opioid-agonist medication used to treat opioid addiction, such as methadone or buprenorphine, it is “virtually guaranteed it will be stopped the day [the individual] step[s] foot inside [his or her] cell.”170

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165 Id. at 829–30 (citations omitted).
166 See id.at 829.
167 Id. at 843.
168 See id. at 843.
170 Barnett, supra note 84. For example, addiction psychiatrist Brian Barnett treated “Shawn” (psychiatrist changed patient’s name for privacy) for six months prior to Shawn’s arrest. Id. Shawn’s addiction was finally in remission due to his group therapy and the combination of prescribed buprenorphine and naloxone, both of which he took daily. Id. When police arrested Shawn for “an outstanding warrant for unpaid court fees,” the police transported him to a Massachusetts jail, where the jail employees forbade him from taking his medication. Id. Shawn was fortunate the jail released him after only one week and that he
The same is true of other medication, therapeutic services, and counseling that individuals with serious mental health problems need.\textsuperscript{171}

In some sense, it would be difficult to provide treatment to inmates for addiction in the current jail and prison system.\textsuperscript{172} Yet, mere expense may be insufficient justification for refusing to provide these services since the failure to do so can spell truly dire consequences for the inmates. Regardless of whether the current Court considers the right to avoid cruel and unusual punishment a fundamental or merely a very important right, the government would be hard-pressed indeed to name a compelling or important government interest so long as the increase in mental health care costs is not astronomical.

Rather, if the government seeks to convict, sentence, and imprison individuals with mental health issues, it may well be required to provide them with the protections the United States Constitution promises to all Americans.\textsuperscript{173} It may have been impossible or nearly impossible for the California prison system to cut down the number of individuals within its prisons, but that did not stop the United States Supreme Court from mandating the release of prisoners due to the state’s failure to provide them with adequate care in \textit{Brown v. Plata}.\textsuperscript{174} If the Court faces a similar case in the future that involves only inmates with mental health problems, it is difficult to see how the Court could act any differently given sufficient expert testimony on the record detailing the inappropriate treatment of mentally ill inmates.\textsuperscript{175} While the Court declined to rule on a similar issue in \textit{Taylor v. Barkes} in 2015, the exacerbation of the problem with time, and the general need for clarity in legal rulings, should compel the Court

\textsuperscript{171} See id.

\textsuperscript{172} Many inmates are in prison because of drug charges, and a response to treating drug addiction in prison with opioid-agonist medication may be “why are you going to bring in a medication that we’re working real hard to keep out?” Andrea Hsu & Ari Shapiro, \textit{Rhode Island Prisons Push to Get Inmates the Best Treatment for Opioid Addiction}, NPR (Nov. 19, 2018), https://www.npr.org/sections/health-shots/2018/11/19/668340844/ro-trd-island-prisons-push-to-get-inmates-the-best-treatment-for-opioid-addiction [https://perma.cc/T6AQ-FXGQ]. If Nevada, Pennsylvania, and Oregon had permitted the use of opioid agonists in their jails and prisons, the jails and prisons almost certainly could have saved the lives of Ms. Coltrain, Ms. Herr, and Ms. Pitkin. See Bonvillian, supra note 22; \textit{Family of 18-Year-Old Who Died}, supra note 22; Tron, supra note 22.

\textsuperscript{173} See U.S. CONST. amend VIII.


to reconsider. 176 All of the United States Supreme Court’s precedent points in one direction: toward declaring the failure to provide adequate mental health treatment unconstitutional under the Cruel and Unusual Punishment Clause of the Eighth Amendment. 177

Ironically, the ruling of the high court to this effect may actually provide an interesting middle ground for convicts struggling with mental health problems. Currently, many would not wish to see the return of asylums or to be subject to civil commitment, since the date of release in those settings can be very indefinite (and the process for commitment not necessarily just). 178 Accounting for these characteristics makes it somewhat understandable that individuals with mental health problems may see asylums and other custodial mental health care facilities as worse than the prospect of homelessness or even incarceration. However, where possible, many individuals struggling with mental illness would wish to avoid conviction and incarceration as well. Yet requiring the administration of proper mental health care during the period of incarceration may actually address both problems.

