

# Forging Links and Renewing Ties: Applying the Principles of Restorative and Procedural Justice to Better Respond to Criminal Offenders with a Mental Disorder\*

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PRINCIPLES TO GUIDE SOCIETY’S RESPONSE TO OFFENDERS WITH A MENTAL DISORDER .....	148
INTRODUCTION .....	155
I. THE FOCUS OF THE CRIMINAL JUSTICE SYSTEM AND RELATED MODELS OF PUNISHMENT .....	159
II. JAILS AND PRISONS: AMERICA’S DE FACTO MENTAL HEALTH SYSTEM .....	167
III. CRIMINAL JUSTICE SYSTEM ALTERNATIVES .....	177
A. <i>Probation</i> .....	178
B. <i>Drug Courts</i> .....	181
C. <i>Mental Health Courts</i> .....	183
IV. THE RESTORATIVE JUSTICE APPROACH .....	191

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\* Portions of the following discussion have been drawn from and expand upon scholarship reported in Sharon G. Garner & Thomas L. Hafemeister, *Restorative Justice, Therapeutic Jurisprudence, and Mental Health Courts: Finding a Better Means to Respond to Offenders with a Mental Disorder*, 22 DEV. MENTAL HEALTH L., no. 2, 2003, at 1. *Developments in Mental Health Law* is a newsletter published by The Institute of Law, Psychiatry & Public Policy at the University of Virginia. The *Buffalo Law Review* would like to thank the editors of *Developments in Mental Health Law*.

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V. THE PROCEDURAL JUSTICE APPROACH .....	200
VI. COMBINING THE PRINCIPLES OF RESTORATIVE AND PROCEDURAL JUSTICE TO FIND A BETTER MEANS TO RESPOND TO MANY OFFENDERS WITH A MENTAL DISORDER.....	202
A. <i>Restorative and Procedural Justice in the Context of Mental Disorders</i> .....	202
B. <i>Employing a Restorative Justice Model Incorporating Procedural Justice Principles When Offenders with a Mental Disorder Are Involved</i> .....	207
VII. POTENTIAL CRITICISMS OF THIS MODEL AND REBUTTAL .....	215
CONCLUSION .....	222

PRINCIPLES TO GUIDE SOCIETY'S RESPONSE TO OFFENDERS  
WITH A MENTAL DISORDER

For almost as long as there has been a criminal justice system, society has struggled with how to respond to offenders with a mental disorder whose criminal behavior has been shaped and driven by their mental disorder. Virtually everyone who works with this population, including criminal justice officials, believes that society's current response is woefully inadequate. This Article will propose an alternative approach that can provide a better response for all of the parties affected by these crimes, including the victims of these crimes and the offenders themselves. At the same time, there is a general lack of overarching principles to guide such analyses. Based on a review of the current literature and a growing consensus regarding various points drawn from this literature, this Article begins with an effort to articulate these principles before turning to the proposed model and its foundations:

(1) Many individuals within society have a mental disorder.<sup>1</sup>

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1. Julie Steenhuisen, *Nearly 1 in 5 Americans Had Mental Illness in 2009*, REUTERS (Nov. 18, 2010), <http://www.reuters.com/article/2010/11/18/us-usa-mentalhealth-idUSTRE6AH4GW20101118> ("More than 45 million Americans, or 20 percent of U.S. adults, had some form of mental illness last year, and 11

(2) Mental disorders are not monolithic, but encompass a widely diverse set of conditions. They appear in many forms and affect individuals in many different ways. Their impact on capacities, abilities, emotions, and behavior vary enormously.<sup>2</sup>

(3) A mental disorder is not an all-or-nothing phenomenon. It tends to fluctuate significantly over time and to interfere with some functions but not others.<sup>3</sup>

(4) A mental disorder can be debilitating, disorienting, frightening, or overpowering to the person experiencing it.<sup>4</sup>

(5) Mental disorders tend to be misunderstood and can be upsetting or frightening to observers, but the likelihood of resulting dangerous behavior is widely overestimated.<sup>5</sup>

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million had a serious illness . . . . Young adults aged 18 to 25 had the highest level of mental illness at 30 percent . . . .”); *see also* Steven Reinberg, *CDC: Half of Americans Will Suffer from Mental Health Woes*, USA TODAY (Sept. 5, 2011), <http://yourlife.usatoday.com/health/medical/mentalhealth/story/2011-0905/CDC-Half-of-Americans-will-suffer-from-mental-health-woes/50250702/1> (“About half of Americans will experience some form of mental health problem at some point in their life . . . .” (citing CTRS. FOR DISEASE CONTROL AND PREVENTION, MORBIDITY AND MORTALITY WEEKLY REPORT, MENTAL ILLNESS SURVEILLANCE AMONG ADULTS IN THE UNITED STATES 1-2 (2011))).

2. U.S. DEPT OF HEALTH AND HUMAN SERVS., MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 5 (1999) [hereinafter SURGEON GENERAL’S REPORT] (“Many ingredients of mental health may be identifiable, but mental health is not easy to define.”).

3. *Id.* at 17 (“[R]elatively few mental illnesses have an unremitting course marked by the most acute manifestations of illness; rather, for reasons that are not yet understood, the symptoms associated with mental illness tend to wax and wane.”).

4. In fact, the Council of State Governments has noted:

People with mental illness are falling through the cracks of this country’s social safety net . . . .

. . . [A] large number of people with mental illness . . . have been incarcerated because they displayed in public the symptoms of untreated mental illness. Experiencing delusions, immobilized by depression, or suffering other consequences . . . many of these individuals have struggled, at times heroically, to fend off symptoms of mental illness.

COUNCIL OF STATE GOV’TS, CRIMINAL JUSTICE/MENTAL HEALTH CONSENSUS PROJECT, at xii (2002).

5. As the U.S. Surgeon General has explained:

(6) Individuals with a mental illness are more likely to come into contact with the criminal justice system.<sup>6</sup> A significant proportion of individuals whose actions are brought to the attention of the criminal justice system have a mental illness.<sup>7</sup>

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Are people with mental disorders truly more violent? Research supports some public concerns, but the overall likelihood of violence is low. The greatest risk of violence is from those who have dual diagnoses, i.e., individuals who have a mental disorder as well as a substance abuse disorder. . . . In fact, there is very little risk of violence or harm to a stranger from casual contact with an individual who has a mental disorder. Because the average person is ill-equipped to judge whether someone who is behaving erratically has any of these disorders, alone or in combination, the natural tendency is to be wary. Yet to put this all in perspective, the overall contribution of mental disorders to the total level of violence in society is exceptionally small.

SURGEON GENERAL'S REPORT, *supra* note 2, at 7 (emphasis omitted) (citations omitted); *see also Understanding Mental Illness: Factsheet*, SUBSTANCE ABUSE AND MENTAL HEALTH SERVS. ADMIN., [http://www.samhsa.gov/mentalhealth/understanding\\_Mentalllness\\_Factsheet.aspx](http://www.samhsa.gov/mentalhealth/understanding_Mentalllness_Factsheet.aspx) (last updated Sept. 24, 2008) ("A consensus statement signed by more than three dozen lawyers, advocates, consumers/survivors, and mental health professionals reads in part: 'The results of several recent large-scale research projects conclude that only a weak association between mental disorders and violence exists in the community. Serious violence by people with major mental disorders appears concentrated in a small fraction of the total number, and especially in those who use alcohol and other drugs.'" (quoting John Monahan & Jean Arnold, *Violence by People with Mental Illness: A Consensus Statement by Advocates and Researchers*, PSYCHIATRIC REHAB. J., Spring 1996 at 67, 70)).

6. Mental Health Early Intervention, Treatment, and Prevention Act of 2000, S. 2639, 106th Cong. (2000) ("Twenty-five to 40 percent of the individuals who suffer from a mental illness . . . will come into contact with the criminal justice system each year.").

7. Robert Bernstein & Tammy Seltzer, *Criminalization of People with Mental Illnesses: The Role of Mental Health Courts in System Reform*, 7 D.C. L. REV. 143, 145 (2003) ("During street encounters, police officers are almost twice as likely to arrest someone who appears to have a mental illness."); *see also* HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 17 (2003) ("In 2000, the American Psychiatric Association reported research estimates that perhaps as many as one in five prisoners were seriously mentally ill, with up to 5 percent actively psychotic at any given moment." (citing AM. PSYCHIATRIC ASSOC., PSYCHIATRIC SERVICES IN JAILS AND PRISONS, at xix (2d ed. 2000))); DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1-2 (2006) [hereinafter BJS REPORT] ("[M]ore than half of all prison and jail inmates ha[ve] a mental health problem . . .").

(7) Persons with a mental disorder should be afforded the respect and dignity to which all human beings are entitled.<sup>8</sup> Human interactions generally remain important to them and how they are treated by others and society often has a significant impact on them.<sup>9</sup>

(8) Like all human beings, persons with a mental disorder may be involved in relationships where friction, disputes, and altercations occur.<sup>10</sup> Nevertheless, the maintenance of these relationships can be of considerable importance to them as well as to the other involved individuals.<sup>11</sup>

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8. See, e.g., Convention on the Rights of Persons with Disabilities art. 3, G.A. Res. 61/106, U.N. Doc. A/RES/61/106 (Dec. 13, 2006); Press Release, U.N. Dep't of Pub. Info., With 20 Ratifications, Landmark Disability Treaty Set to Enter into Force on 3 May, U.N. Press Release HR/4941 (Apr. 3, 2008).

9. See Victoria Maxwell, *This Won't Hurt a Bit, Really: Dating After Mental Illness*, PSYCHOL. TODAY (Apr. 17, 2009, 9:26 PM), <http://www.psychologytoday.com/print/4384> (“[W]e don’t leave our hearts and desires behind when we get a diagnosis. We take them with us, along with our bodies, minds (yes our minds) and spirits as we walk or, in my case, stumble our way to recovery. And that’s the point isn’t it? Not how graceful we are, but that we’re heading in the right direction and surrounded, hopefully, with people who are heading our way too.”).

10. See, e.g., DANIEL MACKLER & MATTHEW MORRISSEY, *A WAY OUT OF MADNESS: DEALING WITH YOUR FAMILY AFTER YOU’VE BEEN DIAGNOSED WITH A PSYCHIATRIC DISORDER* 5-6 (2010) (“The family is one of the most powerful forces in the universe . . . . [F]amilies can have a profound effect on the course of a person’s emotional life and, specifically, the course of a psychiatric disorder.”); *id.* at 3 (“[W]hen you experience severe emotional problems, particularly those that get diagnosed as mental disorders or lead to psychiatric hospitalizations, these [normal and expected] conflicts [with your family] are often heightened. . . . This [disruption] can throw your entire family into further turmoil, worsening your dilemma.”).

11. For example, Hafemeister and Vallas have noted that:

Of all human desires, the longing for intimacy with another human being is one of the most intense. Yet despite the fundamental nature of this desire, for many it remains elusive. Intimate relationships can be difficult to establish, daunting to maintain, and devastating to lose. They can be a minefield for individuals who are relatively free of behavioral, cognitive, or emotional impediments. The quest for intimacy, however, is particularly complex and challenging for those with a mental disorder as such a disorder can limit and impede social interactions, while associated stereotypes and stigma routinely disrupt potential and existing relationships.

(9) Persons with a mental disorder can: (a) learn from the consequences of their behavior, (b) benefit from being held accountable for criminal behavior, (c) be deterred from further criminal behavior, and (d) change their behavior, although they may have an impaired capacity to do so that may require special assistance.<sup>12</sup>

(10) Persons with a mental disorder can feel remorse for criminal behavior and empathy for victims of that behavior, although they may have an impaired capacity to do so that may require special assistance.<sup>13</sup>

(11) Persons with a mental disorder can generally communicate thoughts about the behavior that led to their involvement in the criminal justice system,<sup>14</sup> although they may have an impaired capacity to do so that may require special assistance. They may sometimes feel their criminal

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Thomas L. Hafemeister & Rebecca Vallas, *Intimate Partner Violence and Victims with a Mental Disorder: What Do You Do When It Seems Like All Your Choices Are Lousy and Screaming for Help Just Makes Things Worse* (forthcoming) (manuscript at 1) (on file with author).

12. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., NATIONAL CONSENSUS STATEMENT ON MENTAL HEALTH RECOVERY 2 (2006) ("Consumers have a personal responsibility for their own self-care and journeys of recovery. Taking steps towards their goals may require great courage. [They] must strive to understand and give meaning to their experiences and identify coping strategies and healing processes to promote their own wellness.").

13. *See id.* ("Consumers encourage and engage other consumers in recovery and provide each other with a sense of belonging, supportive relationships, valued roles, and community.").

14. MACKLER & MORRISSEY, *supra* note 10, at 4 ("[Your parents and family] may think they understand what is going on in your life and in your thoughts, but that does not always mean they do. Sometimes your inner world is just too painful for them to comprehend, especially if they feel partially responsible. This, however, may not stop them from *thinking* they know what is best for you. This can leave you feeling controlled, judged, and even stigmatized, which at the very least can be frustrating, and at the worst disempowering and alienating. This not only impedes your recovery but can also heighten the intensity of family conflict."); Norman G. Poythress et al., *Perceived Coercion and Procedural Justice in the Broward Mental Health Court*, 25 INT'L J.L. & PSYCHIATRY 517, 520 (2002) ("Research in a variety of conflict resolution contexts suggests that perceived fairness of the process is perhaps the most critical determinant of procedural justice. Key factors that affect perceived fairness include (1) voice (having one's own side of the dispute presented to and heard by the decision maker) and (2) being treated with respect and dignity by the authoritative decision maker.").

behavior was justified or understandable, and they may believe, sometimes justly, that they have been treated unfairly by the criminal justice system or society.<sup>15</sup>

(12) Persons with a mental disorder may be less culpable for their criminal behavior because of an impairment of their ability to (a) appreciate the nature, character, or consequences of their behavior; (b) appreciate that their behavior was wrong; (c) conform their behavior to the requirements of the law; or (d) choose between right and wrong, although the standard varies and this disposition tends to be controversial.<sup>16</sup>

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15. As Bernstein and Seltzer have indicated:

Contact with the criminal and juvenile justice systems obviously has significant negative consequences for anyone who is subject to arrest, booking and incarceration. It can be doubly traumatic for people with mental illnesses, and the resulting criminal record can impede their later access to housing and mental health services. Their increasing “criminalization” is generating concern among policy-makers, criminal and juvenile justice administrators, families and advocates. A great many of the individuals arrested are charged with only minor offenses for which others are not usually subject to arrest. For most, the underlying issue is their need for basic services and supports that public systems have failed to deliver in meaningful ways.

Bernstein & Seltzer, *supra* note 7, at 143 (footnotes omitted); *see also* Poythress et al., *supra* note 14, at 523, 527 (finding higher satisfaction levels when defendants believed they had been given an “opportunity to tell the judge . . . about [their] personal and legal situation”).

16. In *Clark v. Arizona*, for example, the United States Supreme Court held:

The landmark English rule in *M’Naghten’s Case* . . . states that

the jurors ought to be told . . . that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.

The first part asks about cognitive capacity: whether a mental defect leaves a defendant unable to understand what he is doing. The second part presents an ostensibly alternative basis for recognizing a defense of insanity understood as a lack of moral capacity: whether a mental disease or defect leaves a defendant unable to understand that his action is wrong.

548 U.S. 735, 747 (2006) (citation omitted) (internal quotation marks omitted); *see also* GARY B. MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A*

(13) Responding appropriately to a criminal offender with a mental disorder tends to be a complex undertaking as mental disorders and the challenges they entail tend to be multi-faceted. Complicating factors include (a) co-occurrence with a substance abuse disorder; (b) a lack of employment, housing, and support; and (c) the individual's history of having experienced discrimination, stigma, prejudice, misunderstanding, and mistreatment. Crafting an appropriate response needs to take such factors into account.<sup>17</sup>

(14) Placement of an individual with a serious mental disorder within a correctional facility tends to place such individuals at risk of harming themselves or being harmed by others. Such facilities generally do not provide an appropriate environment for the treatment of these individuals.<sup>18</sup>

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HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 234 (2d ed. 2004) ("The clinical evaluation of [mental state at the time of the offense] is one of the more difficult assessments in forensic work."); Edwin R. Keedy, *Insanity and Criminal Responsibility*, 30 HARV. L. REV. 535, 535 (1917) ("The feud between medical men and lawyers in all questions concerning the criminal liability of lunatics is of old standing. More than one authority on either side has tried to bring about a reconciliation between the contending parties. But their endeavors have been crowned with very little success. For though it cannot be denied that the strife and warfare has of late lost much of its former bitterness, a *modus vivendi* satisfactory to both parties has not been found." (quoting HEINRICH OPPENHEIMER, CRIMINAL RESPONSIBILITY OF LUNATICS, at iii (1909))).

17. See PRESIDENT'S NEW FREEDOM COMM'N ON MENTAL HEALTH, ACHIEVING THE PROMISE: TRANSFORMING MENTAL HEALTH CARE IN AMERICA 32 (2003) ("People with serious mental illnesses who come into contact with the criminal justice system are often: Poor, [u]ninsured, [d]isproportionately members of minority groups, [and] [h]omeless . . .").

18. For example, Kupers has noted that:

For mentally disordered prisoners, danger lurks everywhere. They tend to have great difficulty coping with the prison code—either they are intimidated by staff into snitching or they are manipulated by other prisoners into doing things that get them into deep trouble . . .

Male and female mentally disordered prisoners are disproportionately represented among the victims of rape . . . . Many voluntarily isolate themselves in their cells in order to avoid trouble. . . .

. . .

Prisoners who are clearly psychotic and chronically disturbed are called "dings" and "bugs" by other prisoners, and victimized. [Their]

(15) There are a number of models for (a) diverting individuals with a mental disorder from the criminal justice system, (b) enhancing the likelihood that they will succeed upon returning to the community, and (c) minimizing the likelihood that they will re-offend or otherwise run afoul of the criminal justice system again. The appropriate model will vary depending on the needs of the individual and the resources available, with the availability of resources posing a continuing challenge.<sup>19</sup>

### INTRODUCTION

When does society's imposition of criminal punishment become self-defeating and lose sight of the fact that it may be better served by exploring alternative means of redressing an offender's behavior? For the past forty years the number of incarcerated individuals in the United States has steadily grown to the point where the per capita rate of incarceration exceeds that of every other country in the world.<sup>20</sup> In addition, a significant proportion of this population consists of individuals with a mental disorder. American jails and prisons have become the de facto mental health system of this country, notwithstanding a widespread consensus that incarcerating these individuals is often inappropriate and counterproductive.<sup>21</sup>

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anti-psychotic medications slow their reaction times, which makes them more vulnerable to "blind-siding," an attack from the side or from behind by another prisoner.

