

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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¹ *Tantalized Quotes*, GOODREADS, www.goodreads.com/work/quotes/28412398-tantalized [https://perma.cc/EQJ9-85M3] (last visited Jan. 4, 2020).

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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 Complaints 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.

² See, e.g., Debra Cassens Weiss, *Alabama Men's Prisons are so Unsafe They Likely Violate the Eighth Amendment, DOJ Says*, A.B.A. J. (Apr. 4, 2019, 9:27 AM), <http://www.abajournal.com/news/article/alabama-prisons-are-so-unsafe-they-likely-violate-the-eighth-amendment-justice-department-says> [https://perma.cc/66BZ-TXM6] (noting, in particular, the danger of sexual assault within the prison system from which inmate victims can find no protection); see also *Can Bad Food Be a Violation of the Eighth Amendment Prohibition of Cruel and Unusual Punishment?*, HG.ORG, <https://www.hg.org/legal-articles/can-bad-food-be-a-violation-of-the-eighth-amendment-prohibition-of-cruel-and-unusual-punishment-31521> [https://perma.cc/7FFM-CG2S] (last visited Jan. 10, 2020) [hereinafter *Can Bad Food Be a Violation*]; Clyde Hughes, *Justice Department: Alabama Prisons May Violate 8th Amendment*, UPI (Apr. 3, 2019), https://www.upi.com/Top_News/US/2019/04/03/Justice-department-Alabama-prisons-may-violate-8th-Amendment/8921554309036/ [https://perma.cc/BN77-VR4X].

³ See, e.g., *Can Bad Food Be a Violation*, *supra* note 2; Hughes, *supra* note 2; Weiss, *supra* note 2.

⁴ See, e.g., *Alabama Department of Corrections Releases Plan to Improve Troubled Prison System*, WHNT NEWS 19 (May 23, 2019), <https://whnt.com/2019/05/23/alabama-department-of-corrections-releases-plan-to-improve-troubled-prison-system> [https://perma.cc/NWA4-776N].

⁵ See Stuart B. Klein, *Prisoners' Rights to Physical and Mental Health Care: A Modern Expansion of the Eighth Amendment's Cruel and Unusual Punishment Clause*, 7 *FORDHAM URB. L.J.* 1, 17–18 (1978).

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.⁶ When the Founding Fathers drafted the Eighth Amendment, the field of psychology was nonexistent.⁷ 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.⁸ Psychological studies suggest that this suffering may be as real and as severe as a physical injury.⁹ Hence, just as jails and prisons must provide medical care to sick or injured inmates,¹⁰ 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.¹¹ 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.¹² However, this

⁶ See Ass'n for Psychological Sci., *What We Know Now: How Psychological Science Has Changed Over a Quarter Century*, OBSERVER, Nov. 2013, <https://www.psychologicalscience.org/observer/what-we-know-now-how-psychological-science-has-changed-over-a-quarter-century> [<https://perma.cc/6Y9J-JWFX>].

⁷ See *History of Psychology (387 BC to Present)*, ALLPSYCH, <https://allpsych.com/timeline/> [<https://perma.cc/G2HL-V5LT>] (last visited Dec. 21, 2019) [hereinafter *History of Psychology*]; see also *An Overview of the 8th Amendment*, LAWS, <https://constitution.laws.com/8th-amendment> [<https://perma.cc/PQ2S-KPL9>] (last modified Apr. 7, 2015); *Timeline: The Development of Psychology*, GUARDIAN (Mar. 6, 2009), <https://www.theguardian.com/lifeandstyle/2009/mar/07/timeline-psychology-history> [<https://perma.cc/VSP7-NCAL>].

⁸ HUMAN RIGHTS WATCH, *ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS* 5, 30 (2003), <https://www.hrw.org/sites/default/files/reports/usa1003.pdf> [<https://perma.cc/X4CN-WK8H>].

⁹ See *The Prevalence and Treatment of Mental Illness Today*, HARV. HEALTH PUB. (Mar. 2014), <https://www.health.harvard.edu/mind-and-mood/the-prevalence-and-treatment-of-mental-illness-today> [<https://perma.cc/M8T5-ZUC6>].

¹⁰ *Brown v. Plata*, 563 U.S. 493, 507 (2011); *Helling v. McKinney*, 509 U.S. 25, 32 (1993); *Bell v. Wolfish*, 441 U.S. 520, 535–37 (1979) (applying Eighth Amendment standards to jails, though holding that in the context of pre-trial detention, confinement to jail did not constitute punishment); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

¹¹ See *Jailing People with Mental Illness*, NAMI, <https://www.nami.org/Learn-More/Public-Policy/Jailing-People-with-Mental-Illness> [<https://perma.cc/JA24-MBLE>] (last visited Dec. 28, 2019).

¹² William N. Clark & Artem M. Joukov, *The Criminalization of America*, 76 ALA. LAW. 224, 224 (2015) (quoted and cited by *Gamble v. United States*, 139 S. Ct. 1960, 2008 n.98 (2019) (Gorsuch, J., dissenting)) (“[t]here is no one in the United States over the age of 18 who cannot be indicted for some federal crime.”); Artem M. Joukov & Samantha M. Caspar, *Wherefore is Fortunato? How the Corpus Delicti Rule Excludes Reliable Confessions, Helps the Guilty Avoid Responsibility, and Proves Inconsistent with Basic Evidence Principles*, 41 AM. J. TRIAL ADVOC. 459, 522 n.331 (2018) (citing Clark & Joukov, *supra*); Peter Wagner &

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

Wendy Sawyer, *States of Incarceration: The Global Context 2018*, PRISON POL'Y INITIATIVE (June 2018), <https://www.prisonpolicy.org/global/2018.html>.

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.

¹⁷ See, e.g., Christine Herman, *Most Inmates with Mental Illness Still Wait for Decent Care*, NPR (Feb. 3, 2019), <https://www.npr.org/sections/health-shots/2019/02/03/690872394/most-inmates-with-mental-illness-still-wait-for-decent-care> [<https://perma.cc/X2TA-F2DZ>].