On one hand, the incarcerated will have to face the prospect of imposed mental health care for a very definite and limited term: the length of their sentence. They will receive a definite date of release and avoid the fear of being perpetually locked inside an asylum. This certainty may alleviate some of the concerns of the ailing individual, provide him or her with the necessary care and protection while in government custody, and perhaps even provide the individual with the care he or she might not otherwise receive. After all, many individuals who suffer from mental health problems may not know what it is like to receive proper mental health care, either due to their economic inability to seek such help or due to the fear of what might happen if they do. Hence, being exposed to the idea of proper treatment for the first time in jail or prison may incentivize them to give mental health professionals a chance to address their suffering. This, in turn, might reduce the chances of recidivism, and perhaps the individual may voluntarily submit himself or herself to further care in the future.

On the other hand, if the mental health care the individual receives within the jail or prison proves unsatisfactory to him or her, he or she can be certain of being able to avoid the unsatisfactory treatment in the future so long as he or she can avoid legal violations upon release. Thus, the horrendous history of suf-

176 Taylor v. Barkes, 135 S. Ct. 2042, 2043–44 (2015) (holding that a correctional facility was entitled to qualified immunity because the right to adequate suicide prevention was not clearly established under the Eighth Amendment). The Court did not, however, elaborate on whether the right did or did not exist. Id. See also Artem M. Joukov, Isn’t That Hearsay Anyway? How the Federal Hearsay Rule Can Serve as a Map to the Confrontation Clause, 63 WAYNE L. REV. 337, 380 (2018).
177 See Barkes, 135 S. Ct. at 2044.
ferers being locked in an asylum with no way out will not be repeated. The inmate can leave upon the conclusion of his or her sentence and be incentivized all the more not to return into legal custody (an incentive that may be effective even for individuals with mental health problems). In either instance, the Supreme Court can ensure that inmates receive proper care for a definite term that provides incentives to either seek further help upon release or at least incentives to avoid future law violations. Providing such care could be an attractive (albeit imperfect) solution to a growing problem.

III. REAPING WHAT YOU SOW

To properly make the argument that deinstitutionalization has been a substantial contributor to the current mental illness, drug, and prison-overcrowding crises, this Article examines the history of the deinstitutionalization process in the United States. “Deinstitutionalization” is the term given to the policy of moving patients with severe mental illnesses out of large, state-run institutions and subsequently closing most or all such institutions.\(^\text{179}\) Deinstitutionalization first began in the mid-1950s with the introduction of chlorpromazine, the first effective antipsychotic medication.\(^\text{180}\) Chlorpromazine was effective at treating schizophrenia and related mental disorders, resulting in the government’s partial misconception that patients could now effectively treat themselves at home rather than in a mental institution.\(^\text{181}\)

Deinstitutionalization rapidly accelerated in the mid-1960s.\(^\text{182}\) Since America’s founding, responsibility for providing mental health services had been “assumed by state and local governments.”\(^\text{183}\) In the past, these governments had stepped up to the plate somewhat: after all, the problems faced by mentally ill individuals were a local problem, and it was possible that local institutions would know a better way to handle them.\(^\text{184}\) However, in 1963, President John F. Kennedy envisioned a new model: “closing . . . state psychiatric hospitals and . . . opening federally funded community mental health centers (CMHCs) to provide psychiatric services,” passing the Community Mental Health Construction Act.\(^\text{185}\) Around the same time, the federal government introduced


\(^\text{180}\) Id.