TERRY KUPERS, *PRISON MADNESS: THE MENTAL HEALTH CRISIS BEHIND BARS AND WHAT WE MUST DO ABOUT IT* 18-20 (1999).

19. See *Position Statement 52: In Support of Maximum Diversion of Persons with Serious Mental Illness from the Criminal Justice System*, MENTAL HEALTH AMERICA (June 8, 2008), <http://www.mentalhealthamerica.net/go/position-statements/52> ("The extraordinary human and financial costs to the criminal justice system argue strongly that effective diversion may produce better results at a lower cost. Community-based programs for people with mental illness and substance use conditions would help to provide not only appropriate treatment for them, but would decrease duration or even prevent incarceration altogether.").

20. See Bernard E. Harcourt, Op-Ed., *The Mentally Ill, Behind Bars*, N.Y. TIMES, Jan. 15, 2007, at A15; see also *infra* notes 55-61 and accompanying text.

21. See *infra* Part II.

As many as one in four, or nearly sixty million, American adults suffer from a diagnosable mental disorder<sup>22</sup> in any given year.<sup>23</sup> Between 5% to 7% of the U.S. population over the age of eighteen—as many as twenty million people—suffer from a serious mental illness such as schizophrenia, major depression, or a bipolar disorder,<sup>24</sup> with 46% of Americans struggling with some form of mental illness during their lifetime.<sup>25</sup> Further, more than 10% of the adult population experience serious psychological

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22. The leading diagnostic reference source conceptualizes a mental disorder as:

[A] clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or disability (i.e., impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom.

AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, at xxxi (4th ed. 2000).

23. See *Statistics—Any Disorder Among Adults*, NAT'L INST. OF MENTAL HEALTH, [http://www.nimh.nih.gov/statistics/1ANYDIS\\_ADULT.shtml](http://www.nimh.nih.gov/statistics/1ANYDIS_ADULT.shtml) (last visited Dec. 17, 2011); see also Ronald C. Kessler et al., *Prevalence, Severity, and Comorbidity of 12-Month DSM-IV Disorders in the National Comorbidity Survey Replication*, 62 ARCHIVES GEN. PSYCHIATRY 617, 619 (2005) (“Twelve-month prevalence of any [mental] disorder was 26.2% . . . .”); Steenhuisen, *supra* note 1 (“Young adults ages 18 to 25 had the highest level of mental illness at 30 percent . . . .”); Pinka Chatterji et al., *Psychiatric Disorders and Employment: New Evidence from the Collaborative Psychiatric Epidemiology Surveys 2* (Nat'l Bureau of Econ. Research, Working Paper No. 14404, 2008).

24. THE PRESIDENT'S NEW FREEDOM COMM'N ON MENTAL HEALTH, *supra* note 17, at 2; see also NAT'L ALLIANCE ON MENTAL ILLNESS, MENTAL ILLNESSES: TREATMENT SAVES MONEY & MAKES SENSE 1 (2007) [hereinafter NAMI, MENTAL ILLNESSES]; *What Is Mental Illness: Mental Illness Facts*, NAT'L ALLIANCE ON MENTAL ILLNESS, [http://www.nami.org/Content/NavigationMenu/Inform\\_Yourself/About\\_Mental\\_Illness/About\\_Mental\\_Illness.htm](http://www.nami.org/Content/NavigationMenu/Inform_Yourself/About_Mental_Illness/About_Mental_Illness.htm) (last visited Dec. 17, 2011).

25. Ronald C. Kessler et al., *Lifetime Prevalence and Age-of-Onset Distributions of DSM-IV Disorders in the National Comorbidity Survey Replication*, 62 ARCHIVES GEN. PSYCHIATRY 593, 595 (2005); see also OFFICE OF APPLIED STUDIES, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEPT' OF HEALTH & HUMAN SERVS., THE NATIONAL SURVEY ON DRUG USE AND HEALTH REPORT: SERIOUS PSYCHOLOGICAL DISTRESS AND RECEIPT OF MENTAL HEALTH SERVICES (2008) [hereinafter SAMHSA REPORT], available at <http://oas.samhsa.gov/2k9/SPDtx/SPDtx.pdf> (providing additional information regarding the prevalence of serious mental illness and rates of treatment).

distress during any given year,<sup>26</sup> and mental illness is the leading cause of disability in the United States for people between the ages of fifteen and forty-four.<sup>27</sup> Despite the prevalence of mental disorders and their debilitating impact, and despite increasing recognition that mental disorders can result in disorganized thought processes, impaired reality testing, poor planning and problem solving skills, and impulsivity,<sup>28</sup> the criminal justice system (“CJS”) continues to absorb and struggle with a massive number of individuals with a mental disorder.

In recent years, a restorative justice approach has resurfaced in many countries, including the United States, as a complementary alternative to the traditional criminal

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26. SAMHSA REPORT, *supra* note 25, at 1, 3 n.1. Not everyone with a mental illness experiences “serious psychological distress” at any given time, in part because of fluctuations in the nature and impact of a psychiatric disorder and in part because treatment may at various times successfully limit or minimize this distress. See Satvinder S. Dhingra et al., *Psychological Distress Severity of Adults Reporting Receipt of Treatment for Mental Health Problems in the BRFSS*, 62 *PSYCHIATRIC SERVICES* 396, 397 (2011) (“Psychological, psychopharmacological, and combination treatments . . . can lead to complete and lasting remission, symptom reduction, and better psychosocial functioning.”); Hans-Ulrich Wittchen et al., *The Waxing and Waning of Mental Disorders: Evaluating the Stability of Syndromes of Mental Disorders in the Population*, 41 *COMPREHENSIVE PSYCHIATRY* 122, 130 (2000) (“[S]ymptoms and syndromes, as well as diagnoses, of mental disorders wax and wane over time.”).

27. NAMI, *MENTAL ILLNESSES*, *supra* note 24, at 1. For example, “[a]s of 2000, depressive disorders alone were the fourth leading cause of disease burden worldwide, accounting for 4.4 percent of disability-adjusted life years (DALYs) and 12 percent of all total years lived with disability in the world.” Chatterji et al., *supra* note 23, at 2 (citation omitted). The disabling nature of mental illness is due in part to the frequent co-morbidity of psychiatric disorders with other psychiatric disorders and with medical conditions such as “chronic pain, neurological disorders, circulatory disorders, and gynecological problems. About 45 percent of adults with any kind of psychiatric disorder in the past 12 months have two or more psychiatric disorders.” *Id.* at 2 n.2 (citing Kessler et al., *supra* note 23, at 619).

28. Linda A. Teplin et al., *Crime Victimization in Adults with Severe Mental Illness*, 62 *ARCHIVES GEN. PSYCHIATRY* 911, 911 (2005); see also Michael Menaster, *Psychiatric Illness Associated with Criminality*, *MEDSCAPE* (June 27, 2011), <http://emedicine.medscape.com/article/294626-overview> (“Nearly any psychiatric symptom can be associated with criminality, because symptoms can impair judgment and violate societal norms. . . . However, most individuals with mental illness are not violent.”).

justice approach.<sup>29</sup> Instead of the typical judicial proceeding, this approach allows criminal defendants to participate in a mediation conference with the victims of their crimes.<sup>30</sup> Ideally, offenders will acknowledge their involvement in the crime to victims and other directly affected community members and will express remorse for their behavior. If the victim accepts this admission of responsibility, the parties jointly devise a remedy that holds the offender accountable and makes amends to the victim and other affected individuals.<sup>31</sup> Thus, the sanctions for the crime are determined by those most affected by the crime, including the offender, in the hope that this will facilitate reform in the offender and recovery by the victim and the surrounding community.<sup>32</sup>

Although restorative justice programs are widely established and employed, an unresolved question is whether these programs are successful with only a small, select number of offenders or whether they can be effectively applied to a wider range of individuals. This Article addresses one sizeable group of criminal defendants, namely, individuals with a mental disorder, for whom a restorative justice approach at first glance might seem inappropriate. It concludes, however, that many of these offenders can be successfully encompassed within the restorative justice paradigm.<sup>33</sup> This Article will argue that a restorative justice approach promotes the psychological well-being of many of these offenders and their victims without undermining the societal goals of the CJS. This Article will also contend, however, that a key to its successful application is the incorporation of the principles

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29. *See infra* Part IV.

30. *See infra* Part IV.

31. *See infra* Part IV.

32. *See infra* Part IV.

33. As will be discussed, participating offenders with a mental disorder must possess sufficient understanding of the nature of their offense and its impact on the victim, as well as the requisite interpersonal skills to engage in a meaningful dialogue with the victim. In addition, victims may need to be educated regarding the nature and impact of the offender's mental disorder, and the participation of both parties must be informed and voluntary. *See infra* Part VI.B.

of procedural justice,<sup>34</sup> which will enhance the willingness of these offenders to participate and learn from their mistakes to avoid repeating them in the future, as well as increase victim participation and satisfaction with the outcome.

#### I. THE FOCUS OF THE CRIMINAL JUSTICE SYSTEM AND RELATED MODELS OF PUNISHMENT

Criminal law, like the law in general, is a reflection of the society that creates it.<sup>35</sup> However, unlike other types of law, criminal law is distinct in that it may be categorized as *public* law.<sup>36</sup> Although the immediate victim of a crime is often a private party, crime is viewed as involving more than a private injury. A crime causes “societal harm” because the injury suffered involves “a breach and violation of public rights and duties, due to the whole community, considered as a community, in its social aggregate capacity.”<sup>37</sup>

Consequently, the community relies on the State to prosecute suspected wrongdoers so that offenders are punished, incapacitated where necessary, and hopefully rehabilitated or at least deterred from committing future crime, while prospective potential offenders learn that “crime doesn’t pay” and victims gain a sense that justice has

34. Procedural justice emphasizes the importance of the perceived fairness of the process employed in dispute resolution. For further discussion of the procedural justice paradigm, see *infra* Part V.

35. Thomas L. Hafemeister & John Petrila, *Treating the Mentally Disordered Offender: Society’s Uncertain, Conflicted, and Changing Views*, 21 FLA. ST. U. L. REV. 729, 731 (1994).

36. THOMAS J. GARDNER & TERRY M. ANDERSON, CRIMINAL LAW 6 (10th ed. 2009) (“In early England, crimes such as robbery, murder, and theft were classified as private matters, which made victims responsible for remedying their own problems. . . . Today, criminal law in England and the United States is public law. Apprehension and prosecution of criminals are public matters. Public law enforcement agencies, public prosecutors, courts, jails, and correctional institutions make up the criminal justice systems . . . .”); Mary Sigler, *Private Prisons, Public Functions, and the Meaning of Punishment*, 38 FLA. ST. U. L. REV. 149, 151 (2010) (“Punishment under law is a profound exercise of state power.”).

37. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 1.01 (3d ed. 2001) (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 5 (1769)).

been done and equity restored.<sup>38</sup> To accomplish this, publicly-funded attorneys representing the community at large prosecute crimes, not private individuals or private counsel. Victims are distanced from the criminal process so their feelings of anger, hurt, and outrage, not to mention a desire for vengeance, do not discolor or subvert the proceedings. Having the State pursue an offender and a jury or judge, rather than the immediate victim, determine guilt and assign sanctions is believed to limit subsequent spirals of revenge and violence and enable the community to better achieve and maintain tranquility and stability.<sup>39</sup> Because of society's interest in the criminal law, however, current jurisprudential models of punishment tend to center on the relationship between the offender and the community, with little attention given to the impact of the crime on the victim and any future interactions between the victim and the offender.<sup>40</sup>

It is widely agreed that four models of punishment predominate within today's CJS, namely, retribution, deterrence, incapacitation, and rehabilitation.<sup>41</sup> The *retributive model* argues for the infliction of penalties on offenders because they "deserve" it for violating the community's legal norms.<sup>42</sup> Under this model, crime merits punishment because it is morally fitting that persons committing these acts should suffer in proportion to their culpability.<sup>43</sup>

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38. *See id.* § 2.01.

39. *See, e.g.*, JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 13, at 12 (C.B. Macpherson ed., Hackett Publishing 1980) (1690) ("God hath certainly appointed government to restrain the partiality and violence of men.").

40. Erin C. Blondel, *Victims' Rights in an Adversary System*, 58 DUKE L.J. 237, 241 (2008) (explaining the fundamental differences between adversarial and inquisitorial judicial systems and how the former focuses on procedure and rules, not the offender's relationship to society).

41. Michele Cotton, *Back With a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1315 (2000).

42. R.A. Duff, *Penal Communications: Recent Works in the Philosophy of Punishment*, in 20 CRIME AND JUSTICE: A REVIEW OF RESEARCH 1, 25-27 (Michael Tonry ed., 1996).

43. Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 859-60 (2002).

The *deterrence model* presumes that human actors, when choosing a course of conduct, perform a hedonistic calculus of likely resulting pain and pleasure.<sup>44</sup> If the “costs” are too high, it is asserted, a rational person will choose not to commit a crime.<sup>45</sup> There are two variations of this model. Under the *general deterrence* paradigm, potential offenders are believed to be discouraged from criminal behavior when they observe the consequences suffered by others who commit crimes.<sup>46</sup> Under the *specific deterrence* paradigm, individuals who commit a criminal offense are thought to be dissuaded from repeating their misconduct by the adverse consequences they incurred as a result of their punishment for the crime.<sup>47</sup>

Proponents of the *incapacitation model* assert that society has the right and an obligation to protect its members from harmful behavior by removing from its midst persons considered dangerous because of their criminal conduct.<sup>48</sup> Incapacitation always “works” while offenders are incarcerated because they are not able to commit new offenses in the community during this time, although it may have little salutary impact on their behavior after release.<sup>49</sup>

In contrast to these relatively pessimistic models of punishment is the *model of rehabilitation*. Its supporters

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44. See Ronald J. Rychlak, *Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 TUL. L. REV. 299, 310 (1990).

45. See *id.*

46. Cotton, *supra* note 41, at 1316.

47. See *id.* Unlike retribution, deterrence specifically seeks to prevent or reduce crime. See *id.* Whether punishment actually deters the *general public* from criminal activity is unclear as conclusive empirical research supporting this assertion is lacking and a number of factors are associated with a decision to violate the law. WAYNE R. LAFAYE, CRIMINAL LAW 29 (5th ed. 2010). It may also be impossible to ascertain whether *offenders* are deterred from subsequent criminal activity by the punishment they incur because, while high recidivism rates following incarceration suggest a lack of deterrence, it cannot be definitively ruled out that recidivism rates might have been higher without the punishment. *Id.* at 29-30. At the same time, punishment may actually increase criminal conduct as offenders may respond to punishment with anger and a desire for revenge or become embedded within a criminal culture. *Id.* at 30.

48. John M. Darley et al., *Incapacitation and Just Deserts as Motives for Punishment*, 24 LAW & HUM. BEHAV. 659, 660 (2000).

49. *Id.*

contend that offenders should be provided access to appropriate services and assistance so that they return to society without the desire or need to commit further crimes.<sup>50</sup> This model rests on a belief that the causes of criminal behavior can be identified and means employed to improve the future behavior of the offender.<sup>51</sup> Beginning in the 1970s, support for the rehabilitative model waned, driven by high recidivism rates and the perception that the process of rehabilitation was practically and morally complex and often unsuccessful.<sup>52</sup> In recent years, however, as discussed below, calls have been made to reenergize efforts to rehabilitate criminal offenders,<sup>53</sup> although finding the resources for these efforts as traditionally formulated remains a significant impediment.<sup>54</sup>

It is no coincidence that the more favored models of retribution, deterrence, and incapacitation, with their emphasis on incarceration, have in recent years combined to result in the imprisonment of more people in the United States for the purpose of crime control than virtually any other society in history.<sup>55</sup> During the first seven decades of the twentieth century, “the incarceration rate in the United States consistently averaged 110 inmates for every 100,000 people.”<sup>56</sup> In the 1970s this rate began to increase, and in the 1980s and 1990s it grew exponentially.<sup>57</sup> Between 2000 and 2009, the number of incarcerated offenders continued to

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50. Cotton, *supra* note 41, at 1316.

51. LAFAVE, *supra* note 47, § 1.5(a)(3); Cotton, *supra* note 41, at 1316.

52. See Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1894 (1991).

53. See *infra* notes 65-67 and accompanying text.

54. Don Meyer, Op-Ed., *Fix Probation to Fix Prisons*, L.A. TIMES (Jan. 21, 2009), <http://www.latimes.com/news/opinion/la-oe-meyer21-2009jan21,0,7363039.story>; Suzanne Robson, *Lack of Funding Ends Prison Rehabilitation Program*, PRESTON LEADER, Nov. 2, 2010, at 5.

55. DENNIS SULLIVAN & LARRY TIFFT, *RESTORATIVE JUSTICE: HEALING THE FOUNDATIONS OF OUR EVERYDAY LIVES* 9 (2001).

56. *Id.*

57. In 1980, the rate of incarceration in state and federal prison facilities was 139 per 100,000 persons in the population. By 1999, it had risen to 476 per 100,000 persons. See LAUREN E. GLAZE, U.S. DEPT' OF JUSTICE, BUREAU OF JUSTICE STATISTICS, *CORRECTIONAL POPULATIONS IN THE UNITED STATES*, 2009, at 1 (2010).

increase, although this growth was slower than in previous decades.<sup>58</sup> It is estimated that over two million (2,292,133) individuals were incarcerated in U.S. prisons and jails in 2009, or approximately 743 of every 100,000 members of the population.<sup>59</sup>

The result is the highest rate of incarceration in the world<sup>60</sup> and a crowded and over-extended correctional system. Despite devoting substantial resources to the building of new facilities, many prison and jail systems are operating above their official housing capacity.<sup>61</sup> In California, the correctional census is so large that the U.S. Supreme Court recently took the extraordinary step of upholding an order to dramatically reduce the prison population to remedy violations of prisoners' constitutional rights caused by severe and pervasive overcrowding.<sup>62</sup> Moreover, the value of this extensive and expensive use of incarceration is increasingly being questioned.<sup>63</sup>

58. *Id.* at 1.