¹⁸ Seena Fazel et al., *Mental Health of Prisoners: Prevalence, Adverse Outcomes, and Interventions*, 3 LANCET PSYCHIATRY 871, 874–75 (2016), <https://www.clinicalkey.com/service/content/pdf/watermarked/1-s2.0-S2215036616301420.pdf> [<https://perma.cc/G89A-97N9>].

¹⁹ Many individuals with mental health illnesses do not vote and some *cannot* vote due to a criminal record. Matt Vasilogambros, *Thousands Lose Right to Vote Under 'Incompetence' Laws*, PEW CHARITABLE TRUSTS (Mar. 21, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/03/21/thousands-lose-right-to-vote-under-incompetence-laws> [<https://perma.cc/56S5-C8GK>]; see also *Felon Voting Rights*, NCSL (Oct. 14, 2019), <https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx> [<https://perma.cc/Z3YL-629Z>].

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).

²¹ See Marlene Busko, *Revolving-Prison-Door Phenomenon Seen in Mentally Ill Inmates*, MEDSCAPE (Jan. 16, 2009), <https://www.medscape.com/viewarticle/586926> [<https://perma.cc/6M9S-7NJN>].

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 it²⁶ or do not even recognize that they have a

²² See Crystal Bonvillian, *Report: Woman Detoxing from Heroin Died in Jail After Being Denied Medical Care*, SPRINGFIELD NEWS-SUN (Sept. 6, 2018), <https://www.springfieldnewsun.com/news/crime--law/report-woman-detoxing-from-heroin-died-jail-after-being-denied-medical-care/gFkOW7At6UT0yaba0hg6qJ> [<https://perma.cc/M5ET-7YGD>]; *Family of 18-Year-Old Who Died in Lebanon County Prison Awarded \$4.75 Million in Settlement*, FOX43 (Oct. 24, 2018, 1:44 PM), <https://fox43.com/2018/10/24/family-of-18-year-old-who-died-in-lebanon-county-prison-awarded-4-75-million-in-settlement> [<https://perma.cc/4FTB-PPR9>] [hereinafter *Family of 18-Year-Old Who Died*]; Gina Tron, *Teenage Girl Left to Die of Heroin Withdrawal in Jail, Lawsuit Alleges*, VICE (July 22, 2016, 9:55 AM), https://www.vice.com/en_us/article/z4jjqw/teenage-girl-left-to-die-of-heroin-withdrawal-in-jail-lawsuit-alleges [<https://perma.cc/9233-UKQ7>].

²³ See *History of Psychology*, *supra* note 7.

²⁴ *Id.*

²⁵ Stacy Weiner, *Addressing the Escalating Psychiatrist Shortage*, AAMC (Feb. 13, 2018), <https://news.aamc.org/patient-care/article/addressing-escalating-psychiatrist-shortage> [<https://perma.cc/ZEG3-9C2U>].

²⁶ See James Lake & Mason Spain Turner, *Urgent Need for Improved Mental Health Care and a More Collaborative Model of Care*, 21 PERMANENTE J. 17-024 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5593510/> [<https://perma.cc/CU44-U56H>].

problem requiring psychological attention.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.²⁸

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.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.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.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 2018,³² and nearly 15.9 million of these adults in the United States suffered from severe mental illness.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.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.”³⁵ Nationwide, one in five, or ten million adults, with a mental health condition report having an unmet need.³⁶

²⁷ *Anosognosia*, NAMI, <https://www.nami.org/Learn-More/Mental-Health-Conditions/related-Conditions/Anosognosia> [<https://perma.cc/M4US-3SPJ>] (last visited Dec. 21, 2019).

²⁸ See Lake & Turner, *supra* note 26.

²⁹ See *Mental Health by the Numbers*, NAMI, <https://www.nami.org/learn-more/mental-health-by-the-numbers> [<https://perma.cc/ER7M-6VME>] (last visited Dec. 21, 2019).

³⁰ Alice G. Walton, *Why More Americans Suffer from Mental Disorders Than Anyone Else*, ATLANTIC (Oct. 4, 2011), <https://www.theatlantic.com/health/archive/2011/10/why-more-americans-suffer-from-mental-disorders-than-anyone-else/246035> [<https://perma.cc/E86F-LSQW>].

³¹ Yohanna, *supra* note 13.

³² See *Quick Facts: United States*, U.S. CENSUS BUREAU (2018), <https://www.census.gov/quickfacts/fact/table/US/PST045217> [<https://perma.cc/AEH4-2Z54>].

³³ See Yohanna, *supra* note 13.

³⁴ See *id.*

³⁵ *Id.*

³⁶ *The State of Mental Health in America*, MENTAL HEALTH AM., <http://www.mentalhealthamerica.net/issues/state-mental-health-america> [<https://perma.cc/72DL-QM6L>] (last visited Dec. 20, 2019).

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

³⁷ See Anat Fleischman et al., *14.1 Violent Crime in Schizophrenia and Bipolar Disorder: A Population-Based Study*, 44 SCHIZOPHRENIA BULL. S23, S23 (Apr. 1, 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5888608/> [<https://perma.cc/U6S8-DRPQ>]; *Severe Mental Illness Defined by Duration and Disability*, BEHAV. HEALTH EVOLUTION (2016), http://www.bhevolution.org/public/severe_mental_illness.page [<https://perma.cc/C3S5-FBHQ>].

³⁸ Samantha M. Caspar & Artem M. Joukov, *The Implications of Marijuana Legalization on the Prevalence and Severity of Schizophrenia*, 28 HEALTH MATRIX 175, 179 (2018).

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-shooting-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/3Y4-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.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.⁴⁴ A bipolar individual often cycles from one extreme mood to the other.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.⁴⁶ Symptoms of the disorder include euphoria, grandiosity, irresponsibility, hopelessness, excessive sleeping or difficulty sleeping, self-criticism, and persistent thoughts of death or suicide.⁴⁷ Bipolar individuals have a higher risk of violence than do schizophrenics.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.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.⁵⁰ Schizoaffective disorder is characterized primarily by concurrent symptoms of schizophrenia and a mood disorder, such as bipolar disorder.⁵¹ Schizoaffective disorder is rare, affecting approximately 0.3 percent of the population.⁵² Another mental illness, schizotypal personality dis-

⁴³ HUMAN RIGHTS WATCH, *supra* note 8, at 75.