\(^\text{181}\) See Peter Haddad et al., Chlorpromazine, the First Antipsychotic Medication: History, Controversy and Legacy, British Ass’n for Psychopharmacology (Oct. 31, 2016), https://www.bap.org.uk/articles/chlorpromazine-the-first-antipsychotic/ [https://perma.cc/D2R6-HQNH].

\(^\text{182}\) Torrey, supra note 13, at 1.

\(^\text{183}\) Id.

\(^\text{184}\) See Yohanna, supra note 13.

\(^\text{185}\) Torrey, supra note 13, at 1.
Medicaid, which shifted funding for those individuals suffering from severe mental illnesses “from the states’ responsibility to a shared [responsibility] with the federal government.”\(^{186}\) These two changes created a material economic “incentive for states to close the facilities they funded on their own and move patients into community hospitals and nursing homes [funded] by Medicaid and the federal government.”\(^{187}\)

Kennedy’s model was noble in theory, as his ambition was for the new CMHCs to replace state hospitals, which were sometimes considered “shamefully understaffed, overcrowded, unpleasant institutions from which death too often provided the only firm hope of release.”\(^{188}\) The new CMHCs would be “a ‘bold new approach’ . . . [when carried out,] ‘reliance on the cold mercy of custodial isolation will be supplanted by the open warmth of community concern and capability.’”\(^{189}\) However, several years later, the results of this experiment were clear.\(^{190}\) According to E. Fuller Torrey, an American psychiatrist and schizophrenia researcher:

> Rarely in the history of American government has a program conceived with such good intentions produced such bad results. The patients were deinstitutionalized from the state hospitals, but most of the 763 federally funded CMHCs failed to provide services for them. The majority of the discharged patients, and those who became mentally ill after the hospitals closed, ended up homeless, incarcerated in jails and prisons, or living in board-and-care homes and nursing homes that were often worse than the hospitals that had been closed.\(^{191}\)

Based on some of the descriptions of early asylums prior to the intervention of the federal government, it may be an open question as to whether an individual who found himself or herself homeless would prefer homelessness over the asylum.\(^{192}\) Horror stories do exist of individuals admitted to mental institutions with minor mental illnesses (or no illnesses at all) being forced to remain institutionalized.\(^{193}\) In scenarios such as this, the individuals found themselves imprisoned in a system where Due Process for release was hard to come

\(^{186}\) Yohanna, \textit{supra} note 13.

\(^{187}\) Id.

\(^{188}\) Special Message to the Congress on Mental Illness and Mental Retardation, 50 Pуб.

\(^{189}\) Id. at 1–2.

\(^{190}\) Id. at 1–2.

\(^{191}\) See \textit{id}. at 2.

by. Yet, many individuals who left asylums soon entered state custody due to involvement in crime.

Defenders of Kennedy’s vision claimed the new federally funded CMHCs were necessary because states were failing to provide adequate services to individuals. However, by the time lawmakers passed Kennedy’s plan in 1963, deinstitutionalization of psychiatric patients from state-run hospitals was already occurring, made possible by the development of chlorpromazine. “Most states were [also] ... developing community programs to provide care for the released patients.” Once the federal government started establishing the CMHCs, development of programs by state and local officials ceased, as state officials were no longer responsible for releasing individuals from state psychiatric hospitals, with the federal government overtaking this responsibility. Ultimately, the federal government never built most of these CMHCs—leaving America with significantly fewer options for adequate mental health care.

Deinstitutionalization is “widely regarded as a major failure.” According to the former director of the National Institute of Mental Health and a prominent figure in the shift to community centers, “[m]any of those patients who left the state hospitals never should have done so. . . . The result is not what we intended, and perhaps we didn’t ask the questions that should have been asked when developing a new concept . . . .” To illustrate the startling effect of deinstitutionalization, “[i]n 1955, there were 558,239 severely mentally ill patients in [United States] public psychiatric hospitals.” In 1994, there were only 71,619 persons in United States public psychiatric hospitals. Even more startling, “the census of 558,239 patients in public psychiatric hospitals in 1955 was in relationship to the nation’s total population at the time, which was 164 million,” representing an even larger decrease, as the United States population was 260 million in 1994. If there was an identical “proportion of patients per