59. *World Prison Brief: United States of America*, INT'L CTR. FOR PRISON STUDIES, [http://www.prisonstudies.org/info/worldbrief/wpb\\_country.php?country=190](http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=190) (last visited Dec. 17, 2011).

60. *Entire World—Prison Population Rates per 100,000 of the National Population*, INT'L CTR. FOR PRISON STUDIES, [http://www.prisonstudies.org/info/worldbrief/wpb\\_stats.php?area=all&category=wb\\_poprate](http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=all&category=wb_poprate) (last visited Dec. 17, 2011). In contrast, the Czech Republic, with an incarceration rate of 220, has the highest rate in the European Union. *Id.*

61. PAIGE M. HARRISON & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE STATISTICS, *PRISONERS IN 2002*, at 7 (rev. 2003); Michael B. Farrell, *Parole Holds Key to Prison Overcrowding*, CHRISTIAN SCI. MONITOR (Sept. 29, 2009), <http://www.csmonitor.com/USA/2009/0929/p20s01-usgn.html>; Solomon Moore, *States Export Their Inmates as Prisons Fill*, N.Y. TIMES, July 31, 2007, at A1; David G. Savage & Carol J. Williams, *State Prison Crowding Case Heads to Supreme Court*, L.A. TIMES, Nov. 29, 2010, at A1.

62. *Brown v. Plata*, 131 S. Ct. 1910, 1923-24 (2011); see also Robert Barnes, *Justices Rebuke Calif. Prisons*, WASH. POST, May 24, 2011, at A1 (“[The] Supreme Court . . . ordered California to reduce its chronically overcrowded prisons by more than 30,000 prisoners, saying judges must get involved when prison conditions are ‘incompatible with the concept of human dignity.’”); Adam Liptak, *Justices, 5-4, Tell California to Cut Prison Population*, N.Y. TIMES, May 23, 2011, at A1.

63. Michelle Alexander, Op-Ed., *In Prison Reform, Money Trumps Civil Rights*, N.Y. TIMES, May 15, 2011, at WK9; Sunil Dutta, Op-Ed., *How to Fix America's Broken Criminal Justice System*, CHRISTIAN SCI. MONITOR (Dec. 30, 2010), <http://www.csmonitor.com/Commentary/Opinion/2010/1230/How-to-fix->

Incarcerated individuals show a startling rate of recidivism upon release, with more than four in ten returning to prison within three years of their release.<sup>64</sup>

While the retributive, deterrent, and incapacitation models have tended to be the dominant approaches undergirding punishment policy in recent years, the resulting increase in incarceration and persistently high recidivism rates have led some to call for a return to a greater emphasis on the rehabilitative model.<sup>65</sup> Commentators argue that rehabilitation remains a crucial element of the CJS<sup>66</sup> and have observed that even prison officials continue to call for rehabilitation programs.<sup>67</sup>

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America-s-broken-criminal-justice-system; Adam Liptak, *More than 1 in 100 Adults Are Now in Prison in U.S.*, N.Y. TIMES, Feb. 29, 2008, at A14; Adam Skolnick, *Runaway Prison Costs Trash State Budgets*, FISCAL TIMES (Feb. 9, 2011), <http://www.thefiscaltimes.com/Articles/2011/02/09/Runaway-Prison-Costs-Thrash-State-Budgets.aspx>; Jennifer Steinhauer, *To Trim Costs, States Relax Hard Line on Prisons*, N.Y. TIMES, Mar. 25, 2009, at A1; Krissah Thompson, *Prison Reform Advocates Press States to Shift Money Out of Corrections System*, WASH. POST (Apr. 5, 2011), [http://www.washingtonpost.com/politics/prison-reform-advocates-press-states-to-shift-money-out-of-corrections-system/2011/04/04/AFeCXoIC\\_story.html](http://www.washingtonpost.com/politics/prison-reform-advocates-press-states-to-shift-money-out-of-corrections-system/2011/04/04/AFeCXoIC_story.html).

64. PEW CTR. ON THE STATES, STATE OF RECIDIVISM: THE REVOLVING DOOR OF AMERICA'S PRISONS 2 (2011), available at [http://www.pewcenteronthestates.org/uploadedFiles/Pew\\_State\\_of\\_Recidivism.pdf](http://www.pewcenteronthestates.org/uploadedFiles/Pew_State_of_Recidivism.pdf) ("45.4 percent of people released from prison in 1999 and 43.3 percent of those sent home in 2004 were reincarcerated within three years, either for committing a new crime or for violating conditions governing their release. . . . [R]ecidivism rates between 1994 and 2007 have consistently remained around 40 percent."); see also BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2001, at 506 tbl.6.42 (Kathleen Maguire & Ann L. Pastore eds., 2002) (finding, in fifteen-state survey, that 29.9% of inmates released from state prisons were rearrested within six months of release and 67.5% of them were rearrested within three years).

65. Richard S. Gebelein, *Delaware Leads the Nation: Rehabilitation in a Law and Order Society; A System Responds to Punitive Rhetoric*, 7 DEL. L. REV. 1, 1 (2004); *Developments in the Law—The Law of Mental Illness*, 121 HARV. L. REV. 1114, 1175 (2008).

66. Edward Rubin, *Just Say No to Retribution*, 7 BUFF. CRIM. L. REV. 17, 73 (2003) ("[T]he goal of rehabilitation remains an essential means of organizing and structuring a modern prison. . . . [V]irtually all large prisons offer vocational and academic training of some sort.").

67. *Id.*; see also PEW CTR. ON THE STATES, *supra* note 64, at 8 ("Catching the guy and prosecuting him is really important work, but if we don't do anything with that individual after we've got him, then shame on us. If . . . we just open

Others have sought to undermine the assertion that rehabilitative programs are ineffective, arguing that rehabilitation can, when implemented correctly, decrease recidivism.<sup>68</sup> One notable manifestation of the movement towards reimplementing a rehabilitative approach, prompted by frustration with current practices in the CJS, is the growth of problem-solving courts that seek to address the underlying causes of criminal behavior and thereby negate the need for incarceration.<sup>69</sup> As will be discussed below, the growing popularity of these courts is notable, with such courts having become pervasive in the past two decades and now located in all fifty states.<sup>70</sup>

In recent years, increasing attention has also been given to the deleterious impact of the predominant CJS approach

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the doors five years later, and it's the same guy walking out the door and the same criminal thinking, we've failed in our mission." (quoting Minnesota Commissioner of Corrections Tom Roy, Apr. 7, 2011)). Correctional officials have also recognized that providing needed programs and resources to inmates with a mental illness can have a significant impact on the recidivism rate. Chi-Chi Zhang, *Study: Utah Inmate Recidivism Rates Drop*, DESERET NEWS (Apr. 17, 2011), <http://www.deseretnews.com/article/700128069/Study-Utah-inmate-recidivism-rates-drop.html> ("Jean Nielsen, director of Salt Lake County's Department of Human Services, credits Utah's improvement over the years to an increase in substance abuse programs and resources that help the mentally ill. . . . 'With education, training, substance abuse programs, various treatment, housing options, and counseling, we want to ensure they have a smooth transition back into society and don't go back to jail.'").

68. See ANN CHIH LIN, *REFORM IN THE MAKING: THE IMPLEMENTATION OF SOCIAL POLICY IN PRISON* 25-30 (2000); PEW CTR. ON THE STATES, *supra* note 64, at 6 (quoting Subcommittee on Commerce, Justice, Science and Related Agencies, Committee on Appropriations chair U.S. Rep. Frank Wolf, Jan. 8, 2011); Ted Palmer, *The Effectiveness of Intervention: Recent Trends and Current Issues*, 37 CRIME & DELINQ. 330, 330-32 (1991). See generally Francis T. Cullen & Paul Gendreau, *The Effectiveness of Correctional Rehabilitation: Reconsidering the "Nothing Works" Debate*, in *THE AMERICAN PRISON: ISSUES IN RESEARCH AND POLICY* 23, 23-44 (Lynne Goodstein & Doris Layton MacKenzie eds., 1989) (reviewing research demonstrating the success of rehabilitation programs).

69. James L. Nolan Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541, 1541-43 (2003); see also Michael Daly Hawkins, *Coming Home: Accommodating the Special Needs of Military Veterans to the Criminal Justice System*, 7 OHIO ST. J. CRIM. L. 563, 571 (2010) (noting specialized court programs for veterans are "becoming a fixture of many state criminal justice systems").

70. See *infra* Part III.B-C.

on the victims of crime.<sup>71</sup> Notwithstanding that these victims number in the millions,<sup>72</sup> and that they frequently know the offender well,<sup>73</sup> studies indicate their ability to play a significant role in or to guide the processing of the cases germane to them is limited; prosecutors often fail to inform and consult with them regarding these cases; and the CJS gives inadequate attention to the emotional and material harm they experience.<sup>74</sup> Such findings are of concern, given that commentators have widely noted the importance of involving victims more directly in criminal justice proceedings and responding to their needs.<sup>75</sup>

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71. See, e.g., GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS (1995) (examining the victimization of the victims of a criminal act in a series of high profile trials); Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. TRAUMATIC STRESS 159, 159-60, 162-63 (2003).

72. JENNIFER L. TRUMAN & MICHAEL R. RAND, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMINAL VICTIMIZATION, 2009, at 1 (2010) ("In 2009, U.S. residents age 12 or older experienced an estimated 20 million [crimes] . . .").

73. *Id.* at 7 ("Victims knew the offenders in 45% of violent crimes against men and 68% of violent crimes against women in 2009[.]").

74. Heather Strang & Lawrence Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 18.

75. Aileen Adams & David Osborne, *Victims' Rights and Services: A Historical Perspective and Goals for the Twenty-First Century*, 33 MCGEORGE L. REV. 673, 674-78 (2002); Victor Hugo-Schulze, *Out in the Cold No Longer: A Primer on Victims' Rights*, 9 NEVADA LAW., no. 4, Apr. 2001 at 14, 14; William T. Pizzi, *Victims' Rights: Rethinking Our "Adversary System,"* 1999 UTAH L. REV. 349, 352-53; Strang & Sherman, *supra* note 74, at 16-25. A frequent assertion of commentators pushing for greater recognition of victims' "rights" in these proceedings is that their exclusion or limited role is unjust because they have significant interests in the outcome that should be heard and respected. They also argue that increased victim involvement will enhance the willingness of victims to support and provide needed testimony, as well as lead to greater satisfaction with case dispositions and the CJS generally. See Peggy M. Tobolowsky, *Victim Participation in the Criminal Justice Process: Fifteen Years After the President's Task Force on Victims of Crime*, 25 NEW ENG. J. CRIM. & CIV. CONFINEMENT 21, 101-05 (1999) (discussing expectations, concerns, and empirical findings associated with increased victim participation in the CJS); see also PEGGY M. TOBOLOWSKY ET AL., CRIME VICTIM RIGHTS AND REMEDIES 8-9 (2d ed. 2010) (outlining victim rights during judicial proceedings and remedies for victims' rights violations); Steven Joffee, Note, *Validating Victims: Enforcing Victims' Rights Through Mandatory Mandamus*, 2009 UTAH L. REV. 241, 242-45 (examining the movement for a greater recognition of criminal victims' rights).

## II. JAILS AND PRISONS: AMERICA'S DE FACTO MENTAL HEALTH SYSTEM

While more and more offenders have been imprisoned, jails and prisons have also become, by default, America's de facto mental health system.<sup>76</sup> This occurrence is the result of a dramatic shift in medical and legal policy in the United States. Historically, large state-funded psychiatric facilities were the primary locus of care for individuals with a serious mental disorder, or at least for those who lacked the resources to access other more preferable sources of care.<sup>77</sup> Beginning in the 1950s, the availability of new anti-psychotic medications enabled some individuals with a mental disorder to function better in the community and thereby avoid placement in these institutional settings.<sup>78</sup> Other factors that drove a decline in the population and the closing of many state mental health facilities included: financial constraints faced by many states that reduced their ability to support these facilities;<sup>79</sup> the enactment of Medicaid and Medicare, which made some support for community care available but limited the use of federal

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76. HUMAN RIGHTS WATCH, *supra* note 7, at 16; E. FULLER TORREY, *OUT OF THE SHADOWS: CONFRONTING AMERICA'S MENTAL ILLNESS CRISIS* 25-42 (1997); E. Fuller Torrey, Editorial, *Jails and Prisons—America's New Mental Hospitals*, 85 AM. J. PUB. HEALTH 1611, 1611 (1995); Fox Butterfield, *Study Finds Hundreds of Thousands of Inmates Mentally Ill*, N.Y. TIMES, Oct. 22, 2003, at A14. In addition, police are often characterized as the front-line respondents to people with severe mental illnesses experiencing crises in the community. See *Where We Stand—The Criminalization of People with Mental Illness*, NAT'L ALLIANCE ON MENTAL ILLNESS, [http://www.nami.org/Content/ContentGroups/Policy/WhereWeStand/The\\_Criminalization\\_of\\_People\\_with\\_Mental\\_Illness\\_\\_WHERE\\_WE\\_STAND.htm](http://www.nami.org/Content/ContentGroups/Policy/WhereWeStand/The_Criminalization_of_People_with_Mental_Illness__WHERE_WE_STAND.htm) (last visited Dec. 17, 2011) [hereinafter NAMI, *Criminalization*].

77. H. Richard Lamb et al., *Mentally Ill Persons in the Criminal Justice System: Some Perspectives*, 75 PSYCHIATRIC Q. 107, 109 (2004).

78. PHIL BROWN, *THE TRANSFER OF CARE: PSYCHIATRIC DEINSTITUTIONALIZATION AND ITS AFTERMATH* 39 (1985).

79. PAUL S. APPELBAUM, *ALMOST A REVOLUTION: MENTAL HEALTH LAW AND THE LIMITS OF CHANGE* 50-51 (1994); BROWN, *supra* note 78, at 39-40; see also Ronald L. Wisor Jr., *Community Care, Competition and Coercion: A Legal Perspective on Privatized Mental Health Care*, 19 AM. J.L. & MED. 145, 149 (1993) (noting that the imposition of minimum requirements became fiscally impossible in many locations, resulting in release of residents).

funds to support these large facilities;<sup>80</sup> increases in the costs of operating these facilities, including the need to pay staff higher wages;<sup>81</sup> and a series of exposés<sup>82</sup> and lawsuits<sup>83</sup> challenging the quality of the services provided in these facilities and the lax criteria for admission.

At the peak of the state hospital system in the mid-1950s, the census of individuals receiving care in these facilities reached 559,000.<sup>84</sup> “From 1960 to 1980, this number plunged to less than 100,000.”<sup>85</sup> Currently, there are as few as 40,000 persons residing in state psychiatric facilities.<sup>86</sup> This reduction was also motivated by a widely

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80. RICHARD G. FRANK & SHERRY A. GLIED, BETTER BUT NOT WELL: MENTAL HEALTH POLICY IN THE UNITED STATES SINCE 1950, at 50-51, 54 (2006); William Gronfein, *Incentives and Intentions in Mental Health Policy: A Comparison of the Medicaid and Community Mental Health Programs*, 26 J. HEALTH & SOC. BEHAV. 192 (1985); David Mechanic & David A. Rochefort, *Deinstitutionalization: An Appraisal of Reform*, 16 ANN. REV. SOC. 301, 305, 309, 311 (1990).

81. See Stephen M. Rose, *Deciphering Deinstitutionalization: Complexities in Policy and Program Analysis*, 57 MILBANK Q. 429, 446-49 (1979) (discussing relative costs to states of hospitalization versus community health care (citing GEN. ACCOUNTING OFFICE, RETURNING THE MENTALLY DISABLED TO THE COMMUNITY: GOVERNMENT NEEDS TO DO MORE (1977))); Richard G. Frank, *A Model of State Expenditures on Mental Hospital Services*, 13 PUB. FIN. Q. 319, 319 (1985).

82. FRANK & GLIED, *supra* note 80, at 1, 52-53, 59 (2006) (discussing court cases regarding standards of care, as well as the exposé by Albert Deutsch, entitled *The Shame of the States*, describing “how people with severe mental illness languished in the filthy back wards of public mental hospitals”); DAVID J. ROTHMAN & SHEILA M. ROTHMAN, THE WILLOWBROOK WARS 15-44 (1984); Ralph Slovenko, *The Transinstitutionalization of the Mentally Ill*, 29 OHIO N.U. L. REV. 641, 644-51 (2003).

83. See *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) (holding that individuals with a mental disorder cannot be involuntarily hospitalized if they are not “dangerous” and can survive safely in the community); *Wyatt v. Stickney*, 325 F. Supp. 781, 784 (M.D. Ala. 1971) (holding that states could not deprive persons with a mental illness of liberty through involuntary commitment without providing individual treatment that would give them “a realistic opportunity to be cured”).

84. Lamb et al., *supra* note 77, at 109.

85. RISDON N. SLATE & W. WESLEY JOHNSON, THE CRIMINALIZATION OF MENTAL ILLNESS: CRISIS AND OPPORTUNITY FOR THE JUSTICE SYSTEM 27 (2008) (citation omitted).

86. *Id.* Indeed, such facilities continue to be scheduled for closure. See Tom Rowan Jr., *Chris Christie Says Hagedorn Psychiatric Hospital Will Close in*

held belief that this population would be better served by providing them access to community mental health programs instead.<sup>87</sup> However, funding for such programs either did not materialize or has been quite limited, leaving individuals with a mental disorder in the community oftentimes at risk of psychological deterioration, which in turn can lead to aberrant behavior, subsequent contact with law enforcement officials, and arrest.<sup>88</sup> The continuing shortfalls in the existing community mental health system were recently documented by a report that the states cumulatively cut more than \$1.8 billion from their budgets for services for children and adults living with a mental illness between 2009 and 2011, with ten states (including California and Illinois) cutting their mental health expenditures by 15% or more.<sup>89</sup>

Moreover, in response to increases in the levels of street crime around the turn of the century, many public officials became less tolerant of both the homeless and individuals

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2012, EXPRESS-TIMES (July 2, 2011), [http://www.lehighvalleylive.com/hunterdon-county/express-times/index.ssf/2011/07/chris\\_christie\\_to\\_close\\_hagedo/5508/comments.html](http://www.lehighvalleylive.com/hunterdon-county/express-times/index.ssf/2011/07/chris_christie_to_close_hagedo/5508/comments.html).