⁴⁴ *Severe Mental Illness Defined by Duration and Disability*, *supra* note 37.

⁴⁵ *Id.*

⁴⁶ Caspar & Joukov, *supra* note 3838, at 179; *Severe Mental Illness Defined by Duration and Disability*, *supra* note 3737 (follow link to download “fact sheet about bipolar disorder”).

⁴⁷ *Severe Mental Illness Defined by Duration and Disability*, *supra* note 37.

⁴⁸ Jan Volavka, *Violence in Schizophrenia and Bipolar Disorder*, 25 PSYCHIATRIA DANUBINA 24, 24 (2013).

⁴⁹ Caspar & Joukov, *supra* note 38, at 180; *Severe Mental Illness Defined by Duration and Disability*, *supra* note 37 (follow link to download “fact sheet about schizophrenia”).

⁵⁰ See Athanasios Apostolopoulos et al., *Association of Schizoid and Schizotypal Personality Disorder with Violent Crimes and Homicides in Greek Prisons*, 17 ANNALS GEN. PSYCHIATRY 1, 1–2 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6086037/> [https://perma.cc/3XTN-282V]; *Serious Mental Illness Prevalence in Jails and Prisons*, TREATMENT ADVOC. CTR. (Sept. 2016), <https://www.treatmentadvocacycenter.org/evidence-and-research/learn-more-about/3695> [https://perma.cc/CD5M-7FJY].

⁵¹ *Schizoaffective Disorder*, NAMI, <https://www.nami.org/Learn-More/Mental-Health-Conditions/Schizoaffective-Disorder> [https://perma.cc/HY92-69MN] (last visited Dec. 21, 2019).

⁵² *Id.*

order, presents with unusual beliefs and fears, including paranoia and difficulty forming and maintaining relationships.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.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,⁵⁵ or (2) determine the difference between right and wrong at the time of the act.⁵⁶ The insanity defense may also lead to an acquittal if the individual displayed an irresistible impulse to commit the criminal act,⁵⁷ depending on the jurisdiction.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.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.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.⁶¹ This outcome does not always

⁵³ *Schizotypal Personality Disorder*, PSYCHOL. TODAY, <https://www.psychologytoday.com/us/conditions/schizotypal-personality-disorder> [<https://perma.cc/3DZK-KVQU>] (last visited Dec. 21, 2019).

⁵⁴ *See Insanity*, JUSTIA, <https://www.justia.com/criminal/defenses/insanity/> [<https://perma.cc/MP7J-45NJ>] (last updated Apr. 2018).

⁵⁵ This rule describes the Model Penal Code Test for criminal insanity. *Id.*

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.*

⁵⁷ This rule describes the Irresistible Impulse Test. *Id.*

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.*

⁵⁹ Charlene Sabini, *Affirmative Defenses*, NALS (June 21, 2017), <https://www.nals.org/blogpost/1359892/279125/Affirmative-Defenses> [<https://perma.cc/VU5N-Q4BY>].

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).

⁶¹ *See* Mac McClelland, *When 'Not Guilty' Is a Life Sentence*, N.Y. TIMES MAG. (Sept. 27, 2017), <https://www.nytimes.com/2017/09/27/magazine/when-not-guilty-is-a-life-sentence>

equal release.⁶² 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.⁶³ 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.⁶⁴ 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.⁶⁵ 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).⁶⁶

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.⁶⁷ These individuals may be particularly unlucky, since they cannot avoid a conviction based on their condition.⁶⁸ Furthermore, while mental health problems may be mitigating at sentencing, they do not automatically

.html [<https://perma.cc/43Y6-JLLH>].

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.⁶⁹ Individuals sentenced to imprisonment in a jail or prison or 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.⁷⁰

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.⁷¹ A variety of problems addicts face, including criminality, may be traced to the opioid epidemic.⁷² After all, possession of controlled substances is a crime in every jurisdiction, and addicted individuals seek these substances because of their addiction.⁷³ 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.⁷⁴ In recent years, failure to account for these symptoms has led to drastic consequences.⁷⁵

⁶⁹ See Eric Matheny, *Mitigation for Mental Health Reasons*, ERICMATHENYLAW.COM (Aug. 3, 2010), <https://www.ericmathenylaw.com/blog/2010/august/mitigation-for-mental-health-reasons/> [<https://perma.cc/L8UV-3JWQ>].

⁷⁰ See *Jailing People with Mental Illness*, *supra* note 11.

⁷¹ See David Lebowitz, Note, “Proper Subjects for Medical Treatment?” *Addiction, Prison-Based Drug Treatment, and the Eighth Amendment*, 14 DEPAUL J. HEALTH CARE L. 271, 301–05 (2012).

⁷² See Myles B. Schlam, *Drug Crimes: A Look at Federal and State Laws*, REHABS.COM: DRUG L. & POL’Y (Aug. 1, 2017), <https://www.rehabs.com/pro-talk-articles/drug-crimes-a-look-at-federal-and-state-laws/> [<https://perma.cc/ZE4V-A2FB>].

⁷³ See *id.*

⁷⁴ Cf. *Opioids*, NIDA, <https://www.drugabuse.gov/drugs-abuse/opioids> [<https://perma.cc/59CR-TYKR>] (last visited Dec. 21, 2019).

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 Madaline 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-in-mate.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.⁷⁶ When the jail admitted Ms. Coltrain, she immediately told the jail staff about her opioid addiction and the withdrawal-induced seizures she experienced.⁷⁷ Four hours into her jail stay, she begged jail employees to take her to the hospital to receive medication for her severe withdrawal symptoms.⁷⁸ However, instead of providing her with medical treatment, the jail guards gave her a mop to clean up her own vomit.⁷⁹ After suffering for four days in jail without treatment, Ms. Coltrain died—a direct result of her severe withdrawal symptoms.⁸⁰ 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,⁸¹ 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.⁸² 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.⁸³

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.⁸⁴ Almost all inmates with untreated addictions (approximately 95 percent) "return to using drugs within three years" after release from jail or prison.⁸⁵ 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.*

⁷⁶ Bonvillian, *supra* note 22.