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194 See id.
195 See id.
196 Torrey, supra note 13, at 3.
197 Id.
198 Id.
199 Id.
202 Id. (internal quotation marks omitted).
204 Id.
205 Id.
population in public mental health hospitals in 1994 as there [were] in 1955, the [number of] patients would have [been] 885,010.206

As of 2011, there were “more than one million individuals with serious psychiatric disorders now living in the community” that would have been in state hospitals fifty years ago.207 “Studies have reported that, at any given time, approximately half of these individuals are receiving no treatment for their psychiatric illnesses, despite the fact that” medical professionals can typically provide such treatment in the community.208

To make matters worse, the majority of deinstitutionalized patients suffered from severe mental illnesses.209 Approximately 50–60 percent of them were schizophrenic, 10–15 percent had bipolar disorder and severe depression, and an additional 10–15 percent had epilepsy, strokes, Alzheimer’s disease, or brain damage resulting from trauma.210 The remaining individuals were psychotic, autistic, alcoholics, or drug addicts.211

Thus deinstitutionalization has helped create the mental illness crisis by discharging people from public psychiatric hospitals without ensuring that they received the medication and rehabilitation services necessary for them to live successfully in the community. Deinstitutionalization further exacerbated the situation because, once the public psychiatric beds had been closed, they were not available for people who later became mentally ill, and this situation continues up to the present. Consequently, approximately 2.2 million severely mentally ill people do not receive any psychiatric treatment.212

Mentally ill inmates have increasingly filled jails and prisons, effectively transforming these institutions into the nation’s new “psychiatric inpatient system.”213 The graphic below illustrates the immense increase in the prison population that coincided with deinstitutionalization:214

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206 Id.

The true magnitude of deinstitutionalization, then, is the difference between 885,010 and 71,619. In effect, approximately 92 percent of the people who would have been living in public psychiatric hospitals in 1955 were not living there in 1994. Even allowing for the approximately 40,000 patients who occupied psychiatric beds in general hospitals or the approximately 10,000 patients who occupied psychiatric beds in [CMCHs] on any given day in 1994, that still means that approximately 763,391 severely mentally ill people (over three-quarters of a million) are living in the community today who would have been hospitalized 40 years ago. That number is more than the population of Baltimore or San Francisco.

Id.

207 Torrey, supra note 13, at 4.

208 Id.


210 Id.

211 Id.

212 Id.

213 Torrey, supra note 13, at 2.

As state-run hospitals released patients with no aftercare or alternative, jails and prisons began to receive many of these individuals.\textsuperscript{215} Numerous “crimes were committed in response to delusional thinking,” resulting from former patients’ mental illnesses being left untreated.\textsuperscript{216}

Given that the population in United States prisons and jails totaled 2,162,400 in 2016, nearly 432,480 incarcerated persons have severe mental illness.\textsuperscript{217} According to a 2010 survey, “there are now more than three times more seriously mentally ill persons in jails and prisons than in hospitals.”\textsuperscript{218} Importantly, mentally ill persons have an average stay in jail or prison that “is twice as long as for non-mentally-ill” persons.\textsuperscript{219} Mentally ill inmates are also “victimized by other inmates more commonly, and commit suicide more commonly.”\textsuperscript{220} Additionally, the state cost for a mentally ill inmate is significantly higher than for a non-mentally-ill inmate: in Washington State prisons in 2009, the average cost per year was $101,000 for a mentally ill inmate versus $30,000 per year for a non-mentally ill inmate.\textsuperscript{221}