87. SLATE & JOHNSON, *supra* note 85, at 27. By the 1960s, the prevailing view came to be that minimal institutionalization benefitted individual patients, saved money, and placed accountability for care more appropriately in the hands of local authorities. ANN BRADEN JOHNSON, *OUT OF BEDLAM: THE TRUTH ABOUT DEINSTITUTIONALIZATION* 53-106 (1990) (providing a critique of these rationales for deinstitutionalization). In 1963, Congress passed the Community Mental Health Act, and, over the following years, tens of thousands of patients were released from hospitals ostensibly to receive community care. *See* Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963, Pub. L. No. 88-164, 77 Stat. 282, *repealed by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 902(e)(2)(B), 95 Stat. 357, 560. Sadly, as discussed in the text, this community care was and is often not forthcoming. *See infra* notes 88-89 and accompanying text.

88. HUMAN RIGHTS WATCH, *supra* note 7, at 20-21; NAMI, *Criminalization*, *supra* note 76, at 1; Jennifer Hodulik, Comment, *The Drug Court Model as a Response to "Broken Windows:" Criminal Justice for the Homeless Mentally Ill*, 91 J. CRIM. L. & CRIMINOLOGY 1073, 1076 (2001).

89. *See* RON HONBERG ET AL., NAT'L ALLIANCE ON MENTAL ILLNESS, *STATE MENTAL HEALTH CUTS: A NATIONAL CRISIS* 3 (2011); *see also* Kristen Wyatt, *State Budget Cuts Decimate Mental Health Services*, ASSOC. PRESS (Mar. 9, 2011), <http://www.mh.alabama.gov/Downloads/COPI/NewsArticles/WSFA030911.pdf> ("32 states and Washington, D.C., cut funding just as economic stressors such as layoffs and home foreclosures boosted demand for services. . . . In many states, the picture is likely to get uglier.").

with mental disorders living in the community. For example, Rudolph Giuliani, mayor of New York City from 1993 to 2002, ushered in a new policy known as the “Broken Windows” approach to crime control.<sup>90</sup> This approach, proposed by James Wilson and George Kelling in an *Atlantic Monthly* article,<sup>91</sup> contends that allowing indicators of disorder, such as broken windows and relatively minor offenses, to remain unaddressed demonstrates a loss of public order and control, which in turn breeds more serious criminal activity.<sup>92</sup> Because the presence of the homeless was viewed as an indication of this disorder, efforts were made to remove them from the streets. This was accomplished in part by arresting and jailing them for arguably petty violations of public ordinances such as “begging, sleeping, camping, sitting, lying down, loitering, or obstructing pedestrian traffic in public places.”<sup>93</sup> As a significant percentage of the homeless have a mental disorder,<sup>94</sup> many of these incarcerated individuals had significant mental health impairments.<sup>95</sup>

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90. Hodulik, *supra* note 88, at 1076.

91. James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29.

92. Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 271 (2006); Hodulik, *supra* note 88, at 1076. Although widely employed, this premise and its empirical foundation have drawn considerable criticism in recent years. See FAIRNESS AND EFFECTIVENESS IN POLICING 2 (Wesley Skogan & Kathleen Frydl eds., 2004); RALPH TAYLOR, BREAKING AWAY FROM BROKEN WINDOWS 21-23 (2000).

93. Hodulik, *supra* note 88, at 1076 (quoting Maria Foscanaris et al., *Out of Sight—Out of Mind?: The Continuing Trend Toward the Criminalization of Homelessness*, 6 GEO. J. POVERTY L. & POL’Y 145, 147 (1999)) (internal quotation marks omitted).

94. *Id.* at 1073; see also HUMAN RIGHTS WATCH, *supra* note 7, at 21 (“[O]ne in twenty persons with a severe mental illness is homeless . . . from 20 to 33 percent of the homeless have serious mental illnesses.”).

95. Prison inmates with a mental disorder were more than twice as likely as other inmates to have been homeless in the twelve months prior to arrest (20% vs. 9%). PAULA M. DITTON, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS 1 (1999), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/mhtip.pdf>; see also Dale E. McNiel et al., *Incarceration Associated with Homelessness, Mental Disorder, and Co-occurring Substance Abuse*, 56 PSYCHIATRIC SERVICES 840, 844 (2005) (noting that people who were homeless and had a mental disorder accounted for a substantial

Similarly, efforts to crack down on substance abuse during the so-called “War on Drugs” of the mid-1980s and early 1990s also inadvertently increased the number of individuals with a mental disorder entering the CJS.<sup>96</sup> Because many persons with a mental disorder have a co-occurring substance abuse disorder,<sup>97</sup> these efforts led to increased arrests for drug offenses of individuals who had a mental disorder.<sup>98</sup> In one study, researchers found that over a three-year period, 83% of individuals with co-occurring mental illness and substance abuse disorders had contact with the CJS and 44% were arrested on at least one occasion.<sup>99</sup>

These changes have led to a considerable increase in the incarceration of persons with a mental disorder.<sup>100</sup> It has been estimated that between 200,000 and 300,000 inmates in U.S. prisons suffer from a mental disorder and 70,000 inmates are experiencing a psychosis on any given day.<sup>101</sup>

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portion of persons incarcerated in San Francisco despite representing only a small proportion of the total population).

96. JOHN S. GOLDKAMP & CHERYL IRONS-GUYN, BUREAU OF JUSTICE ASSISTANCE, EMERGING JUDICIAL STRATEGIES FOR THE MENTALLY ILL IN THE CRIMINAL CASELOAD: MENTAL HEALTH COURTS IN FORT LAUDERDALE, SEATTLE, SAN BERNARDINO, AND ANCHORAGE 2 (2000), available at <http://ncjrs.gov/pdffiles1/bja/182504.pdf>.

97. SURGEON GENERAL’S REPORT, *supra* note 2, at 15 (“Approximately 15 percent of all adults who have a mental disorder . . . also experience a co-occurring substance (alcohol or other drug) use disorder . . .”); Karen M. Abram & Linda A. Teplin, *Co-Occurring Disorders Among Mentally Ill Jail Detainees: Implications for Public Policy*, 46 AM. PSYCHOLOGIST 1036, 1036 (1991).

98. DITTON, *supra* note 95, at 4 (indicating that 15.2% of inmates with a mental illness in a local jail, 12.8% of inmates with a mental illness in state prison, and 40.4% of inmates with a mental illness in federal prison were incarcerated for a drug offense).

99. Robin E. Clark et al., *Legal System Involvement and Costs for Persons in Treatment for Severe Mental Illness and Substance Use Disorders*, 50 PSYCHIATRIC SERVICES 641, 646 n.1 & tbl.3 (1999).

100. HUMAN RIGHTS WATCH, *supra* note 7, at 23.

101. *Id.* at 1. These numbers were largely based on a review by the American Psychiatric Association in 2000 that concluded that as many as one in five prisoners are seriously mentally ill, with up to 5% of the prison population actively psychotic at any given time. AM. PSYCHIATRIC ASS’N, PSYCHIATRIC SERVICES IN JAILS AND PRISONS, at xix (2d ed. 2000). Another review of available research concluded that 8% to 19% of prisoners have significant psychiatric or functional disabilities and another 15% to 20% will need some form of

Focusing on admissions to local jails, it was recently determined that the rate of current serious mental illness for jail inmates is 14.5% for males and 31.0% for females, with the authors of this study concluding that “there were about two million (2,161,705) annual bookings of persons with serious mental illnesses into jails.”<sup>102</sup> In addition, the Bureau of Justice Statistics has determined that more than half of all prison and jail inmates have mental health problems.<sup>103</sup> Further, a member of the House Subcommittee on Crime told his colleagues that, based on a report by the National Alliance on Mental Illness, between 25% and 40% of all Americans with a mental illness at some point in their lives become entangled in the CJS.<sup>104</sup> Not surprisingly, research has shown that there are “three times more mentally ill people in prisons than in mental health hospitals, and that prisoners have rates of mental illness that are two to four times greater than the rates of members of the general public.”<sup>105</sup> The 2000 Census of state

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psychiatric intervention during incarceration. Jeffrey L. Metzner et al., *Treatment in Jails and Prisons*, in TREATMENT OF OFFENDERS WITH MENTAL DISORDERS 211, 211 (Robert M. Wettstein ed., 1998). Similarly, the Federal Bureau of Justice Statistics estimated that at midyear 1998, 283,800 offenders with a mental illness were incarcerated in American prisons and jails, with 16% of state prison inmates, 7% of federal inmates, and 16% of inmates in local jails reporting either a psychiatric condition or an overnight stay in a mental hospital. DITTON, *supra* note 95, at 1. Furthermore, approximately 61% of the inmates with a mental illness in state prison, approximately 60% of inmates in federal prison, and approximately 41% of inmates in local jails had required mental health services since admission. *Id.* at 9.

102. Henry J. Steadman et al., *Prevalence of Serious Mental Illness Among Jail Inmates*, 60 PSYCH. SERVICES 761, 764 (2009). Serious mental illness was defined as “major depressive disorder; depressive disorder not otherwise specified; bipolar disorder I, II, and not otherwise specified; schizophrenia spectrum disorder; schizoaffective disorder; schizophreniform disorder; brief psychotic disorder; delusional disorder; and psychotic disorder not otherwise specified.” *Id.* at 761.

103. BJS REPORT, *supra* note 7, at 1 (noting that at mid-year 2005, 705,600 inmates in state prisons, 70,200 inmates in Federal prisons, and 479,000 in local jails reported either a recent history of mental illness or experiencing symptoms of a mental health problem during the previous twelve months).

104. Mental Health Early Intervention, Treatment, and Prevention Act of 2000, S. 2639, 106th Cong. § 2(2) (2000); HUMAN RIGHTS WATCH, *supra* note 7, at 18.

105. HUMAN RIGHTS WATCH, *supra* note 7, at 1. Another report concluded that the number of Americans with serious mental illnesses in prison was four times

and federal prisons reported that the “primary . . . or secondary function” of 150 prisons nationwide is “mental health confinement.”<sup>106</sup> Indeed, the Cook County and Los Angeles County jails, which provide entry points into the prison systems of Illinois and California, are widely referred to as two of the largest “mental health” facilities in the country.<sup>107</sup>

Until the mid-1800s and the wide-spread establishment of state-operated mental health facilities, it was common practice to jail individuals with a mental illness.<sup>108</sup> It seems we have regressed to this practice. In addition, correctional facilities have frequently proven inadequate to meet the needs of these individuals,<sup>109</sup> although this is perhaps not surprising in that they were established for a very different purpose.

For example, studies have shown that inmates with a mental illness are more vulnerable to physical assault and exploitation while incarcerated and more likely to have been charged with breaking facility rules than other inmates.<sup>110</sup>

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greater than in the general public. THE PRESIDENT’S NEW FREEDOM COMM’N ON MENTAL HEALTH, *supra* note 17, at 32. The National Commission on Correctional Health Care issued a report to Congress in April 2002 in which it provided estimates of the prevalence of seven psychiatric disorders among jail inmates and state and federal prison inmates, with the prevalence rates for state prison inmates generally the highest and jail inmates generally the lowest. NAT’L COMM’N ON CORR. HEALTH CARE, 2 THE HEALTH STATUS OF SOON-TO-BE-RELEASED INMATES 59, 64 (2002) (using 1995 data).

106. ALLEN J. BECK & LAURA M. MARUSCHAK, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH TREATMENT IN STATE PRISONS 4 (2001), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/mhtsp00.pdf>.

107. *See, e.g.*, HUMAN RIGHTS WATCH, *supra* note 7, at 16, 17 n.9 (internal citation omitted) (noting on any given day the Los Angeles County Jail holds as many as 3,300 inmates with a serious mental illness and the Cook County Jail has over 1,000 prisoners in mental health treatment).

108. APPELBAUM, *supra* note 79, at 19.

109. Hodulik, *supra* note 88, at 1083.

110. *See* BJS REPORT, *supra* note 7, at 10 (reporting that State prisoners with a mental illness were twice as likely to have been injured in a fight since admission as those without mental health problems); DITTON, *supra* note 95, at 10 (finding higher rates of discipline for inmates with a mental illness); HUMAN RIGHTS WATCH, *supra* note 7, at 56-58; *see also* Mary Beth Pfeiffer, *Cruel and Usual Punishment*, N.Y. TIMES, May 7, 2006, § 14LI (Magazine), at 17 (describing treatment of inmates with a mental illness in New York State

One commentator writes of the difficulties awaiting inmates with a mental illness housed in jails and prisons:

Correctional institutions have rigid formal rules and even more subtle informal rules both institutionally and within the inmate population itself. Mentally ill inmates often cannot comprehend these rules. If there ever was a place where horrific paranoid delusions might really come true, it is in a prison. Mentally ill prisoners are not only inherently vulnerable to abuse, but they are also often provocatively irritating and offensive to other prisoners and prison guards. Yelling, removing clothes, throwing food, setting fires . . . to drive demons out of the cell . . . are not unusual behaviors for them. Attacks, rapes and dominating relationships are often regular plights of mentally ill prisoners. Suicide is also a more common problem.<sup>111</sup>

In addition to providing a potentially harmful environment for persons with a mental illness, jails and prisons are also often ill equipped to provide them with needed treatment.<sup>112</sup> In 2003, President George W. Bush created the New Freedom Commission on Mental Health, which subsequently reported that persons with a mental illness who are jailed are “likely to continually recycle

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prisons, including frequent use of solitary confinement as punishment for behavior associated with the symptoms of mental disorders).

111. Paul F. Stavis, *Why Prisons Are Brim Full of the Mentally Ill: Is Their Incarceration a Solution or a Sign of Failure?*, 11 GEO. MASON U. C.R. L.J. 157, 183-84 (2000); see also TORREY, *supra* note 76, at 31 (“Being in jail or prison when your brain is playing tricks on you is often brutal.”); *id.* at 34 (“Jails and prisons usually exacerbate psychiatric symptoms . . . .”); Eve Bender, *Prison Punishment Exacerbates Inmates’ Psychiatric Illness*, 40 PSYCHIATRIC NEWS, no. 15, Nov. 2005 at 15, 15 (“In people with serious mental illness, spending time in [segregated housing units] exacerbates symptoms and can lead to psychotic decompensation or suicidality [effectively creating] the most severely psychotic people [mental health professionals] have seen in more than 25 years . . . .”); NAMI, *Criminalization*, *supra* note 76, at 1 (“Conditions in jails and prisons are often terrifying for people with severe mental illnesses.”).

112. HUMAN RIGHTS WATCH, *supra* note 7, at 194-95; Risdon N. Slate, *From the Jailhouse to Capitol Hill: Impacting Mental Health Court Legislation and Defining What Constitutes a Mental Health Court*, 49 CRIME & DELINQ. 6, 14 (2003) (“[I]n excess of 20 percent of jails provide no formal access to mental health treatment . . . .”); see also W. David Ball, *Mentally Ill Prisoners in the California Department of Corrections and Rehabilitation: Strategies for Improving Treatment and Reducing Recidivism*, 24 J. CONTEMP. HEALTH L. & POL’Y 1, 7 (2007) (highlighting limitations to treatment in California jails and prisons).

through the mental health, substance abuse, and criminal justice systems,” in part because they “frequently do not receive appropriate mental health services [while they are in jail].”<sup>113</sup> For example, one study found that, on average, only 80% of state prisoners who needed structured counseling received it, while under 60% of those who need psychotropic medications received them.<sup>114</sup> Furthermore, because jails and prisons are intended to administer punishment and protect society, their primary mission does not encompass the delivery of mental health services and, indeed, this is often antithetical to what staff perceives to be their primary responsibility.<sup>115</sup> The U.S. Supreme Court in its recent ruling dictating that California reduce its prison population focused much of its opinion on the inadequate mental health care being provided these inmates, which it determined reached the level of a Constitutional violation.<sup>116</sup>

Even when appropriate treatment is provided in the course of incarceration, the individual’s status upon release as both a former inmate and a person in need of mental health services results in a double stigmatization that makes obtaining treatment in the community—even when that treatment is available, which it often is not—particularly difficult.<sup>117</sup> Further, even a minor conviction

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113. THE PRESIDENT’S NEW FREEDOM COMM’N ON MENTAL HEALTH, *supra* note 17, at 32.

114. Wendy Pogorzelski et al., *Behavioral Health Problems, Ex-Offender Reentry Policies, and the “Second Chance Act,”* 95 AM. J. PUB. HEALTH 1718, 1719 (2005) (“On average, 1 in 8 state prisoners is engaged in structured counseling (about 80% of the estimated number needing it) and 1 in 10 is receiving psychotropic medications (nearly 60% of the estimated number needing them).” (citing BECK & MARUSCHAK, *supra* note 106, at 1)).

115. H. Richard Lamb, Op-Ed., *Reversing Criminalization*, 166 AM. J. PSYCHIATRY 8, 8 (2009).

116. *Brown v. Plata*, 131 S. Ct. 1910, 1932-33 (2011). The record indicated that vacancy rates for psychiatrists ranged as high as 54%, and that even if fully staffed officials would be unable to meet inmates’ mental health needs because of overcrowding. *Id.* at 1932. Furthermore, a prison psychiatrist reported that staff were doing about 50% of what they should be doing. *Id.* Lack of resources led to significant delays in treatment and the housing of inmates with a mental illness in administrative segregation for up to six months, including placements in “tiny phone-booth sized cages.” *Id.* at 1933. In addition, prisoners committed suicide while awaiting transfer to a treatment unit. *Id.*

117. Lamb, *supra* note 115, at 8; NAMI, *Criminalization*, *supra* note 76, at 1 (“Federal and state prisons generally do not have adequate rehabilitative

labels an individual with a mental illness as a criminal, a designation that may limit housing and employment opportunities and adversely color future encounters with police and adjudicative decisions.<sup>118</sup> As a result, offenders with a mental illness tend to pass through a “revolving door” where they are removed from the community for a criminal offense, incarcerated, returned to the streets, and then arrested and imprisoned again when their unaddressed mental health problems contribute to violations of society’s norms.<sup>119</sup>

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services available for inmates with severe mental illnesses to aid them in their transition back into communities.”). For an examination of how criminal convictions limit mental health treatment within the community, see Pogorzelski et al., *supra* note 114, at 1721-23. For a discussion of the increasing shortages in these services, see *supra* note 89 and accompanying text.