⁷⁷ *Id.*

⁷⁸ *See id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *See* Kelley Smith, *Warden: Inmates 'Lie' About ISP Conditions*, NEWS DISPATCH (June 29, 2018), https://www.thenewsdispatch.com/news/article_a26869e9-6de7-5d00-8554-c1e03a2196c5.html [<https://perma.cc/JD89-V2K8>].

⁸² *See Training: Eight Week Academy*, NEV. DEP'T CORR., http://doc.nv.gov/About/Human_Resources/Training_Eight-Week_Academy/ (last visited Feb. 28, 2020); *cf.* Sarah Maslin Nir, *'I'm Going to Die Here,' She Told the Guards. They Didn't Listen.*, N.Y. TIMES (Jan. 30, 2019), <https://www.nytimes.com/2019/01/30/us/lamekia-dockery-death-jail-prison.html> [<https://perma.cc/GK5J-G4W6>].

⁸³ *See, e.g., supra* note 75.

⁸⁴ Brian Barnett, *Jails and Prisons: The Unmanned Front in the Battle Against the Opioid Epidemic*, STAT NEWS (July 2, 2018), <https://www.statnews.com/2018/07/02/opioid-epidemic-jails-prisons-treatment/> [<https://perma.cc/3QLE-D774>].

⁸⁵ *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.*

⁸⁷ See *Access to Mental Health Care and Incarceration*, MENTAL HEALTH AM., <https://www.mentalhealthamerica.net/issues/access-mental-health-care-and-incarceration> [https://perma.cc/A6QF-Y98B] (last visited Dec. 30, 2019).

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) (“[I]t is safe to affirm that punishments of torture . . . are forbidden by [the Eighth] [A]mendment to the Constitution.”).

⁹¹ *Cf.* U.S. CONST. amend VIII.

⁹² See, e.g., *Coleman v. Brown: Recent Developments in Mental Health Staffing, Crisis Transfers and Population Challenges*, ROSEN BIEN GALVAN & GRUNFELD LLP (July 12, 2019), <https://rbgg.com/coleman-v-brown-update/> [https://perma.cc/AW52-CS7L]; see also Derek Gilna, *California Jail Settles Class-Action Lawsuit Over Conditions of Confinement*, PRISON LEGAL NEWS (Apr. 2, 2019), <https://www.prisonlegalnews.org/news/2019/apr/2/california-jail-settles-class-action-lawsuit-over-conditions-confinement/> [https://perma.cc/8B3D-RQ2B]; Michael S. Krelstein, *The Role of Mental Health in the Inmate Disciplinary Process: A National Survey*, 30 J. AM. ACAD. PSYCHIATRY & L. 488, 488 (2002); *Lawsuit Filed Over Treatment of Inmates with Mental Illness*, AP (Oct. 25, 2019), <https://apnews.com/53a65318d18148d1aae4ce961c726178> [https://perma.cc/G22L-SACM]; Angela Ruggiero, *Alameda County Jail Lawsuit Alleges Bad Conditions for Inmates with Mental Illness*, EAST BAY TIMES, <https://www.eastbaytimes.com/2018/12/21/alameda-county-jails-sued-over-bad-conditions-for-inmates-with-mental-illness/> [https://perma.cc/DE9F-CXFC] (last updated Dec. 24, 2018, 8:59 AM); Ashley Southall, *Mentally Ill Prisoners Are Held Past Release Dates, Lawsuit Claims*, N.Y. TIMES (Jan. 23, 2019), <https://www.nytimes.com/2019/01/23/nyregion/prisoners-mentally-ill-lawsuit.html> [https://perma.cc/BZF3-GF2H]; Alexandra Yoon-Hendricks, *Inmate Advocates, Sacramento County Settle Lawsuit Over ‘Inhumane’ Jail Conditions*, SACRAMENTO BEE (June 20, 2019), <https://www.sacbee.com/news/local/article231792088.html> [https://perma.cc/YS4Z-VHKK].

custody stands out: the case of Jeffrey Epstein.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.⁹⁴ He even attempted suicide on an occasion, which led to his placement on suicide watch within the jail.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.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.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.⁹⁸

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

⁹³ See Bobby Allyn, *Jeffrey Epstein's Prison Guards Are Indicted on Federal Charges*, NPR (Nov. 19, 2019), <https://www.npr.org/2019/11/19/780794931/prosecutors-charge-correctional-officers-who-guarded-jeffrey-epstein-before-his-> [<https://perma.cc/DYE5-RRU8>]; Katie Benner, *Barr Says Epstein's Suicide Resulted From 'Perfect Storm of Screw-Ups'*, N.Y. TIMES (Nov. 22, 2019), <https://www.nytimes.com/2019/11/22/nyregion/william-barr-jeffrey-epstein-suicide-investigation.html> [<https://perma.cc/B65S-HEDH>]; Jane Coaston et al., *Jeffrey Epstein, the Convicted Sex Offender Who Was Friends with Donald Trump and Bill Clinton, Explained*, VOX, <https://www.vox.com/2018/12/3/18116351/jeffrey-epstein-case-indictment-arrested-trump-clinton> [<https://perma.cc/5R5W-SUTN>] (last updated Sept. 4, 2019, 11:13 AM); Michael Gold et al., *Guards Accused of Napping and Shopping Online the Night Epstein Died*, N.Y. TIMES (Nov. 19, 2019), <https://www.nytimes.com/2019/11/19/nyregion/epstein-prison-guards-arrested.html> [<https://perma.cc/YK86-URM3>]; Caroline Hallemann, *What We Know So Far About Jeffrey Epstein's Sex Trafficking Case*, TOWN & COUNTRY (Dec. 2, 2019), <https://www.townandcountrymag.com/society/money-and-power/a28352055/jeffrey-epstein-criminal-case-facts/> [<https://perma.cc/9UG5-8K8L>]; Mark Hosenball, *FBI Studies Two Broken Cameras Outside Cell Where Epstein Died: Source*, REUTERS (Aug. 28, 2019, 2:51 PM), <https://www.reuters.com/article/us-people-jeffrey-epstein-cameras/fbi-studies-two-broken-cameras-outside-cell-where-epstein-died-source-idUSKCN1VI2LC> [<https://perma.cc/ZD2U-AZM2>]; James B. Stewart, *The Day Jeffrey Epstein Told Me He Had Dirt on Powerful People*, N.Y. TIMES (Aug. 12, 2019), <https://www.nytimes.com/2019/08/12/business/jeffrey-epstein-interview.html> [<https://perma.cc/5GKL-V45S>].