\textsuperscript{215} Torrey, supra note 13, at 5.
\textsuperscript{216} To illustrate, in the 1970s, approximately “5 percent of jail and prison inmates were seriously mentally ill.” Id. at 6. “In the 1980s, this [number] had increased to 10 percent.” Id. In the 1990s, 15 percent of inmates were seriously mentally ill, and in the 2000s, this number had risen to 20 percent or higher. Id.
\textsuperscript{219} Torrey, supra note 13, at 6.
\textsuperscript{220} Id.
\textsuperscript{221} Id.
Crimes committed by mentally ill individuals have also increased significantly over the past few decades, in part an effect of deinstitutionalization. Severely mentally ill individuals who are not receiving treatment are now responsible for approximately 10 percent of United States homicides. This figure contrasts with studies of homicide in the United States between 1900 and 1950, before deinstitutionalization got underway; these early studies reported that ‘insane’ or ‘psychotic’ persons were responsible for between 1.7 percent and 3.6 percent of homicides. There are now approximately 19,510 homicides per year in the United States, and therefore, approximately 1,951 homicides would not have happened if mentally ill individuals received psychiatric treatment.

A newly developing mental illness across the United States that has already resulted in gross mistreatment of the incarcerated and sometimes leads to death in prisons is the opioid addiction crisis. “Opioids are a class of drugs that include . . . pain relievers . . . such as oxycodone[,] hydrocodone[,] codeine, morphine, and [] others.” Opioi ds also “include the illegal drug heroin, [and] synthetic opioids[,] such as fentanyl” and carfentanil. These drugs all produce similar effects in the body, since their chemical structures are similar. Specifically, opioids trigger a release of dopamine, a neurotransmitter responsible for “feelings of euphoria, bliss, motivation, and concentration.” After repeated use, an individual can become dependent on the drug, causing the part of the brain that is responsible for releasing dopamine to function properly only when the drug is in an individual’s system. If the drug leaves the user’s system, withdrawal symptoms, including body aches, fever, diarrhea, vomiting, sweating, and chills, can occur. An addiction to opioids includes strong crav-
Opioid addiction treatment typically involves behavioral counseling and two medications that are generally extremely effective: buprenorphine and methadone, used to reduce opioid cravings and withdrawal symptoms. Naltrexone is an additional medication used to treat addiction, but it is typically less effective than buprenorphine and methadone because it requires full detoxification.

Each day “more than 130 individuals in the United States die after overdosing on opioids,” with these numbers steadily increasing in recent years. “[D]eaths due to drug overdose[s] reached a record high in [2017], with over 70,000” reported. Drug addiction is a mental illness, as addiction causes distinct brain changes in its user and can change a user’s normal behaviors, causing the individual to prioritize drug use over everything else. An individual’s ability to control his or her compulsion to use drugs decreases as these brain changes occur, promoting continued drug use despite knowledge of the drug’s harm. The compulsive behaviors accompanying addictions “bear [many] similarities to other mental illnesses.” In the United States, health care professionals use the Diagnostic and Statistical Manual of Mental Disorders (DSM) when diagnosing mental illnesses. The DSM defines addiction as a mental illness and states: “an important characteristic of substance use disorders is an underlying change in brain circuits that may persist beyond detoxification.” Similar to other mental illnesses, addiction often requires long-term treatment. It is clear that addiction is a “chronic, relapsing [brain] disease,” requiring specialized treatment.
Additionally, substance abuse often occurs simultaneously with other mental illnesses. Studies have shown that individuals diagnosed with mood or anxiety disorders are twice as likely to have a substance-abuse disorder as other individuals.\(^{245}\) Persons diagnosed with antisocial personality disorders or conduct disorders are also more likely to abuse drugs or alcohol.\(^{246}\) Moreover, there is a strong link between substance abuse and developing certain mental disorders.\(^{247}\) For example, individuals with a genetic predisposition to schizophrenia “are four times more likely to develop [schizophrenia] after using marijuana.”\(^{248}\) The opioid crisis cost the government approximately $1 trillion from 2001 through March of 2018, with this number expected to rise by $500 billion from 2019 to 2020.\(^{249}\)