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

119. DITTON, *supra* note 95, at 1 (“Over three-quarters of mentally ill inmates had been sentenced to time in prison or jail or [placed] on probation at least once prior to the current sentence.”); *id.* at 5 (noting 54% of jail inmates, 52% of state prisoners, and 49% of federal prisoners with a mental illness reported three or more prior criminal sentences); GOLDKAMP & IRONS-GUYNN, *supra* note 96, at 22; HUMAN RIGHTS WATCH, *supra* note 7, at 193 (stating in New York and Ohio studies, 64% and 63%, respectively, of mentally ill offenders were rearrested within eighteen months; in a Tennessee study, 39% of prisoners with mental health diagnoses were back in the correctional system within twelve months of discharge); LeRoy L. Kondo, *Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders*, 24 SEATTLE U. L. REV. 373, 374 (2000); Marlee E. Moore & Virginia Aldigé Hiday, *Mental Health Court Outcomes: A Comparison of Re-Arrest and Re-Arrest Severity Between Mental Health Court and Traditional Court Participants*, 30 LAW & HUM. BEHAV. 659, 660 (2006).

III. CRIMINAL JUSTICE SYSTEM ALTERNATIVES<sup>120</sup>

Critics of the frequent incarceration of persons with a mental illness have observed that this imprisonment has not been offset by public safety or deterrence benefits.<sup>121</sup> Further, because prisons and jails are often a harmful environment for individuals with a mental disorder and may be largely ineffective in responding to their mental health needs or reducing their likelihood of recidivism,<sup>122</sup> attention has turned to identifying diversion programs for this population.<sup>123</sup> Police, jail and prison officials, judges, prosecutors, defense attorneys, human rights advocates, advocates for individuals with a mental illness, and mental health officials and professionals have all agreed that incarceration is generally not an appropriate placement for

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120. The discussion that follows focuses on diversion programs that can be employed once an individual with a mental disorder has been arrested and criminal justice proceedings initiated. Other fruitful alternatives could commence at an earlier point in time. For example, efforts could be made to prevent such individuals from running afoul of the CJS in the first place by increasing the availability of community mental health services or targeting such services for individuals who have shown a proclivity or likelihood to be arrested. Additionally, attention could be given to enhancing diversion after a police officer has responded to a report of a criminal offense but before the formal criminal justice process is commenced. *See* H. Richard Lamb & Leona L. Bachrach, *Some Perspectives on Deinstitutionalization*, 52 *PSYCHIATRIC SERVICES* 1039, 1042 (2001) (noting a range of such strategies, including “mental health consultations to police officers in the field, formal training of police officers, careful screening of incoming jail detainees, and diversion to the mental health system of mentally ill persons who have committed minor offenses”).

121. *See, e.g.*, Amanda Pustilnik, *Prisons of the Mind: Social Value and Economic Inefficiency in the Criminal Justice Response to Mental Illness*, 96 *J. CRIM. L. & CRIMINOLOGY* 217, 219 (2006) (“General deterrence . . . and specific deterrence . . . certainly cannot be promoted by incarcerating people who have not committed a crime. Similarly, public safety is not advanced by confining people who are nonoffending or whose offenses of conviction are nonviolent. Even as to violent mentally ill lawbreakers, public safety may be better served by detention in secure hospitals, as many prison systems transfer their violent mentally ill inmates to hospitals in any event.”).

122. *See supra* notes 109-16 and accompanying text.

123. *See, e.g.*, THE PRESIDENT’S NEW FREEDOM COMM’N ON MENTAL HEALTH, *supra* note 17, at 43 (“It is important to keep adults and youth with serious mental illnesses who are not criminals out of the criminal justice system. . . . With appropriate diversion and re-entry programs, these consumers could be successfully living in and contributing to their communities.”).

an offender with a mental disorder, particularly if it is a severe mental illness.<sup>124</sup> In response, a number of alternatives to incarceration have been explored that might better address individuals with a mental disorder who have committed a crime.

#### A. Probation

A traditional alternative in lieu of incarceration is to place individuals who have committed a relatively minor crime on probation for a period of time, with the offenders required to meet various conditions of probation to maintain their freedom.<sup>125</sup> An offender with a mental disorder could be required to obtain mental health treatment or take other steps (e.g., submit to periodic drug testing) as a condition of probation.<sup>126</sup>

A study by the Federal Bureau of Justice Statistics found, however, that although 13% of probationers were required to seek mental health treatment as a condition of release into the community, only 43% of them had participated in treatment as required.<sup>127</sup> Another study found that the rates of rearrest for probationers with a mental illness (54%) were nearly double that of probationers without a mental illness (30%).<sup>128</sup>

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124. Butterfield, *supra* note 76.

125. See GLAZE, *supra* note 57, at 2 (“The majority (70%) of offenders under correctional supervision at yearend 2009 were supervised in the community (5,018,900) either on probation or parole, remaining relatively unchanged since 2000 (71%).”); LAUREN E. GLAZE & THOMAS P. BONCZAR, U.S. DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2009, at 1 (2010), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/ppus09.pdf> (“Probation is a court-ordered period of correctional supervision in the community, generally as an alternative to incarceration. In some cases, probation can be a combined sentence of incarceration followed by a period of community supervision.”).

126. DITTON, *supra* note 95, at 3 (“Of those on probation at year end 1998, an estimated 547,800 were mentally ill.”); see also Jennifer L. Skeem et al., *Probation, Mental Health, and Mandated Treatment: A National Survey*, 33 CRIM. JUST. & BEHAV. 158, 158 (2006) (providing a national survey of supervision approaches of mental health and traditional probation agencies).

127. DITTON, *supra* note 95, at 9.

128. Skeem et al., *supra* note 126, at 160 (citing Lorena Lee Dauphinot, *The Efficacy of Community Correctional Supervision for Offenders with Severe*

Part of the problem with this approach is that it necessitates a level of expertise regarding mental disorders and how best to respond to them, and the opportunity and ability to identify and appraise the effectiveness of mental health programs that most probation officers do not have.<sup>129</sup> Even if they have this expertise, because the case load of probation officers is generally quite large, they will rarely have the time required to provide needed intensive case services to this population.<sup>130</sup> It has been noted:

Like other criminal justice institutions, probation agencies were not designed to meet the unique challenges of individuals with serious mental illness. Probationers with mental illness (PMIs) often have pronounced needs for precious social resources that include housing, entitlements, and transportation. When their functioning is limited, PMIs may have difficulty meeting standard conditions of probation (e.g., paying fees, maintaining employment). Moreover, PMIs are likely to be mandated to participate in mental health treatment as a special condition of probation. Such conditions obligate the probation officer (PO) to implement treatment mandates, often in complex and overburdened mental health care systems. Although monitoring and enforcing treatment compliance is viewed as the POs' primary task in supervising PMIs, there are few guidelines for doing so. These disjunctures between PMIs' needs and basic operating procedures in probation agencies may help explain PMIs' relatively high risk of failure.<sup>131</sup>

Some jurisdictions have attempted to meet these challenges by establishing specialized probation programs

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Mental Illness (Aug. 1996) (unpublished Ph.D. dissertation, University of Texas at Austin)).

129. COUNCIL OF STATE GOV'TS, *supra* note 4, at 121 ("A common frustration for courts is to identify a person with mental health needs, consult its inventory of programs, and be unable to find a program that, because of the person's charge, treatment history, or lack of insurance, is willing to accept the person.").

130. Skeem et al., *supra* note 126, at 158-59 ("Recently, the number of people under correctional supervision reached an all-time high of more than 6.7 million individuals. Given that the majority (60%) of these individuals are supervised in the community by probation officers, the burgeoning correctional population places an unprecedented strain on probation agencies. This strain is intensified by the serious mental health and substance abuse problems that an increasing proportion of these probationers experience." (citations omitted)).

131. *Id.* at 160 (citations omitted).

for this population.<sup>132</sup> However, a national survey of these programs identified a number of associated limitations, including large caseloads, mixed caseloads that diffuse focus, probation officers lacking mental health expertise or training, a failure to actively integrate internal and external resources to meet probationers' needs, and an inability to maintain treatment compliance and a lack of related problem-solving strategies.<sup>133</sup> It also may not be possible to maintain these relatively costly programs as the criminal justice system in general and the probation system in particular come under increased scrutiny and fiscal pressure.<sup>134</sup> Finally, this approach only addresses part of the equation as it does not address the related needs of the victims of these offenses, provide offenders with an opportunity or encouragement to accept responsibility for their criminal acts, or enable either victims or offenders to actively participate in shaping the response to the precipitating mental health problems and resulting criminal behavior.<sup>135</sup>

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132. *Id.*; see also COUNCIL OF STATE GOV'TS, *supra* note 4, at 121-22 (recommending that probation agencies assign probationers with "mental health conditions" to probation officers with "specialized training and small caseloads").

133. See Skeem et al., *supra* note 126, at 160-83.

134. See David Reynolds, *NC Probation Officers Overloaded as Caseloads Grow*, STAR-NEWS (Mar. 9, 2010), available at <http://www.correctionsone.com/probation-and-parole/articles/2016631-NC-probation-officers-overloaded-as-caseloads-grow/> (reporting that increased caseloads and a high turnover rate among probation officers has caused problems in the North Carolina probation system); Dan Ring, *Gov. Deval Patrick Criticizes Bill Aimed at Overhauling Massachusetts Probation System*, THE REPUBLICAN (Apr. 22, 2011), available at [http://www.masslive.com/news/index.ssf/2011/04/gov\\_deval\\_patrick\\_criticizes\\_b.html](http://www.masslive.com/news/index.ssf/2011/04/gov_deval_patrick_criticizes_b.html) (reporting calls from the legislature and the governor to reform Massachusetts' probation system); Andrew Welsh-Huggins, *Ohio Chief Justice Wants Probation System Change*, DESERET NEWS (Jan. 11, 2011), <http://www.deseretnews.com/article/700099815/Ohio-chief-justice-wants-probation-system-change.html> (reporting budget problems in Ohio as a possible catalyst for changing the probation system); see also *supra* note 63.

135. Although not widely practiced, and even then focused more on communicating with the probationer's mental health provider than the probationer, the value of the offender's input has at least been recognized in part. COUNCIL OF STATE GOV'TS, *supra* note 4, at 122 ("Mental health providers whose clients are on probation, while being careful not to become monitors of compliance, can also assist the individual to understand the consequences of their behavior in terms of sanctions and can build a collaborative relationship with the specialized probation officers that can benefit the individual. In this

### B. *Drug Courts*

Another diversion alternative that may inadvertently impact offenders with a mental disorder are drug courts. Drug courts are typically designed to divert low-level drug offenders into substance abuse treatment programs, thereby enabling them to avoid incarceration but also, hopefully, diminishing their likelihood of recidivism.<sup>136</sup> After the first such court was established in 1989, the number of drug courts across the country exploded, with over 2,000 such courts now established and operative in virtually every state.<sup>137</sup> Because of the high percentage of offenders with a mental disorder who also have a substance abuse problem,<sup>138</sup> drug courts have the potential to help a

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way, the probation officer can have more confidence when making decisions on how to respond to violations. For example, the officer and the provider can meet jointly with the individual to identify barriers to compliance and to make changes in the treatment plan or probation rules as necessary.”).

136. C. WEST HUDDLESTON, III ET AL., NAT’L DRUG COURT INST., BUREAU OF JUSTICE ASSISTANCE, *PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURT PROGRAMS IN THE UNITED STATES 2* (2008), available at [http://www.ojp.usdoj.gov/BJA/pdf/12902\\_PCP\\_fnl.pdf](http://www.ojp.usdoj.gov/BJA/pdf/12902_PCP_fnl.pdf) (“Drug courts represent the coordinated efforts of justice and treatment professionals to actively intervene and break the cycle of substance abuse, addiction, and crime. As an alternative to less effective interventions, drug courts quickly identify substance-abusing offenders and place them under ongoing judicial monitoring and community supervision, coupled with effective, long-term treatment services. In this blending of systems, the drug court participant undergoes an intensive regimen of substance abuse treatment, case management, drug testing, and probation supervision while reporting to regularly scheduled status hearings before a judge with specialized expertise in the drug court model.” (citations omitted)).

137. *Id.* at 1; see also RYAN S. KING & JILL PASQUARELLA, *THE SENTENCING PROJECT, DRUG COURTS: A REVIEW OF THE EVIDENCE 1* (2009), available at [www.sentencingproject.org/doc/dp\\_drugcourts.pdf](http://www.sentencingproject.org/doc/dp_drugcourts.pdf) (providing background information on drug courts and the first drug court in America).

138. DITTON, *supra* note 95, at 7 (noting that 58.7% of state prison inmates, 46.5% of federal prison inmates, 64.6% of local jail inmates, and 49.0% of probationers with a mental illness reported using alcohol or drugs at the time of the offense; similarly, 34.4% of state prison inmates, 23.9% of federal prison inmates, 37.9% of local jail inmates, and 34.8% of probationers with a mental illness were diagnosed as having a history of alcohol dependence).

significant number of offenders with a mental illness avoid incarceration.<sup>139</sup>

Drug courts, however, are typically not designed to address the more specific needs of this population. One limitation is that the drug treatment programs and the individuals running them are frequently not well equipped to deal with these offenders' co-occurring mental disorders.<sup>140</sup> Further, these courts tend to rely heavily on a "carrot-and-stick" approach.<sup>141</sup> The coercion and therapeutic pressure they employ to encourage offenders to adhere to a drug treatment and testing regime is often not an effective means to help offenders with a mental disorder avoid relapse.<sup>142</sup>

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139. See HUDDLESTON ET AL., *supra* note 136, at 2 ("[D]rug courts increase the probability of participants' success by providing a wide array of ancillary services such as mental health treatment, trauma and family therapy, job skills training, and many other life-skill enhancement services."); HUMAN RIGHTS WATCH, *supra* note 7, at 26; see also Kevin S. Burke, *Just What Made Drug Courts Successful?*, 36 NEW ENG. J. CRIM. & CIV. CONFINEMENT 39, 43-44 (2010) (outlining the main components of drug courts and their success). See generally Hildi Hagedorn & Mark L. Willenbring, *Psychiatric Illness Among Drug Court Probationers*, 29 AM. J. DRUG & ALCOHOL ABUSE 775 (2003) (describing a study of drug court probationers with a mental illness).

140. Annette McGaha et al., *Lesson from the Broward County Mental Health Court Evaluation*, 25 EVALUATION & PROGRAM PLAN. 125, 125 (2002).

141. GOLDKAMP & IRONS-GUINN, *supra* note 96, at 4.

142. See Riittakerttu Kaltiala-Heino et al., *Impact of Coercion on Treatment Outcome*, 20 INT'L J.L. & PSYCH. 311, 320 (1997) (finding generally that patients who initially felt coerced were less likely to take medications, use mental health services, and show improvement in symptoms); Trudi Kirk & Donald N. Bersoff, *How Many Procedural Safeguards Does It Take to Get a Psychiatrist to Leave the Lightbulb Unchanged? A Due Process Analysis of the MacArthur Treatment Competence Study*, 2 PSYCHOL. PUB. POL'Y & L. 45, 58 (1996) ("[S]tudies on the effects of coercion on mental health treatment reveal that mental health treatment consumers are particularly sensitive to the presence of coercion and react particularly negatively to the persons and systems that exercise the coercion."); John Monahan et al., *Mandated Treatment in the Community for People with Mental Disorders*, 22 HEALTH AFFAIRS 28, 35-36 (2003) (asserting that incentives and disincentives to facilitate and promote adherence to treatment by individuals with a mental disorder can be appropriate, but primarily when these interventions are experienced by these individuals as being clinically grounded in a caring therapeutic relationship, with the critical component being whether the intervention "respected their wishes and . . . 'empowered' them to become actively engaged as decision-makers in their own care").

### C. *Mental Health Courts*

Another response employed in many states, including California, Florida, and New York, has been the establishment of mental health courts (“MHCs”), which often evolved from and in some instances are akin to drug courts in their goals and operation.<sup>143</sup> Although it has been said that there is no prototypical MHC,<sup>144</sup> these courts typically attempt to divert non-violent offenders with a mental disorder from incarceration into a judicially-supervised mental health treatment regime.<sup>145</sup>

MHCs often attempt to apply the principles of therapeutic jurisprudence,<sup>146</sup> a school of thought that has

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143. See LAUDAN ARON ET AL., NAT’L ALLIANCE ON MENTAL ILLNESS, *GRADING THE STATES 2009: A REPORT ON AMERICA’S HEALTH CARE SYSTEM FOR ADULTS WITH SERIOUS MENTAL ILLNESS* 42 (2009) (“Approximately 200 communities in 43 states have created mental health courts . . . . These courts operate in partnership with mental health and substance abuse systems as well as individual providers to offer court-supervised treatment as an alternative to incarceration.”); see also Henry J. Steadman et al., *Effect of Mental Health Courts on Arrests and Jail Days*, 68 ARCH. GEN. PSYCHIATRY 167, 167 (2011) (reporting a multisite study of mental health courts’ effects on criminal justice outcomes).

144. E. Lea Johnston, *Theorizing Mental Health Courts*, 89 WASH. U. L. REV. (forthcoming 2012) (manuscript at 2); Amy Watson et al., *Mental Health Courts: Promises and Limitations*, 28 J. AM. ACAD. PSYCHIATRY & L. 476, 477 (2001); see also Henry J. Steadman et al., *Mental Health Courts: Their Promise and Unanswered Questions*, 52 PSYCHIATRIC SERVICES 457, 457 (2001) (“[T]he strong support for mental health courts seems to assume that there is a structured model[,] . . . [however] [d]rug courts vary in their organization by jurisdiction . . .”).

145. GOLDKAMP & IRONS-GUYN, *supra* note 96, at 60; HUMAN RIGHTS WATCH, *supra* note 7, at 26; Kondo, *supra* note 119, at 403; H. Richard Lamb & Linda E. Weinberger, *Mental Health Courts as a Way to Provide Treatment to Violent Persons with Severe Mental Illness*, 300 JAMA 722, 722 (2008). *But see* GOLDKAMP & IRONS-GUYN, *supra* note 96, at 49 (noting the San Bernardino Mental Health Court will consider defendants charged with a violent offense if it becomes clear that what was involved was not a truly violent incident); Carol Fisler, *Building Trust and Managing Risk: A Look at a Felony Mental Health Court*, 11 PSYCHOL. PUB. POL’Y & L. 587, 593 (2005) (discussing reasons for allowing felony offenders into mental health courts, including providing treatment for offenders and preserving judicial resources).