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

⁹⁵ *Id.*

⁹⁶ See Coaston et al., *supra* note 93; 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 . . .”).

⁹⁷ See Coaston et al., *supra* note 93; Stewart, *supra* note 93.

⁹⁸ See Coaston et al., *supra* note 93; Stewart, *supra* note 93.

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

¹⁰⁰ *See id.*

from suicide watch.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.¹⁰² Both of the guards apparently fell asleep or became distracted by online shopping, and both cameras malfunctioned.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.¹⁰⁴ Epstein's suicide left the government without a crucial witness in a set of circumstances that have spawned yet another federal investigation.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.¹⁰⁶ If likely the most important person in government custody could not receive the care he needed to prevent self-harm,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.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.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,¹¹⁰ how can they protect anyone else?

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 bedsheet."); Hosenball, *supra* note 93 ("He had been taken off suicide watch prior to his death.").

¹⁰² Allyn, *supra* note 93; Hosenball, *supra* note 93.

¹⁰³ Allyn, *supra* note 93; Gold et al., *supra* note 93; Hosenball, *supra* note 93.

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' . . .").

¹⁰⁵ Hosenball, *supra* note 93.

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 . . .").

¹⁰⁷ See *id.*; Stewart, *supra* note 93.

¹⁰⁸ Bell v. Wolfish, 441 U.S. 520, 533, 535 n.16, 554 (1979).

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.'").

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.*”¹¹¹ 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.¹¹² Hence, today the Cruel and Unusual Punishment Clause prohibits barbaric methods of punishment and applies to both the federal government and the states.¹¹³

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.¹¹⁴ 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.¹¹⁵ The Eighth Amendment may address general concerns of incarcerated living, such as unpalatable food, extreme heat or cold, or physical punishments imposed by guards.¹¹⁶ 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.

¹¹³ See Bryan A. Stevenson & John F. Stinneford, *The Eighth Amendment*, NAT’L CONST. CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-viii/clauses/103> [<https://perma.cc/QH4N-FSK2>] (last visited Jan. 23, 2020).

¹¹⁴ See *Hutto v. Finney*, 437 U.S. 678, 685–88 (1978).

¹¹⁵ See, e.g., *Brown v. Plata*, 563 U.S. 493, 501 (2011).

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.*

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.¹¹⁷

To illustrate, in *Brown v. Plata*, the Justices of the United States Supreme Court faced a case outlining extremely deficient conditions within California prisons.¹¹⁸ The underlying evidence included a California prison system that operated at approximately 200 percent capacity for more than a decade.¹¹⁹ The overcrowding led to significant problems in the way prisons treated their inmates, implicating the Eighth Amendment.¹²⁰ The mistreatment involved ignoring the inmates' physical and mental health.¹²¹ For example, California prisons sometimes locked suicidal prisoners in small cages approximately the size of a telephone booth (without toilets).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.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.¹²⁴

Inmates either lived in cells too small for human habitation or were crammed into a gymnasium in packs of several hundred where they would receive monitoring from "two or three correctional officers."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.¹²⁶ Suicide rates climbed to 80 percent higher than the national average, with 72.1 percent of the deaths ruled as preventable.¹²⁷ In addition, those with physical injuries, independent of, or in addition to, psychological problems, found little respite in the medical care facilities.¹²⁸ California's prisons sometimes held as many as fifty inmates in a twelve foot by twenty foot cage.¹²⁹ These despicable conditions and delays in treatment led to deaths for common, curable physical ailments.¹³⁰ Some prisoners would die of an illness presenting with abdominal pain after a delay in medical care lasting one month.¹³¹ Other prisoners would complain of severe

¹¹⁷ See, e.g., *Brown*, 563 U.S. at 502.

¹¹⁸ *Id.* at 499.

¹¹⁹ *Id.* at 502.

¹²⁰ *Id.* at 507.

¹²¹ *Id.* at 502.

¹²² *Id.* at 503.

¹²³ *Id.* at 502.

¹²⁴ *Id.* at 505 n.4.

¹²⁵ *Id.* at 502.

¹²⁶ *Id.* at 504.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 505.

¹³¹ *Id.*

chest pain, only for the prison to leave the individuals untreated until they succumbed to their ailments.¹³² One patient died of testicular cancer after the prison doctors' failure to recognize the illness despite seventeen months of pain complaints.¹³³ Even survivors still suffered prolonged, unnecessary pain and discomfort that the prisons could have avoided if the prisons were not so overcrowded.¹³⁴

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.¹³⁵ The inmates within California prisons had been seeking improvements for more than a decade, and California still failed to act.¹³⁶ This problem persists across the country, since inmates within jails and prisons may have limited access to counsel and limited resources,¹³⁷ a limited education,¹³⁸ a limited understanding of their rights,¹³⁹ a limited understanding of the criminal justice system,¹⁴⁰ and limited voting rights.¹⁴¹ 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.¹⁴² 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.¹⁴³ It is difficult to argue that these prisoners are receiving what the

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 505–06.

¹³⁵ Qualified immunity protects certain government employees from financial judgments, providing police officers and prison guards with “a strong defense even against neglectful or violent conduct that violates a citizen’s constitutional rights.” Josh Saul, *Prison Abuse: Prison Guards Who Torture Inmates Can’t Be Sued Because of Legal Loophole Called Qualified Immunity*, NEWSWEEK (Nov. 29, 2017), <https://www.newsweek.com/prison-inmate-qualified-immunity-protect-officials-constitution-civil-rights-723943> [<https://perma.cc/Q7CM-E74Q>].

¹³⁶ *Brown*, 563 U.S. at 502.

¹³⁷ See Johanna Kalb, *Protecting the Right to Counsel: Lessons from New Orleans*, BRENNAN CTR. FOR JUST. (June 14, 2018), <https://www.brennancenter.org/blog/protecting-right-counsel-lessons-new-orleans> [<https://perma.cc/BF4Z-BGB5>].