The opioid crisis has also contributed to the significant increase in United States incarceration rates.\(^{250}\) The United States is the world leader in incarceration, with approximately 2.2 million individuals currently in the country’s prisons and jails, representing a 500 percent increase in prison and jail populations over the last forty years.\(^{251}\) This large increase is due in part to the opioid crisis, with individuals incarcerated for drug offenses soaring over the past several years.\(^{252}\) “Furthermore, harsh sentencing laws, such as mandatory minimums” for drug offenses, keep countless individuals “convicted of drug offenses in prison for longer [] times.”\(^{253}\) For example, in 1986, persons “released after serving time for a federal drug offense” spent approximately twenty-two months in prison.\(^{254}\) In 2004, individuals “convicted on federal drug offenses were expected to serve [nearly] three times that [sentence] length,” or sixty-two months, in prison.\(^{255}\) Nearly half of individuals in federal prisons in 2016 were in prison for drug-related offenses.\(^{256}\) Additionally, the number of individuals in prison for drug offenses at the state level has increased nine times since 1980.\(^{257}\) According to The Sentencing Project, “[m]ost [of the individuals in-

\(^{245}\) Id. at 2.
\(^{246}\) Id.
\(^{247}\) Caspar & Joukov, supra note 38, at 176.
\(^{248}\) Id. at 182.
\(^{251}\) Id. at 2.
\(^{252}\) Id. at 3.
\(^{253}\) Id.
\(^{254}\) Id.
\(^{255}\) Id.
\(^{256}\) Id.
\(^{257}\) Id.
carcerated for drug offenses] are not high-level actors in the drug trade, and most have no prior criminal record for a violent offense."  

CONCLUSION

Overall, the mental health prognosis in the United States looks grim, and state and federal governments have not adequately shared the burden of handling its strain on jails and prisons. Yet, if Brown v. Plata serves as any guide, the mistreatment of mentally ill individuals in jails and prisons has not escaped the gaze of the United States Supreme Court.  

As the Court wrote in Brown v. Plata, conditions of confinement that exacerbate mental illness or fail to treat its causes or symptoms can constitute part of the grounds for placing Eighth-Amendment-mandated population caps. This decision is a step in the right direction, which still leaves an open question of whether mental health problems alone can compel a correctional facility to improve its treatment of particular inmates.

Based on the United States Supreme Court’s rulings in cases where physical rather than mental health was involved, the Court clearly views undue suffering within a jail or prison cell to be an Eighth Amendment violation. Evidence certainly exists that mentally ill convicts can suffer as much as, if not more than, physically ill inmates, particularly when it comes to illnesses such as opioid addiction, where the symptoms can manifest both mentally and physically and potentially lead to death if left untreated. Hence, the path seems open for defense counsel and even pro se prisoners to raise the issue under Eighth Amendment claims.

Overall, a combination of state and federal government actions has contributed to the mishandling of the United States mental health crisis. Now that these actions are culminating in a rise in Eighth Amendment violations within jails and prisons, courts are more and more likely to scrutinize this problem in light of greater awareness of the struggles the mentally ill face. Government appeals for saving funds are unlikely to sway the constitutional question of whether it is proper under current and former standards of decency to allow a person with a severe mental illness to remain untreated for the period of his or her incarceration or a large portion thereof. Since the Eighth Amendment likely requires the provision of far greater care, and since the United States Supreme Court has already ordered the release of nearly 46,000 people on grounds that

258 Id.
260 Id. at 502.
262 See Klein, supra note 5, at 18, 25.
encompass the mistreatment of the mentally ill, jailers and wardens across the country should begin taking steps to bring their facilities in compliance with the United States Constitution on their own terms. If the jailers and wardens wait, they might get to see a panel of judges require them to provide such mental health services.

264 See Brown, 563 U.S. at 510, 545.