146. Roger A. Boothroyd et al., *The Broward Mental Health Court: Process, Outcomes and Service Utilization*, 26 INT’L J.L. & PSYCHIATRY 55, 55 (2003); see John Braithwaite, *Restorative Justice and Therapeutic Jurisprudence*, 38 CRIM. L. BULL. 244, 257 (2002) (providing a general overview of therapeutic

explored alternatives to the conventional CJS approach.<sup>147</sup> Proponents of therapeutic jurisprudence recognize that an offender's interactions with CJS actors and processes can have both therapeutic and anti-therapeutic consequences,<sup>148</sup> and seek to enhance the design and application of the CJS to promote the psychological well-being of participants without sacrificing other societal values.<sup>149</sup>

MHCs attempt to reduce the criminal behavior of offenders with a mental disorder by directly addressing the disorder associated with the illegal conduct.<sup>150</sup> The general assumption, although it may and perhaps should be questioned, is that there is a causal link between the disorder and the criminal behavior.<sup>151</sup> MHCs are thus limited to defendants with an identified mental disorder, although courts differ in defining this eligibility

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jurisprudence and its principles); Arthur J. Lurigio & Jessica Snowden, *Putting Therapeutic Jurisprudence into Practice: The Growth, Operations, and Effectiveness of Mental Health Court*, 30 JUST. SYS. J. 196, 198 (2009); Allison D. Redlich et al., *Patterns of Practice in Mental Health Courts: A National Survey*, 30 LAW & HUM. BEHAV. 347, 349 (2006). See generally Nancy Wolff, *Courts as Therapeutic Agents: Thinking Past the Novelty of Mental Health Courts*, 30 J. AM. ACAD. PSYCHIATRY & L. 431, 431-33 (2002) (discussing the assumptions underlying the therapeutic approach of mental health courts).

147. See, e.g., David B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, 35 WM. & MARY L. REV. 279, 280-83 (1993).

148. Juan Dalmau Ramirez, *Inauguration Therapeutic Jurisprudence Forum of the International Network on Therapeutic Jurisprudence*, 67 REV. JUR. U.P.R. 95, 95 (1998).

149. *Id.* at 95; Robert F. Schopp, *Integrating Restorative Justice and Therapeutic Jurisprudence*, 67 REV. JUR. U.P.R. 665, 666 (1998); David B. Wexler & Bruce J. Winick, *Introduction to LAW IN A THERAPEUTIC KEY*, at xvii, xvii (David B. Wexler & Bruce J. Winick eds., 1996).

150. Wolff, *supra* note 146, at 431.

151. Johnston, *supra* note 144, manuscript at 9-10 (“[M]ental health courts justify segregating and diverting individuals with mental illnesses from the traditional justice system on the basis that their illnesses likely contributed to their criminal behavior. . . . [However,] social and psychological research demonstrates that the criminal acts of individuals with mental illnesses often do not stem from their disorders but may arise from a number of motivations. . . . In addition, the weight of recent scientific evidence demonstrates that mental illness is not a direct contributor to recidivism for most offenders with mental illnesses.”).

requirement.<sup>152</sup> MHCs also commonly consider the type of offense committed when determining eligibility, with 27% of them restricting participation to offenders with misdemeanor charges, although roughly half (46%) of them accept participants charged with felonies if the criminal behavior was non-violent in nature.<sup>153</sup>

While MHCs function as criminal courts, they differ significantly from traditional courts in terms of the procedures they employ, using a non-adversarial “team” approach with the judge, the offender, and the defending and prosecuting attorneys assuming “cooperative” roles.<sup>154</sup> Initial attention may be given to the offenders’ competence to participate in the proceedings and understand that participation is voluntary, and to ensuring that they chose to enroll of their own accord.<sup>155</sup> Although participation may occur pre-adjudication, many MHCs operate on a post-adjudicatory basis and require a preceding plea of guilty or nolo contendere.<sup>156</sup> Proceedings are typically informal<sup>157</sup> and discussions of the charges tend to be limited.<sup>158</sup> Emphasis

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152. A national survey of MHCs found that up to one-third limited eligibility to offenders with an Axis I diagnosis as defined by the DSM-IV, such as schizophrenia, bipolar disorder, or major depression. Fewer than 10% allowed individuals with developmental disabilities to participate, and only 3% accepted defendants with a primary Axis II diagnosis, effectively closing off access for offenders with “less serious” personality disorders. Other courts eschew specific diagnostic criteria and focus instead on the severity of the mental illness, using entry criteria such as a “severe and persistent mental illness.” Lurigio & Snowden, *supra* note 146, at 205.

153. *Id.* at 206. However, at least some MHCs have begun to accept defendants charged with some violent felonies as well. See Johnston, *supra* note 144, manuscript at 3.

154. Redlich et al., *supra* note 146, at 48.

155. See GOLDKAMP & IRONS-GUYN, *supra* note 96, at 13-14, 27-28, 37-39, 52; Boothroyd et al., *supra* note 146, at 58 (determining that “transcripts contained some mention of a defendant’s competence-to-proceed in 29.4% of cases” with voluntary participation addressed in 15.7% of the cases). Questions have been raised, however, about how often such participation is truly voluntary. GOLDKAMP & IRONS-GUYN, *supra* note 96, at 73; Johnston, *supra* note 144, manuscript at 6-7, n.23.

156. Patricia A. Griffin et al., *The Use of Criminal Charges and Sanctions in Mental Health Courts*, 53 *PSYCHIATRIC SERVICES* 1285, 1286 (2002).

157. GOLDKAMP & IRONS-GUYN, *supra* note 96, at 17.

158. Boothroyd et al., *supra* note 146, at 58.

instead is often on a mandated and supervised program of community treatment that typically requires the offender to take prescribed medications.<sup>159</sup> Compliance with the treatment program is usually supervised by either dedicated court personnel or community treatment professionals indirectly linked to the court.<sup>160</sup> MHCs encourage adherence to treatment plans by offering incentives for compliance and sanctions for noncompliance. Incentives range widely from simple praise from the judge at weekly status review hearings to having the initial charges dropped or the conviction vacated after successful completion of the requirements imposed by the MHC.<sup>161</sup> Sanctions for non-compliance also vary considerably, including requiring that more mental health services be obtained, increasing the frequency of supervision, and expelling participants from the program and placing them in jail.<sup>162</sup> One of the purported strengths of the MHC system is its ability to forge and enhance linkages between the CJS and the community mental health system.<sup>163</sup>

Concerns, however, have also been expressed about the MHC system. For example, because it does not attempt to process offenders as quickly as the traditional criminal court, necessitates making additional services available, and requires extensive judicial involvement, the

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159. Allison D. Redlich, *Voluntary, But Knowing and Intelligent?*, 11 PSYCHOL. PUB. POL'Y & L. 605, 606 (2005); see also Boothroyd et al., *supra* note 146, at 58 (noting discussions addressed treatment/placement issues (83.6% of cases), current or prior symptoms and diagnoses (42.2%), and use of psychotropic medications (24.5%)). While beyond the scope of this Article, it should be noted that heavy reliance on medications to address mental illness is the subject of considerable ongoing debate. See generally IRVING KIRSCH, *THE EMPEROR'S NEW DRUGS: EXPLODING THE ANTIDEPRESSANT MYTH* 3 (2010) ("In this book I invite you to share this journey in which I moved from acceptance to dissent, and finally to a thorough rejection of the conventional view of antidepressants."); ROBERT WHITAKER, *ANATOMY OF AN EPIDEMIC: MAGIC BULLETS, PSYCHIATRIC DRUGS, AND THE ASTONISHING RISE OF MENTAL ILLNESS IN AMERICA* 11 (2010) ("[I]f we uncover . . . that psychiatric drugs are in fact *fueling* the epidemic of disabling mental illness—what then?").

160. Redlich, *supra* note 159, at 607.

161. *Id.* at 607-08.

162. Lurigio & Snowden, *supra* note 146, at 207.

163. GOLDKAMP & IRONS-GUYNN, *supra* note 96, at 67-68.

considerable expense of this alternative has been noted.<sup>164</sup> As state systems in general and court systems in particular face significant budgetary constraints,<sup>165</sup> the question arises whether the funding needed for MHCs can be sustained even for those courts that have been previously established, much less be found to support such programs in the many jurisdictions that do not currently have a MHC.<sup>166</sup> In addition, some have questioned whether these courts actually reduce recidivism, a pivotal issue in light of their expense.<sup>167</sup> Another concern is that MHCs, with their tendency to limit participation to relatively high-functioning, treatment-compliant offenders—which may in part explain the purported successes they have achieved—may not benefit those offenders who have the greatest treatment needs and are the most vulnerable within the CJS.<sup>168</sup>

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164. Christin E. Keele, *Criminalization of the Mentally Ill: The Challenging Role of the Defense Attorney in the Mental Health Court System*, 71 *UMKC L. REV.* 193, 203 (2002).

165. Bob Drogin, *Trials Halted to Save Money*, *L.A. TIMES*, Dec. 22, 2008, at A1 (“At least [20] states, including California, have slashed court budgets and other government services as their economies have tanked.”); Paul Elias, *San Francisco Court Closure: 200 Employees and 25 Courtrooms Gone*, *HUFFPOST SAN FRANCISCO* (July 18, 2011), [http://www.huffingtonpost.com/2011/07/18/san-francisco-courtroom-closure\\_n\\_902097.html](http://www.huffingtonpost.com/2011/07/18/san-francisco-courtroom-closure_n_902097.html); Joseph Goldstein, *After Cuts, Defendants’ Wait to See a Judge Often Exceeds 24 Hours*, *N.Y. TIMES*, July 20, 2011, at A22; Lloyd Mann, *California Financial Crisis Hits Los Angeles Courts Hard*, *EXAMINER.COM* (July 7, 2009), <http://www.examiner.com/legal-profession-in-los-angeles/california-financial-crisis-hits-los-angeles-courts-hard> (“As a result of the severe financial crisis in California, Los Angeles Courtrooms will be going out of business for one day this month, followed by one day each month until further notice.”); John Schwartz, *Critics Say Budget Cuts for Courts Risk Rights*, *N.Y. TIMES*, November 27, 2011, at A18; Wyatt, *supra* note 89.

166. Steve Kanigher, *Nevada’s Mental Health Courts Are in Serious Jeopardy*, *LAS VEGAS SUN*, May 1, 2011, at 1; Shannon Murphy, *Mental Health Court May Lose State Funding, Advocates Try to Save ‘Life-changing’ Program*, *FLINT J.* (Michigan), Mar. 16, 2009, at A3.

167. Johnston, *supra* note 144, manuscript at 4-5 (“It is unclear whether mental health courts actually reduce recidivism . . . . The few rigorous studies that have been published have reached generally positive but inconsistent conclusions, ranging from finding no effect on re-arrest rate to a decrease in recidivism . . . of fifteen percent at eighteen months.” (citations omitted)).

168. See Wolff, *supra* note 146, at 432. Wolff has criticized MHCs for only accepting offenders who have committed low-level offenses, have no prior

Such courts may also find it difficult to identify needed community treatment services, particularly when the availability of such services is limited or costly, mental health providers are unwilling to work with this population, or these services have previously proven ineffective for the individual.<sup>169</sup> Concern has also been raised that the interjection of these courts may have the effect of skewing the mental health service delivery system by placing a new and significant demand on limited existing treatment resources.<sup>170</sup>

In addition, although MHCs may be more effective than traditional courts at encouraging treatment compliance, a substantial number of offenders still decline these services.<sup>171</sup> A key factor for these courts is the level of coercion perceived by the offender.<sup>172</sup> It is believed that treatment is less likely to be accessed and to be successful if the offender believes it was imposed.<sup>173</sup> Particularly if the relatively coercive model employed by drug courts is relied upon,<sup>174</sup> offenders with a mental disorder may be less

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criminal histories of violence, and are willing to accept that they need treatment for, or assistance with, their mental disorder. *Id.* at 431.

169. GOLDKAMP & IRONS-GUYNN, *supra* note 96, at 75-76; Keele, *supra* note 164, at 202.

170. GOLDKAMP & IRONS-GUYNN, *supra* note 96, at 75-76; Johnston, *supra* note 144, manuscript at 7 (noting “the potential of these courts to divert resources from law-abiding individuals with mental illnesses”); Keele, *supra* note 164, at 202. For a discussion of recent cut-backs in the availability of mental health services in general, see *supra* note 89 and accompanying text.

171. Boothroyd et al., *supra* note 146, at 63-64 (finding that 53% of the offenders appearing before a mental health court used behavioral health services after their court appearance compared to only 28% of the offenders appearing before a non-mental health comparison court).

172. Poythress et al., *supra* note 14, at 519-20, 526; *see also supra* note 142 and accompanying text.

173. Poythress et al., *supra* note 14, at 519-20, 526.

174. *See, e.g.,* GOLDKAMP & IRONS-GUYNN, *supra* note 96, at 57 (“[P]articipants who cannot comply with the requirements of the treatment process are sanctioned . . . . They often receive stern lectures and reprimands, . . . possibly being placed in a more restrictive and structured treatment setting, and, occasionally, being returned to jail until further plans can be made.”).

receptive to and compliant with the mandated treatment program.<sup>175</sup>

Similarly, although an effort is made to engage offenders during the proceedings, their involvement, while greater than under the traditional criminal justice model, remains relatively limited.<sup>176</sup> To the extent offenders with a mental disorder are not engaged by the MHC proceedings, they may fail to develop insights into the consequences of their criminal acts and their need for mental health treatment.<sup>177</sup> Related to these challenges, another apprehension is that MHCs, as an appendage of the

175. *See id.* at 20 (“How well punitive (deterrent) sanctions serve to promote the therapeutic process in a mental health setting remains an important and somewhat controversial question.”); *id.* at 54 (“San Bernardino differs from the other early mental health courts in its close adaptation of the drug court model to the mental health court treatment process, including the use of jail as a sanction.”); Johnston, *supra* note 144, manuscript at 6 (“Some commentators . . . have expressed concerns about the coercive nature of the courts . . .” (citing Redlich, *supra* note 159)); Keele, *supra* note 164, at 200-01.

176. Boothroyd et al., *supra* note 146, at 57 (noting that, on average, fifty-four utterances were made at the initial hearing, with the defendant making seventeen of them). Indeed, a variable considered important for the successful functioning of a MHC is whether the offender perceives that he or she has been treated fairly, treated with respect by the judge, and allowed to voice his or her personal situation. Poythress et al., *supra* note 14, at 520-21, 527.

177. For example, Bernstein & Seltzer have noted that:

Many of the existing [mental health] courts include practices that are unnecessarily burdensome to defendants, that make it harder for them to reintegrate into the community and that may compromise their rights.

Few of the courts are part of any comprehensive plan to address the underlying failure of the service system to reach and effectively address the needs of people at risk of arrest. Substantial numbers of mental health court participants are people who should not have been arrested in the first place. . . .

. . . .

No diversion or alternative disposition program . . . can be effective unless the services and supports that individuals with serious mental illnesses need to live in the community are available.

Bernstein & Seltzer, *supra* note 7, at 147. Similarly, to the extent that an offender is not competent to participate in these proceedings, the offender is also unlikely to be engaged by and benefit from the MHC proceedings. *See* Johnston, *supra* note 144, manuscript at 6 (“[Some commentators] have expressed concerns about . . . offenders’ competence to consent to diversion.”).

relatively fast-paced CJS, may find it difficult to tolerate the relatively slow, erratic, and uncertain course of treatment often associated with offenders who have a mental disorder, thus making ill-suited demands of offenders that are counter-productive.<sup>178</sup>

Finally, and of particular relevance to this Article, although some effort is typically made to have the *offender* play a role in the proceedings and engage in a dialogue with the judge,<sup>179</sup> studies show that participation by and input from the *victim* of the crime is quite limited.<sup>180</sup> Relatedly, concern has been voiced that MHCs allow offenders to escape responsibility for their actions, which may undercut the restorative function of the CJS and fail to repair the harm done to the victim and to prior relationships involving the victim, the community, and the offender.<sup>181</sup>

Writing about several of the problems MHCs illicit, one commentator contends there are “other ways to engage the court as a therapeutic agent that will yield a better portfolio of consequences.”<sup>182</sup> Developing an alternative with a stronger restorative justice component may provide a valuable (and less expensive) alternative to MHCs, drug courts, probation, and other mechanisms for (1) diverting offenders with a mental disorder away from incarceration, (2) reducing recidivism, and (3) promoting the well-being and recovery of these individuals, while also better addressing the needs of the victims of these crimes.

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178. GOLDKAMP & IRONS-GUYNN, *supra* note 96, at 73-75.

179. Poythress et al., *supra* note 14, at 521 (“In MHC defendants become engaged in a dialogue with a highly respected authority who speaks to them in a respectful manner.”). *But see* Boothroyd et al., *supra* note 146, at 57 (noting that only 33% of the utterances made at initial MHC hearings came from the defendant).

180. Boothroyd et al., *supra* note 146, at 57 (determining that other witnesses, including victims, did not testify at MHC hearings). *But see* Poythress et al., *supra* note 14, at 518 (determining that the consent of the victim is required before an individual charged with assault may come before the Broward County MHC).

181. *See* Keele, *supra* note 164, at 202.

182. Wolff, *supra* note 146, at 431.

## IV. THE RESTORATIVE JUSTICE APPROACH

The restorative justice approach, somewhat like problem-solving courts, seeks to move beyond the relatively narrow emphasis of the CJS on imposing punishment. The restorative justice model emphasizes instead reparation for the harm incurred by the victim, reintegration of the offender into the community, and the restoration of the community's moral equilibrium and tranquility.<sup>183</sup> Although formally dating only from the 1970s,<sup>184</sup> this approach has become widely established and employed.<sup>185</sup> Proponents view restorative justice as an approach that offers "a far more accountable, understandable, and healing system of justice" than the traditional CJS, which they believe alienates both offenders and victims.<sup>186</sup> While proponents generally recognize that this approach is not a useful

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183. Schopp, *supra* note 149, at 666-67.