¹³⁸ See CAROLINE WOLF HARLOW, U.S. DEP’T JUST., EDUCATION AND CORRECTIONAL POPULATIONS 1 (2003), <https://www.bjs.gov/content/pub/pdf/ecp.pdf> [<https://perma.cc/SP28-PLGS>].

¹³⁹ *Prisoners’ Rights*, ACLU, <https://www.aclu.org/issues/prisoners-rights> [<https://perma.cc/W7S9-53DQ>] (last visited Jan. 23, 2020).

¹⁴⁰ See Connie L. McNeely, *Perceptions of the Criminal Justice System: Television Imagery and Public Knowledge in the United States*, 3 J. CRIM. JUST. & POPULAR CULTURE 1, 7–8 (1995).

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

¹⁴⁴ See *The Issue*, PENAL REFORM INT'L, <https://www.penalreform.org/issues/prison-conditions/issue/> [<https://perma.cc/GMF9-7R7K>] (last visited Dec. 27, 2019).

¹⁴⁵ See, e.g., *Pesce v. Coppinger*, 355 F. Supp. 3d 35, 39 (D. Mass. 2018).

¹⁴⁶ See *Brown*, 563 U.S. at 502–07.

¹⁴⁷ See, e.g., *Helling v. McKinney*, 509 U.S. 25, 32 (1993); *Bell v. Wolfish*, 441 U.S. 520, 529 n.11 (1979); *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

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.

¹⁵¹ See Artem M. Joukov, *A Second Opinion: Can Windsor v. United States Survive Under President Trump’s Supreme Court?*, 27 J.L. & POL’Y 327, 327, 330 (2018); Adam Liptak, *Kavanaugh and Gorsuch, Justices with Much in Common, Take Different Paths*, N.Y. TIMES (May 12, 2019), <https://www.nytimes.com/2019/05/12/us/politics/brett-kavanaugh-neil-gorsuch.html> [<https://perma.cc/EH47-VFC7>].

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*,¹⁵³ 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).¹⁵⁴ The Court wrote: “deliberate indifference to serious medical needs of prisoners constitutes the ‘unnecessary and wanton infliction of pain[.]’ proscribed by the Eighth Amendment.”¹⁵⁵ 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.¹⁵⁶ After all, to an injured person, even mundane assignments might appear draconian due to the pain they cause.¹⁵⁷ Hence, the existence of physical health problems prevented the imposition of tasks that would exacerbate them or cause the inmate undue pain.¹⁵⁸

Several consistent decisions followed.¹⁵⁹ In *Helling v. McKinney*,¹⁶⁰ 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.¹⁶¹ *Farmer v. Brennan* also embraced the concept that prison staff owe a duty of care toward prisoners.¹⁶² 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.¹⁶³ 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.¹⁶⁴ 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

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.

¹⁵³ *Estelle v. Gamble*, 429 U.S. 97 (1976).

¹⁵⁴ *Id.* at 100, 104.

¹⁵⁵ *Id.* at 104 (internal citation omitted).

¹⁵⁶ *See id.* at 104–05.

¹⁵⁷ *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)).

¹⁵⁸ *See id.*

¹⁵⁹ *See, e.g.*, *Helling v. McKinney*, 509 U.S. 25, 33 (1993); *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

¹⁶⁰ *Helling*, 509 U.S. at 25.

¹⁶¹ *Id.* at 35–36.

¹⁶² *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

¹⁶³ *Id.* at 829–30.

¹⁶⁴ *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

¹⁶⁵ *Id.* at 829–30 (citations omitted).

¹⁶⁶ *See id.* at 829.

¹⁶⁷ *Id.* at 843.

¹⁶⁸ *See id.* at 843.

¹⁶⁹ Abbe R. Gluck & Kate Stith, Opinion, *Don't Sentence Prisoners to Addiction*, WALL STREET J. (Dec. 10, 2018, 7:12 PM), <https://www.wsj.com/articles/dont-sentence-prisoners-to-addiction-1544487128> [<https://perma.cc/4PHM-SXD9>].

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.¹⁷¹

In some sense, it would be difficult to provide treatment to inmates for addiction in the current jail and prison system.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.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 *Brown v. Plata*.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.¹⁷⁵ While the Court declined to rule on a similar issue in *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

had his medication waiting for him at home, where, rather than relapsing, he began re-taking his medication as prescribed. *Id.* “Most prisoners with opioid addictions who have their medication stopped” do not have medication waiting for them at home once released. *Id.* Instead, these individuals commonly search for illicit opioids on the streets to help alleviate their cravings, often leading to their overdose and subsequent death, since many individuals lose their tolerance to opioids while incarcerated. *Id.*

¹⁷¹ *See id.*

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, *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/rhode-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; *Family of 18-Year-Old Who Died*, *supra* note 22; Tron, *supra* note 22.

¹⁷³ *See* U.S. CONST. amend VIII.

¹⁷⁴ *Brown v. Plata*, 563 U.S. 493, 502 (2011).

¹⁷⁵ Such expert evidence, presented (and contested) in cases like *Brown*, should conform to the standards of admissibility set forth by the Supreme Court. Artem M. Joukov, *Who’s the Expert? Frye and Daubert in Alabama*, 47 CUMB. L. REV. 275, 276 (2017).

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.

¹⁷⁸ BRIAN STETTIN ET AL., TREATMENT ADVOC. CTR., MENTAL HEALTH COMMITMENT LAWS: A SURVEY OF THE STATES 17, 25 (2014), <https://www.treatmentadvocacycenter.org/mental-health-commitment-laws> [<https://perma.cc/2FXH-54LG>].

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.¹⁷⁹ Deinstitutionalization first began in the mid-1950s with the introduction of chlorpromazine, the first effective antipsychotic medication.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.¹⁸¹

Deinstitutionalization rapidly accelerated in the mid-1960s.¹⁸² Since America’s founding, responsibility for providing mental health services had been “assumed by state and local governments.”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.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.¹⁸⁵ Around the same time, the federal government introduced

¹⁷⁹ E. FULLER TORREY, *OUT OF THE SHADOWS: CONFRONTING AMERICA’S MENTAL ILLNESS CRISIS* (1997), reprinted in *Deinstitutionalization: A Psychiatric “Titanic”*, PBS: FRONTLINE (May 10, 2005), <https://www.pbs.org/wgbh/pages/frontline/shows/asylums/special/excerpt.html> [<https://perma.cc/T8Y7-GTKT>] [hereinafter *Deinstitutionalization: A Psychiatric “Titanic”*].