184. Brenda Sims Blackwell & Clark D. Cunningham, *Taking the Punishment Out of the Process: From Substantive Criminal Justice Through Procedural Justice to Restorative Justice*, 67 *LAW & CONTEMP. PROBS.*, Autumn 2004, at 59, 68 (2004). The roots of the restorative justice approach, however, have been traced back to antiquity when communities had to rely upon themselves to resolve a dispute stemming from a breach of society's norms. JOHN BRAITHWAITE, *RESTORATIVE JUSTICE AND RESPONSIVE REGULATION 5* (2002) ("Restorative justice has been the dominant model of criminal justice throughout most of human history for perhaps all the world's peoples."); HEATHER STRANG, *REPAIR OR REVENGE: VICTIMS AND RESTORATIVE JUSTICE 3-5* (2002). In addition, the juvenile justice system in this country has long contained elements of a restorative justice approach. See Thomas L. Hafemeister, *Parameters and Implementation of a Right to Mental Health Treatment for Juvenile Offenders*, 12 *VA. J. SOC. POL'Y & L.* 61, 72-82 (2004); Steve Mulligan, *From Retribution to Repair: Juvenile Justice and the History of Restorative Justice*, 31 *U. LA VERNE L. REV.* 139, 139-40 (2009); William R. Nugent et al., *Participation in Victim-Offender Mediation and the Prevalence of Subsequent Delinquent Behavior: A Meta-Analysis*, 14 *RES. SOC. WORK PRAC.* 408, 408 (2004).

185. There are over 300 mediation programs in North America and more than 500 in Europe. PRISON FELLOWSHIP INT'L, CTR. FOR JUSTICE & RECONCILIATION, *RESTORATIVE JUSTICE BRIEFING PAPER 1* (2008), available at <http://www.pfi.org/cjr/restorative-justice/introduction-to-restorative-justice-practice-and-outcomes/briefings/what-is-restorative-justice>.

186. Mark S. Umbreit et al., *Restorative Justice in the 21st Century: A Social Movement Full of Opportunities and Pitfalls*, 89 *MARQ. L. REV.* 251, 304 (2005). In addition, as courts across the country have come under increasing fiscal pressure, the restorative justice approach may provide a valuable alternative. See *supra* note 165 and accompanying text.

vehicle for fact-finding or adjudicating guilt,<sup>187</sup> they assert that having the victim and offender participate voluntarily in a session designed to reach an equitable and just outcome can lead to better long-term consequences for those involved.<sup>188</sup>

Methodologically, a restorative justice approach, like mediation and family conferencing,<sup>189</sup> employs informal interactions and decision-making that actively involves the victim, the offender, and relevant members of the community in seeking to develop mutual understanding and an acceptable plan for both repairing the harm done and preventing future harm by the offender.<sup>190</sup> A variation on this model also seeks to “restore” the criminal offender to the community, as offenders may have become alienated and have “lost connection with any kind of healthy or supportive community.”<sup>191</sup> These sessions involve an exchange of information that enables the participants to appreciate what precipitated these events, as well as their consequences and impact.<sup>192</sup> The goal is a cathartic process in which offenders express shame and remorse for their actions and in which the victims then forgive the offenders for their acts.<sup>193</sup> This exchange is intended to promote the recovery of the victim, generate insights and reduce recidivism by the offender, and allow for the reintegration of the offender into the community.<sup>194</sup>

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187. Schopp, *supra* note 149, at 668.

188. See Barton Poulson, *A Third Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice*, 2003 UTAH L. REV. 167, 177-78.

189. Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 130-31 (2004) (“Victim-offender mediation brings offenders . . . and victims face to face. . . . Family group conferences bring together the families of offenders and victims to discuss crimes, mediated by a trained facilitator.”).

190. BRAITHWAITE, *supra* note 184, at 11.

191. Blackwell & Cunningham, *supra* note 184, at 59, 69. This variation also enables the restorative justice approach to be applied to so-called “victimless” crimes (e.g., traffic offenses, drug possession, prostitution, gambling), with the focus on the harm to the community at large. *Id.* at 69.

192. *See id.* at 68.

193. Schopp, *supra* note 149, at 667.

194. *See* BRAITHWAITE, *supra* note 184, at 69.

The restorative justice approach focuses on the harm suffered by the individuals involved, the adverse effect on their relationships, and the deleterious impact to the surrounding community, asserting that a failure to redress this damage will result in future crime and a weakening and deterioration of community life.<sup>195</sup> Its proponents argue that the traditional criminal justice approach “invites the public and legal system to indulge the passion for revenge untroubled by moral qualms.”<sup>196</sup> Restorative justice, on the other hand, stands for the proposition that “justice” must amount to more than punishing the guilty: that crime “creates obligations to make things right,” and that responses to crime should be aimed at “healing the wounds” caused by the criminal acts.<sup>197</sup>

Victims, offenders, and the community in which they live are viewed as the primary stakeholders in the process, not the abstract entity referred to as the “State.”<sup>198</sup> From this perspective, the State is not entitled to dictate the decision-making process and impose sanctions unilaterally following a criminal act.<sup>199</sup> Further, this model seeks to restore a sense of control to the victims by allowing them to determine what they need physically and emotionally to repair the harm they experienced.<sup>200</sup> It also attempts to enhance insight and responsibility in offenders by helping them appreciate the consequences of their actions and by giving them a sense of control over the steps taken to make amends for their actions.<sup>201</sup>

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195. See GORDON BAZEMORE & MARA SCHIFF, *RESTORATIVE COMMUNITY JUSTICE* 4 (2001).

196. David Dolinko, *Three Mistakes of Retributivism*, 39 *UCLA L. REV.* 1623, 1652 (1992).

197. BAZEMORE & SCHIFF, *supra* note 195, at 7.

198. See *id.* at 8.

199. Allison Morris & Warren Young, *Reforming Criminal Justice: The Potential of Restorative Justice*, in *RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE* 11, 14 (Heather Strang & John Braithwaite eds., 2000).

200. *Id.* at 17.

201. *Id.* at 18 (“The presence of victims also means that offenders’ justifications for their offending—‘she could afford it’, ‘he is insured’, and so on—can be challenged. Indeed, restorative conferences are typically emotionally powerful occasions far removed from the typical courtroom . . . Overall, about a half of the young offenders . . . said that they had felt involved in the conferencing process at least in some way. They were able to say what they

In sum, restorative justice seeks to promote the regeneration of all involved parties. Unlike conventional procedures, this approach directly addresses the emotional impact of the crime that occurred.<sup>202</sup> Proponents emphasize:

[I]n any situation in which we have been harmed in some way . . . our hope is that the person responsible for the harm will at the very least acknowledge what he or she did, perhaps recognize the devastating effects his or her acts created in our life, and maybe even offer an apology. . . . Though we might find support from our family and friends for our misfortune, without an acknowledgment of our lessened state by the one who caused it, we find it hard to simmer down; we feel that we are still being dismissed, that our needs are being written off, that we don't count.<sup>203</sup>

As noted, in the conventional system, victims are excluded from the process almost entirely,<sup>204</sup> leaving them with an emotional void that can be difficult to fill. During a restorative session, victims can seek an acknowledgement of the harm done from the offender, accept an ensuing apology, and move forward with their recovery.<sup>205</sup> Further, acknowledging the harm can indicate that the thought process underlying and responsible for the crime has begun to dissolve, replaced by a greater concern for others and the taking of steps to prevent recurrences.<sup>206</sup> The crime cannot be undone, but research shows that “[o]nce we hear words spoken that acknowledge the pain and distress of our lives, as we experience it, we find ourselves enabled to move on, even if only slightly.”<sup>207</sup>

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wanted to and to speak without pressure . . . . They also acknowledged the power of meeting victims.”).

202. *Id.* at 17.

203. SULLIVAN & TIFFT, *supra* note 55, at 2-3 (citations omitted).

204. *See supra* notes 71-75 and accompanying text. As discussed, even in conjunction with mental health court proceedings, the impact of a crime on the victim receives little attention and the victim has little role to play in subsequent CJS proceedings. *See supra* notes 179-80 and accompanying text.

205. *See Schopp, supra* note 149, at 667.

206. *See Morris & Young, supra* note 199, at 18.

207. SULLIVAN & TIFFT, *supra* note 55, at 4.

The offender is also expected to benefit from a restorative justice session.<sup>208</sup> Supporters of this approach assert that conventional programs often “show little or no concern for the needs of those who were the source of the harm, writing them off as animals or non-persons.”<sup>209</sup> The restorative justice model, however, seeks to rehabilitate offenders and restore them to the community.<sup>210</sup> Interactions with and reparations to the victim can be equally cathartic for offenders, who, after being given an opportunity to explain their actions and to see how their actions were viewed by other parties, can begin to forgive society and various individuals for perceived injustices, acknowledge responsibility, form bonds again with the victim and other individuals, and take the necessary steps to reenter the community.<sup>211</sup>

Both material and symbolic reparations are important facets of restorative justice. As stated, a process is required in which (1) the offender expresses genuine shame and remorse for his/her actions, and (2) the victim forgives the offender.<sup>212</sup> Restorative justice proponents believe that the offender’s expression of genuine shame is the key to an effective session.<sup>213</sup> Shame functions to bring home to

208. See Blackwell & Cunningham, *supra* note 184, at 69.

209. SULLIVAN & TIFFT, *supra* note 55, at 21-22; see also Poythress et al., *supra* note 14, at 521 (“[CJS] [h]earings are conducted by remote video, the judge and attorneys do most of the talking, and the implicit (if not explicit) agenda appears to be quick resolution of the charges, often through a plea agreement that is offered by the judge and agreed to by counsel, and defendants usually are not encouraged to speak except in response to plea offerings.”).

210. See Blackwell & Cunningham, *supra* note 184, at 68.

211. Morris & Young, *supra* note 199, at 18.

212. See *supra* note 193 and accompanying text.

213. Gabrielle Maxwell & Allison Morris, *What Is the Place of Shame in Restorative Justice?*, in *CRITICAL ISSUES IN RESTORATIVE JUSTICE* 131, 134 (Howard Zehr & Barb Toews eds., 2004). Skeptics may assert that an offender’s mouthing of the words of apology and shame is merely an empty exercise motivated by a desire to avoid punishment, but it should be noted that psychological research suggests that expressing shame, if it is not the product of external force, can shape the person’s attitudes to become more consistent with the statements expressed (i.e., the act of saying words, increases belief in the words). See PHILIP G. ZIMBARDO ET AL., *INFLUENCING ATTITUDES AND CHANGING BEHAVIOR* 72 (1977) (“To change attitudes according to dissonance theory, first induce behavior change under manipulated conditions of high choice and minimally adequate justification, then provide an opportunity for the new

offenders the seriousness and consequences of the offense.<sup>214</sup> The goal is not to humiliate them, as that is likely to simply harden them and increase recidivism, but rather to give them insights from which they can learn and thereby avoid such behavior in the future.<sup>215</sup> Advocates acknowledge that sometimes offenders experience too little shame or are too apathetic for a session to be successful.<sup>216</sup> Nevertheless, the emotional meeting of the minds gained through the shame and forgiveness sequence is an integral part of the restorative justice process.<sup>217</sup>

Considerable empirical evidence shows that a restorative justice approach can be effective.<sup>218</sup> Indeed, victims, offenders, and community representatives have all expressed high satisfaction levels with the restorative justice process.<sup>219</sup>

For example, a number of studies have found that *victims* involved in the criminal justice process prefer (1) a less formal process where their views are solicited and carry weight, (2) more information about developments in and the outcomes of their cases, (3) increased participation in their cases, (4) respectful and fair treatment, and (5) emotional

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attitude to be expressed.”); Eric Stice, *The Similarities Between Cognitive Dissonance and Guilt: Confession as a Relief of Dissonance*, 11 CURRENT PSYCHOL. 69, 69 (1992) (“[B]oth dissonance and guilt are states of negative emotional arousal. Thus, both dissonance and guilt may motivate the individual to act in ways that reduce this negative effect once it has been aroused.”).

214. JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 178-79 (1989).

215. *Id.* at 179; SULLIVAN & TIFFT, *supra* note 55, at 45-46; Thomas J. Scheff, *Community Conferences: Shame and Anger in Therapeutic Jurisprudence*, 67 REV. JUR. U.P.R. 97, 104-05 (1998).

216. Scheff, *supra* note 215, at 105.

217. Maxwell & Morris, *supra* note 213, at 138.

218. BRAITHWAITE, *supra* note 184, at 69; *see also* NEW ZEALAND MINISTRY OF JUSTICE, REOFFENDING ANALYSIS FOR RESTORATIVE JUSTICE CASES: 2008 AND 2009—A SUMMARY (2011); Kate E. Bloch, *Reconceptualizing Restorative Justice*, 7 HASTINGS RACE & POVERTY L.J. 201, 208 (2010).

219. Bloch, *supra* note 218, at 208; John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 20 (1999); AUDREY EVJE & ROBERT CUSHMAN, A SUMMARY OF THE EVALUATIONS OF SIX CALIFORNIA VICTIM OFFENDER RECONCILIATION PROGRAMS 3 (2000), available at <http://www.courts.ca.gov/documents/vorp.pdf>; Poulson, *supra* note 188, at 198.

restoration, including an apology from the offender.<sup>220</sup> One five-year study found these preferences are more often realized in cases randomly assigned to a restorative justice session than in cases assigned to a court for resolution.<sup>221</sup> Victims tend to say their session was helpful and allowed them to address and resolve their feelings about the offense and the offender.<sup>222</sup> In addition, involvement in a restorative justice session has been shown to: decrease victims' feelings of fear, anger, and anxiety; enhance their sense of dignity, self-respect, and self-confidence; and enable them to forgive the offender and develop a sense of closure regarding their case.<sup>223</sup> A particularly striking result was that more than half the victims of violence whose cases were resolved through traditional court proceedings said they would harm their offender if they had the chance, compared to only 9% of those who had completed a restorative justice session.<sup>224</sup>

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220. STRANG, *supra* note 184, at 198; Strang & Sherman, *supra* note 74, at 20-25.

221. Strang & Sherman, *supra* note 74, at 25-35. The study found that 79% of the victims assigned to a restorative justice session reported they were informed in good time about when their case was to be decided (vs. 14% of the victims assigned to a court proceeding). *Id.* at 26-27. In addition, 93% said they were given an opportunity to explain the loss and harm that resulted, *id.* at 28, and 86% (vs. 16%) said they received apologies from the offender. *Id.* Meanwhile, only 5% (vs. 18%) said they expected the offender to repeat the offense, *id.* at 29, and 90% reported they had been treated fairly and with respect. *Id.* at 35.

222. STRANG, *supra* note 184, at 198; *see also* Braithwaite, *supra* note 219, at 22 (noting that 79% of victims were satisfied with the outcome vs. only 57% of those who did not have mediation); Poulson, *supra* note 188, at 178-98. Poulson collapsed results from all relevant empirical studies, and found that victims in restorative justice were 3.4 times more likely than victims in court to believe that the criminal justice system was fair, Poulson, *supra* note 185, at 179; 2.8 times more likely to be satisfied with the way their case was handled, *id.* at 180; 8.8 times more likely to believe that they had been able to tell their story during the proceedings, *id.* at 182; and 2.3 times more likely to say that the mediator had been fair than to say that about the judge. *Id.* at 186. They were also 4.9 times more likely to say that the offender had been held accountable, *id.* at 188; 2.6 times more likely to rate the outcome as fair, *id.* at 192; 2.3 times more likely to be satisfied with the outcome, *id.* at 193; 2.4 times more likely to end up with better perceptions of the other parties' behavior, *id.* at 194; half as likely to feel upset about the crime afterwards, *id.* at 196; and one-third as likely to be afraid of revictimization. *Id.* at 197.

223. STRANG, *supra* note 184, at 198; *see also* Poulson, *supra* note 188, at 178, 182.

224. Poulson, *supra* note 188, at 178, 182.

In addition, participants reported increased levels of satisfaction with the CJS in general.<sup>225</sup>

Studies have also found a high level of success and satisfaction among *offenders* participating in restorative justice programs.<sup>226</sup> For example, an analysis found that 64% to 100% of reparation and compensation agreements generated by a restorative justice session were fully completed by the offenders.<sup>227</sup> In general, rates of restitution and compliance with agreements by offenders have been found to be significantly higher than in traditional court settings.<sup>228</sup> Further, offenders generally have been found to act in a more positive manner following conviction when they perceive that the criminal justice process is just and fair,<sup>229</sup> and research indicates that they perceive restorative justice sessions as more fair and more just than the traditional CJS process.<sup>230</sup> It has also been asserted that

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225. ROBERT DAVIS ET AL., *MEDIATION AND ARBITRATION AS ALTERNATIVE TO PROSECUTION IN FELONY ARREST CASES, AN EVALUATION OF THE BROOKLYN DISPUTE RESOLUTION CENTER* 64 (1980); MARK S. UMBREIT, *MEDIATION OF CRIMINAL CONFLICT: AN ASSESSMENT OF PROGRAMS IN FOUR CANADIAN PROVINCES* 106 (1995).

226. Braithwaite, *supra* note 219, at 26 (“[O]ffender satisfaction . . . has been extremely high.”).

227. *Id.* at 23-24; *see also* Blackwell & Cunningham, *supra* note 184, at 68-83.

228. *See, e.g.*, Jeff Latimer et al., *The Effectiveness of Restorative Justice Practices: A Meta-Analysis*, 85 *PRISON J.* 127, 137 (2005) (finding 33% higher restitutionary compliance compared to control cases); Mark Umbreit et al., *Victim Offender Mediation: Evidence Based Practice Over Three Decades*, *THE HANDBOOK OF DISPUTE RESOLUTION* 455, 461-63 (2005) (ascertaining 81% compliance rates in restorative justice cases compared to 58% in court).

229. *See infra* Part V.

230. Braithwaite, *supra* note 219, at 26-27; *see also* Bloch, *supra* note 218, at 208; Latimer et al., *supra* note 228, at 136; Poulson, *supra* note 188, at 178-98. After collapsing results from all relevant empirical studies, Poulson found that offenders in restorative justice sessions were 2.0 times more likely than offenders in court to believe that the CJS was fair, Poulson, *supra* note 188, at 178-79; 1.9 times more likely to be satisfied with the way their case was handled, *id.* at 181; and 4.1 times more likely to believe they had been able to tell their story during the proceedings. *Id.* at 183. Offenders were also 2.1 times more likely to believe their opinions were adequately considered, *id.* at 185; 6.0 times more likely to say the mediator had been fair than to say that about the judge, *id.* at 186; 4.8 times more likely to say they had been held accountable, *id.* at 188; 2.6 times more likely to rate the outcome as fair, *id.* at 191-92; 1.6 times more likely to be satisfied with the outcome, *id.* at 193; 1.9 times more

offenders derive an increased sense of self-respect from the restorative justice process.<sup>231</sup>

In addition, research on restorative justice programs has shown a reduction in the recidivism rates of participating offenders.<sup>232</sup> One study found that offenders who apologized to their victims were three times less likely to be convicted of a subsequent crime during the next four years than those who had not.<sup>233</sup> This study also determined that offenders who participated in restorative justice sessions with their victims were over four times less likely to be convicted again during the next four years than when no victim had been present.<sup>234</sup> As one commentator put it, “the court/prison system encourages offenders to deny their responsibility, which may be one reason for [its] high rate of recidivism.”<sup>235</sup>

Reintegration into the community is another priority of the restorative justice process. Offenders who participated in a restorative justice program were more likely to find jobs, pursue educational goals, and partner with community members. When these steps were taken, offenders were

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likely to end up with better perceptions of the other parties’ behavior, *id.* at 194; and 6.9 times more likely to apologize. *Id.* at 190.