¹⁸⁰ *Id.*

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>].

¹⁸² TORREY, *supra* note 13, at 1.

¹⁸³ *Id.*

¹⁸⁴ See Yohanna, *supra* note 13.

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, *supra* note 13.

¹⁸⁷ *Id.*

¹⁸⁸ Special Message to the Congress on Mental Illness and Mental Retardation, 50 PUB. PAPERS 126, 127 (Feb. 5, 1963).

¹⁸⁹ Richard A. Friedman, *A Solution That Now Looks Crazy*, N.Y. TIMES (Jan. 13, 2014), <https://www.nytimes.com/2014/01/14/health/american-psychosis-attacks-mental-health-care.html> [<https://perma.cc/L8Z2-UGUL>].

¹⁹⁰ TORREY, *supra* note 13, at 1.

¹⁹¹ *Id.* at 1–2.

¹⁹² *See id.* at 2.

¹⁹³ *See, e.g.,* Daniel Distant, *John Montin Lawsuit: Sane Man Trapped in Mental Hospital for 20 Years*, CHRISTIAN POST (July 15, 2014), <https://www.christianpost.com/news/john-montin-lawsuit-sane-man-trapped-in-mental-hospital-for-20-years-123350/> [<https://perma.cc/68JP-G66S>].

by.¹⁹⁴ Yet, many individuals who left asylums soon entered state custody due to involvement in crime.¹⁹⁵

Defenders of Kennedy's vision claimed the new federally funded CMHCs were necessary because states were failing to provide adequate services to individuals.¹⁹⁶ 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.¹⁹⁷ "Most states were [also] . . . developing community programs to provide care for the released patients."¹⁹⁸ 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.¹⁹⁹ Ultimately, the federal government never built most of these CMHCs—leaving America with significantly fewer options for adequate mental health care.²⁰⁰

Deinstitutionalization is "widely regarded as a major failure."²⁰¹ 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"²⁰² To illustrate the startling effect of deinstitutionalization, "[i]n 1955, there were 558,239 severely mentally ill patients in [] [United States] public psychiatric hospitals."²⁰³ In 1994, there were only 71,619 persons in United States public psychiatric hospitals.²⁰⁴ 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 1994.²⁰⁵ If there was an identical "proportion of patients per

¹⁹⁴ *See id.*

¹⁹⁵ *See id.*

¹⁹⁶ TORREY, *supra* note 13, at 3.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *See, e.g.,* Vern Pierson, *Hard Truths About Deinstitutionalization, Then and Now*, CALMATTERS (Mar. 10, 2019), <https://calmatters.org/articles/commentary/hard-truths-about-deinstitutionalization-then-and-now/> [<https://perma.cc/FX6N-PRZR>].

²⁰¹ Richard D. Lyons, *How Release of Mental Patients Began*, N.Y. TIMES (Oct. 30, 1984), <https://www.nytimes.com/1984/10/30/science/how-release-of-mental-patients-began.html> [<https://perma.cc/BGK3-J9JE>].

²⁰² *Id.* (internal quotation marks omitted).

²⁰³ *Deinstitutionalization: A Psychiatric "Titanic"*, *supra* note 179.

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

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.*

²⁰⁹ See *Deinstitutionalization: A Psychiatric “Titanic”*, *supra* note 179.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ TORREY, *supra* note 13, at 2.

²¹⁴ *Locked In: The Costly Criminalisation of the Mentally Ill*, *ECONOMIST* (Aug. 3, 2013), <https://www.economist.com/united-states/2013/08/03/locked-in> [<https://perma.cc/PVJ6-THUY>].



As state-run hospitals released patients with no aftercare or alternative, jails and prisons began to receive many of these individuals.²¹⁵ Numerous “crimes were committed in response to delusional thinking,” resulting from former patients’ mental illnesses being left untreated.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.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.”²¹⁸ Importantly, mentally ill persons have an average stay in jail or prison that “is twice as long as for non-mentally-ill” persons.²¹⁹ Mentally ill inmates are also “victimized by other inmates more commonly, and commit suicide more commonly.”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.²²¹

²¹⁵ TORREY, *supra* note 13, at 5.

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.*

²¹⁷ See DANIELLE KAEBLE & MARY COWHIG, U.S. DEPT. JUST., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2016 3 (2018), <https://www.bjs.gov/content/pub/pdf/cpus16.pdf> [<https://perma.cc/HRZ5-6PQX>]; TORREY, *supra* note 13, at 6.

²¹⁸ E. FULLER TORREY ET AL., TREATMENT ADVOC. CTR., MORE MENTALLY ILL PERSONS ARE IN JAILS AND PRISONS THAN HOSPITALS: A SURVEY OF THE STATES 1 (2010), https://www.treatmentadvocacycenter.org/storage/documents/final_jails_v_hospitals_study.pdf [<https://perma.cc/MR48-JWJU>].

²¹⁹ TORREY, *supra* note 13, at 6.

²²⁰ *Id.*

²²¹ *Id.*

Crimes committed by mentally ill individuals have also increased significantly over the past few decades, in part an effect of deinstitutionalization.²²² Severely mentally ill individuals who are not receiving treatment are now responsible for approximately 10 percent of United States homicides.²²³ “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.”²²⁴ There are now approximately 19,510 homicides per year in the United States,²²⁵ 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.²²⁶ “Opioids are a class of drugs that include . . . pain relievers . . . such as oxycodone[], hydrocodone[], codeine, morphine, and [] others.”²²⁷ Opioids also “include the illegal drug heroin, [and] synthetic opioids[,] such as fentanyl” and carfentanil.²²⁸ These drugs all produce similar effects in the body, since their chemical structures are similar.²²⁹ Specifically, opioids trigger a release of dopamine, a neurotransmitter responsible for “feelings of euphoria, bliss, motivation, and concentration.”²³⁰ 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.²³¹ If the drug leaves the user’s system, withdrawal symptoms, including body aches, fever, diarrhea, vomiting, sweating, and chills, can occur.²³² An addiction to opioids includes strong crav-

²²² *Deinstitutionalization: A Psychiatric “Titanic”*, *supra* note 179.

²²³ TREATMENT ADVOC. CTR., *New Study Suggests that Severely Mentally Ill Individuals Who Are Not Being Treated Are Responsible for 10 Percent of U.S. Homicides*, MENTAL ILLNESS POL’Y ORG., <https://mentalillnesspolicy.org/consequences/1000-homicides.html> [<https://perma.cc/2ECP-9G36>] (last visited Jan. 24, 2020).

²²⁴ TORREY, *supra* note 13, at 7.

²²⁵ *Assault or Homicide*, CDC: NAT’L CTR. HEALTH STATS., <https://www.cdc.gov/nchs/factsheets/homicide.htm> (last visited Feb. 6, 2020).

²²⁶ *Medications to Treat Opioid Use Disorder*, NIDA, <https://www.drugabuse.gov/publications/medications-to-treat-opioid-addiction/how-opioid-use-disorder-treated-in-criminal-justice-system> [<https://perma.cc/J3YS-NYZH>] (last visited Jan. 24, 2020).

²²⁷ *Opioids*, *supra* note 74.

²²⁸ *Id.*

²²⁹ *How Do People Become Addicted to Opioids?*, TRUTH, <https://www.thetruth.com/o/articles/opioid-addiction> [<https://perma.cc/2QG4-PDEB>] (last visited Jan. 24, 2020).

²³⁰ Kate Brophy, *What is Dopamine? Understanding the “Feel-Good Hormone”*, UNIV. HEALTH NEWS: DAILY (July 10, 2019), <https://universityhealthnews.com/daily/depression/what-is-dopamine-understanding-the-feel-good-hormone/> [<https://perma.cc/2H8N-XVA7>].

²³¹ *Prescription Opioids*, NIDA, <https://www.drugabuse.gov/publications/drugfacts/prescription-opioids> [<https://perma.cc/QQU2-4FM4>] (last revised June 2019).

²³² *Id.*

ings to take the drug, despite knowledge of its negative effects.²³³ 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.²³⁴ Naltrexone is an additional medication used to treat addiction, but it is typically less effective than buprenorphine and methadone because it requires full detoxification.²³⁵

Each day “more than 130 individuals in the United States die after overdosing on opioids,” with these numbers steadily increasing in recent years.²³⁶ “[D]eaths due to drug overdose[s] reached a record high in [2017], with over 70,000” reported.²³⁷ 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.²³⁸ 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.²³⁹ The compulsive behaviors accompanying addictions “bear [many] similarities to other mental illnesses.”²⁴⁰ In the United States, health care professionals use the Diagnostic and Statistical Manual of Mental Disorders (DSM) when diagnosing mental illnesses.²⁴¹ 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.”²⁴² Similar to other mental illnesses, addiction often requires long-term treatment.²⁴³ It is clear that addiction is a “chronic, relapsing [brain] disease,” requiring specialized treatment.²⁴⁴

²³³ *The Science of Drug Use and Addiction: The Basics*, NIDA, <https://www.drugabuse.gov/publications/media-guide/science-drug-use-addiction-basics> [https://perma.cc/C245-RMN4] (last visited Jan. 24, 2020).

²³⁴ *Effective Treatments for Opioid Addiction*, NIDA, <https://www.drugabuse.gov/publications/effective-treatments-opioid-addiction/effective-treatments-opioid-addiction> [https://perma.cc/9TZ7-Y9NR] (last updated Nov. 2016).

²³⁵ *Id.*

²³⁶ *Opioid Overdose Crisis*, NIDA, <https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis> [https://perma.cc/LTC7-XHWB] (last revised Jan. 2019).

²³⁷ Caleb Rans, *U.S. Life Expectancy: The Mental Health Perspective*, 36 PSYCHIATRIC TIMES (Feb. 15, 2019), <https://www.psychiatristimes.com/opioid-epidemic/us-life-expectancy-mental-health-perspective> [https://perma.cc/6827-AJD9].

²³⁸ Lauren Villa, *Mental Health and Drug Abuse*, DRUGABUSE, <http://drugabuse.com/mental-health-drug-abuse/> [https://perma.cc/A66K-GLKK] (last visited Jan. 11, 2020).

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ NAT’L INSTITUTE ON DRUG ABUSE, COMORBIDITY: ADDICTION AND OTHER MENTAL ILLNESSES 10 (2010), <https://www.drugabuse.gov/sites/default/files/rcomorbidity.pdf> [https://perma.cc/MLS4-JKMJ].

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.

²⁴⁹ Dan Mangan, *Economic Cost of the Opioid Crisis: \$1 Trillion and Growing Faster*, CNBC (Feb. 13, 2019, 6:00 AM), <https://www.cnbc.com/2018/02/12/economic-cost-of-the-opioid-crisis-1-trillion-and-growing-faster.html> [<https://perma.cc/AH8V-XCL5>].

²⁵⁰ See SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 3 (2019), <https://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf> [<https://perma.cc/F3W3-WMC9>].

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.”²⁵⁸

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.²⁵⁹ 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.²⁶⁰ 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.²⁶¹ 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.²⁶² 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.²⁶³ 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.*

²⁵⁹ *Brown v. Plata*, 563 U.S. 493, 545 (2011).

²⁶⁰ *Id.* at 502.

²⁶¹ *See, e.g.*, *Helling v. McKinney*, 509 U.S. 25, 35 (1993); *Bell v. Wolfish*, 441 U.S. 520, 528, 562–63 (1979); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

²⁶² *See Klein, supra* note 5, at 18, 25.

²⁶³ Alana Horowitz Satlin, *U.S. Mental Healthcare System Failing Patients, Advocates Say*, HUFFPOST (Dec. 26, 2012, 12:15 PM), https://www.huffpost.com/entry/us-mental-healthcare-system_n_2353319 [<https://perma.cc/SV9G-GXRV>].

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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.²⁶⁴ 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.

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