231. Strang & Sherman, *supra* note 74, at 37.

232. Kathleen Daly, *Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases*, 46 *BRIT. J. CRIMINOLOGY* 334, 351 (2006) (participating youth sexual offenders had a lower prevalence of reoffending than those who did not); EVJE & CUSHMAN, *supra* note 219, at 49, 60, 69, 84, 96, 103 (showing that five of six victim-offender mediation programs surveyed reported reduced recidivism); *see also* Strang & Sherman, *supra* note 74, at 38-39 (noting that in all seven randomized field trials of restorative justice diversions from prosecution, the diversion program had worked at least as well as prosecution in preventing repeat offending and in two of the trials, restorative justice had clearly done better). For a review of studies comparing the recidivism rates of offenders who participated in restorative justice sessions, *see* Braithwaite, *supra* note 219, at 27-30.

233. HEATHER STRANG & JOHN BRAITHWAITE, *RESTORATIVE JUSTICE: PHILOSOPHY TO PRACTICE* 19 (2000) (citing GABRIELLE MAXWELL & ALLISON MORRIS, *UNDERSTANDING RE-OFFENDING* (1999)); *see also* Poulson, *supra* note 188, at 202 (reporting a 32% reduction in recidivism after one year for participants in a restorative justice program compared to non-participants).

234. STRANG & BRAITHWAITE, *supra* note 233, at 19.

235. Scheff, *supra* note 215, at 100.

subsequently less likely to be convicted of crimes.<sup>236</sup> In general, the research has demonstrated that these programs can outperform traditional court proceedings.<sup>237</sup>

#### V. THE PROCEDURAL JUSTICE APPROACH

The framework of “procedural justice,” drawn from the field of social psychology, can also provide useful guidance for crafting a better response to criminal offenders. This model asserts that people’s evaluations of the resolution of a dispute (including matters resolved by the judicial system) are influenced more by their perception of the fairness of the process employed than by their belief regarding whether the “right” outcome was reached.<sup>238</sup> In other words, procedural justice proponents believe that “process matters,” such that “when the people affected by a decision-making process perceive the process to be just, they are much more likely to accept the outcomes of the process, even when the outcomes are adverse.”<sup>239</sup>

Moreover, the benefits of procedural justice are not limited to an acceptance of the immediate decision. Rather, “acceptance of decisions made by *legal* actors is associated with higher levels of perceived legitimacy of the legal system as well as a heightened sense of obligation to obey the law and cooperate with legal authorities.”<sup>240</sup>

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236. STRANG & BRAITHWAITE, *supra* note 233, at 20.

237. Poulson, *supra* note 188, at 177 (“Overall, restorative justice practices substantially outperformed court on almost every item for both victims and offenders.”).

238. See Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26, 26 (2007) (“Studies suggest first that procedural justice has an impact on whether people accept and abide by the decisions made by the courts, both immediately and over time. Second, procedural justice influences how people evaluate the judges and other court personnel they deal with, as well as the court system and the law.”). See generally E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 1 (1988) (“[This book] views people as more interested in issues of process than issues of outcome, and it addresses the way in which their evaluations of experiences and relationships are influenced by the *form* of social interaction.”).

239. Michael M. O’Hear, *Explaining Sentences*, 36 FLA. ST. U. L. REV. 459, 478 (2009).

240. *Id.*

Research further shows that an effective alternative dispute resolution mechanism requires the implementation of procedural justice. It has been determined that “the use of fair procedures encourages a positive climate among the parties, which is more likely to promote both a long-term relationship and adherence to the agreements made about how to handle issues . . . that are related to that relationship.”<sup>241</sup> It has also been noted that “fair procedures lead to a concern about delivering gains to all parties rather than winning over others” and are “a key to the development of stable and lasting solutions to conflicts.”<sup>242</sup>

In terms of what makes a particular process procedurally just, several factors have been identified, including whether: (1) the individual had an opportunity to state his or her case and provide input when decisions were being made (“voice”); (2) authorities were seen as unbiased, consistent, and principled (“neutrality”); and (3) authorities were seen as benevolent and having honestly considered the individual’s needs and concerns (“trustworthiness”).<sup>243</sup>

Of direct relevance to this Article, studies indicate that procedural justice is a key to the success of mental health

241. Tyler, *supra* note 238, at 26.

242. *Id.* at 27. In one study, adults arrested for driving while intoxicated had their case resolved through alternative legal procedures. Interviewed two years later, it was determined that their views of the legitimacy of the law were related to their perceptions of the fairness of their case. Those who saw their hearing as fairer reoffended at a reduced rate of 25% during the four years after their hearing. Tom R. Tyler et al., *Reintegrative Shaming, Procedural Justice, and Recidivism: The Engagement of Offenders’ Psychological Mechanisms in the Canberra RISE Drinking-and-Driving Experiment*, 41 *LAW & SOC’Y REV.* 553, 555-58 (2007); *see also* TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* 28-45 (2002) (studying a sample of 1,656 people in Los Angeles and Oakland regarding a recent personal experience with the police or the courts, it was found that the primary factor shaping the willingness to accept a court’s decision was the fairness of the proceedings, with procedural justice also the primary factor shaping overall views about the court system; results were consistent regardless of the person’s social or economic background, gender, and whether the person was white, Hispanic, or African-American); Blackwell & Cunningham, *supra* note 184, at 60-67.

243. O’Hear, *supra* note 239, at 479; *see also* Adam Lamparello, *Incorporating the Procedural Justice Model Into Federal Sentencing Jurisprudence in the Aftermath of United States v. Booker: Establishing United States Sentencing Courts*, 4 *N.Y.U. J.L. & LIBERTY* 112, 118-19 (2009).

courts.<sup>244</sup> As noted, attention has been given to ensuring that participation in these courts is voluntary and that a cooperative approach be employed.<sup>245</sup> It has been asserted that mental health courts will be more successful if they listen to participants and incorporate their views into treatment decisions.<sup>246</sup> Rather than being passive participants in a traditional court with “a clear agenda of rapid case disposition,” participants should be actively “engaged in a dialogue with a highly-respected authority who speaks to them in a respectful manner,” thereby enhancing the likelihood that they will feel positive about and support the outcome of these hearings.<sup>247</sup>

VI. COMBINING THE PRINCIPLES OF RESTORATIVE AND  
PROCEDURAL JUSTICE TO FIND A BETTER MEANS TO RESPOND  
TO MANY OFFENDERS WITH A MENTAL DISORDER

A. *Restorative and Procedural Justice in the Context of  
Mental Disorders*

Combining the principles of restorative and procedural justice within a dispute-resolution model has received a limited degree of attention, usually in the context of a discussion of therapeutic jurisprudence.<sup>248</sup> Although the primary focus of each is ostensibly different—the former focusing more on the victim of a crime and the latter more on the offender<sup>249</sup>—both seek to do more than simply process

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244. Poythress et al., *supra* note 14, at 521.

245. See *supra* notes 154-55 and accompanying text.

246. Poythress et al., *supra* note 14, at 519-21, 526-27.

247. *Id.* at 521.

248. See, e.g., Blackwell & Cunningham, *supra* note 184, at 67-83; Scheff, *supra* note 215, at 97-98; Schopp, *supra* note 149, at 667; Tyler et al., *supra* note 242, at 553. For a discussion of several programs combining these elements, see Blackwell & Cunningham, *supra* note 184, at 59.

249. It should be noted that both the procedural and the restorative justice paradigms are attuned to the alternative perspective as well. Thus, restorative justice also addresses the mindset and involvement of the offender, see *supra* notes 208-11, 226-37 and accompanying text, while procedural justice is also sensitive to the victims' perceptions. See Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1903-04 (2002).

criminal cases in the most efficient and expeditious manner. They recognize that ignoring the victims' and the offenders' perceptions and the emotional impact of the criminal proceedings on them is often counterproductive and can leave long-term scars that are ultimately harmful, not only to the parties involved, but for society in general.<sup>250</sup>

A failure to address these shortcomings places the parties at risk and enhances the likelihood that similar events will occur in the future. For example, if the wounds of the victim and the anger of the offender are unresolved, this will undercut the ability of both of them to learn, understand, and move forward; to form trusting relationships; and to fulfill roles as productive members of society.<sup>251</sup>

A well-crafted restorative justice approach incorporates procedural justice principles by providing both the victim and the offender with a forum in which they will have an opportunity to systematically raise and address their concerns and needs, explore the interconnection and interdependence of events in a neutral and trustworthy fashion, and share and probe their personal stories.<sup>252</sup> This kind of environment can help offenders recognize and begin to understand and address their behaviors and the impact of these behaviors, while promoting both their own recovery and that of their victims.<sup>253</sup> Instead of the threatening, formal, and oppositional atmosphere of the courtroom, restorative justice programs with procedural justice elements attempt to promote mutual respect, understanding, and inclusiveness.<sup>254</sup> Further, research shows participants in restorative justice programs perceive they are treated more fairly than in traditional court proceedings, another key procedural justice element.<sup>255</sup>

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250. *See supra* Parts IV, V.

251. *See* Morris & Young, *supra* note 199, at 14.

252. *See supra* Part IV.

253. *See supra* Part IV.

254. *See supra* notes 189-97 and accompanying text.

255. Hennessey Hayes & Kathleen Daly, *Conferencing and Re-offending in Queensland*, 37 AUSTL. & N.Z. J. CRIMINOLOGY 167, 186-87 (2004); Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 ANN. REV. L. & SOC. SCI. 161, 174 (2007); Poulson, *supra* note 188, at 182.

One context where the two approaches can be particularly well joined and applied involves offenders with a mental disorder. Such a model can promote the psychological well-being of these offenders and their victims without sacrificing other important societal and legal goals. These approaches may also provide a means to slow the cycle of recidivism which many offenders with a mental disorder find themselves unable to escape.<sup>256</sup>

For example, offenders with a mental disorder who suffer from a heightened distrust of others may feel much more relaxed and willing to speak in a restorative justice session and, as a result of having their voice heard, be more likely to accept responsibility for the criminal behavior, express remorse and seek forgiveness for their actions, and take steps, such as obtaining services to address their mental disorder, that will diminish the likelihood of future criminal behavior.<sup>257</sup> Further, by providing a forum where offenders are encouraged to speak and feel comfortable doing so, the victims of these offenses will gain greater insight into what led the offender to act, including the impact of the mental disorder, be more willing to forgive the offender, and be able to place these events behind them and feel secure again in the community.<sup>258</sup>

Also, restorative justice may prompt offenders with a mental disorder to be more dedicated to their own

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256. GOLDKAMP & IRONS-GUYN, *supra* note 96, at 22; HUMAN RIGHTS WATCH, *supra* note 7, at 193; Kondo, *supra* note 119, at 374; *see also supra* notes 117-19 and accompanying text.

257. *See* Kirk & Bersoff, *supra* note 142, at 57-58 (“[M]ental health treatment consumers are particularly sensitive to the presence of coercion and react particularly negatively to the persons and systems that exercise the coercion.”).

258. *See* Sean Fewster, *When Victims Forgive the Unforgiveable*, THE TELEGRAPH (Austl.), (May 14, 2011), <http://www.dailytelegraph.com.au/why-we-forgive-the-unforgiveable/story-fn6b3v4f-1226055723516> (“[F]orgiveness in criminal cases tends to fall into one of three categories. The victims of crimes involving spouses, mental illness or reckless driving are most likely to forgive offenders. . . . ‘If we can say that a person had a mental illness, diminished responsibility or a lack of culpability at the time of a crime, then we are more able to forgive.’ . . . ‘Forgiveness is easier with cases of mental illness because the context is clearly that the offender is suffering as well . . . . People acknowledge the crime was hurtful and tragic, but by the same token there are extenuating circumstances.’” (quoting Dr. Alan Campbell, senior lecturer at the University of South Australia’s School of Psychology, Social Work, and Social Policy)).

restoration. They may begin to understand the effect of their actions on victims and the community, to gain insights into the nature of their disorder, and to more fully commit themselves to rehabilitation.<sup>259</sup> Studies of successful restorative justice programs intersect with the claims of procedural justice theory, as results indicate that the active involvement of individuals with a mental disorder in negotiating and designing their treatment programs enhances adherence and favorable outcomes.<sup>260</sup> Offenders may, as a result, be more receptive to efforts to assist them and provide them with needed services. Participating in the process of apology and forgiveness, as well as having been given an opportunity to state their case in a neutral forum where they are accepted and treated as a human being,<sup>261</sup> can motivate offenders with a mental disorder to make positive changes in their self-esteem, attitudes, and behavior.

Restorative justice has also been shown to help offenders strengthen their support networks, which may in turn result in greater opportunities for rehabilitation outside of the CJS.<sup>262</sup> Relatedly, allowing offenders with a mental disorder to participate in restorative justice programs may serve to heighten community awareness and understanding of mental disorders.<sup>263</sup> Broken links between the community and individuals with mental disorders who feel disconnected from society may be reforged and, further,

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259. See SURGEON GENERAL'S REPORT, *supra* note 2, at 99 (asserting that research suggests rediscovery and reconstruction of a sense of self are important to recovery for individuals with a mental illness); Barbara Tooth et al., *Factors Consumers Identify as Important to Recovery from Schizophrenia*, 11 AUSTRALASIAN PSYCHIATRY S70, S72 (2003) (noting that among individuals with schizophrenia, the most frequently cited goals were to develop an active sense of self, to get better, and to manage their illness).

260. David B. Wexler, *Therapeutic Jurisprudence and the Criminal Courts*, in LAW IN A THERAPEUTIC KEY, *supra* note 149, at 165, 165-67.

261. See *supra* notes 208-11 and accompanying text.

262. Gwen Robinson & Joanna Shapland, *Reducing Recidivism: A Task for Restorative Justice?*, 48 BRIT. J. CRIMINOLOGY 337, 345 (2008).

263. See Patrick W. Corrigan & Alicia K. Matthews, *Stigma and Disclosure: Implications for Coming Out of the Closet*, 12 J. MENTAL HEALTH 235, 235 (2003) ("Members of the general public are more likely to diminish prejudicial attitudes and discriminating behaviors when they have contact with people with mental illness.").

the community may be prompted to develop additional service programs for these offenders.<sup>264</sup>

Another valuable aspect of including offenders with mental disorders in these programs is that the resulting restitution targets the individual needs of both the victims and the offenders.<sup>265</sup> During their interactions, participants can come to a mutual agreement about what needs to be done to heal the breach of society's norms. This may include identifying or developing services that specifically address the mental health needs of both the offender and the victim.

Conceptually, there do not appear to be inherent obstacles to implementing a restorative justice program that employs the principles of procedural justice and encompasses offenders with a mental disorder, although reports and empirical analyses of such an approach are generally lacking.<sup>266</sup> In light of the wide-spread concern about the traditional CJS processing of offenders with a mental disorder,<sup>267</sup> exploration of this alternative model, either in conjunction with or independent of a mental health court or the other CJS alternatives previously discussed,<sup>268</sup> is needed and timely. The remainder of this Article is devoted to a preliminary exploration of how such a program might be structured.

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264. As discussed, there is a shortage of both support for and resources needed to sustain such programs. *See supra* notes 88-89 and accompanying text.

265. *See supra* notes 200-02, 210-11 and accompanying text.

266. Although empirical data have generally not been systematically gathered, Lawrie Parker, Executive Director of the Piedmont Dispute Resolution Center in Virginia, asserts that her organization—which has been providing dispute resolution services in general for over twenty years and restorative justice sessions involving criminal offenders and their victims for at least the past twelve years—has successfully conducted many restorative justice sessions involving offenders with a mental disorder. Lawrie Parker, Executive Director, Piedmont Dispute Resolution Center, Remarks at the Virginia Mediation Network Spring Conference (Mar. 20, 2011).

267. *See supra* Part II.

268. *See supra* Part III.

B. *Employing a Restorative Justice Model Incorporating Procedural Justice Principles When Offenders with a Mental Disorder Are Involved*

The first step in deciding whether to employ this model in a given case should be to examine the underlying charge to see whether an offense appropriate for inclusion is involved. To avoid public opposition to their activities, many restorative justice programs only accept offenders who have committed lesser crimes, such as misdemeanors.<sup>269</sup> Like mental health and drug courts,<sup>270</sup> restorative justice programs are more likely to choose such cases for diversion, notwithstanding that this may not encompass all cases that might benefit from a restorative justice approach.<sup>271</sup>

This is not likely to be a major impediment as the majority of offenders with a mental disorder are charged with low-level offenses.<sup>272</sup> In a survey of jail officials, the most common reasons for incarcerating offenders with a mental illness were assault, theft, disorderly conduct,

269. Notorious or violent crimes tend not to be accepted because they are likely to have consequences beyond those experienced by the immediate victim, namely, they threaten society in general and, although the victim may ultimately forgive the offender, the resolution reached by the victim and the offender may be perceived as failing to satisfy society's interests in retribution, deterrence, and incapacitation, and thereby undercut support for restorative justice programs in general. Some programs also focus on a particular group of offenders (juveniles) or victims (victims of domestic violence) thought to have special needs or to be particularly likely to benefit from this approach. *See, e.g.*, Gordon Bazemore & Mark Umbreit, *A Comparison of Four Restorative Conferencing Models*, 2001 JUV. JUST. BULL. 1 (2001); Lawrence W. Sherman, *Domestic Violence and Restorative Justice: Answering Key Questions*, 8 VA. J. SOC. POL'Y & L. 263, 265-68 (2000).

270. *See supra* note 153 and accompanying text.

271. Wolff, *supra* note 146, at 431, 434; *see also* Rachel Alexandra Rossi, *Meet Me on Death Row: Post-Sentence Victim-Offender Mediation in Capital Cases*, 9 PEPP. DISP. RESOL. L.J. 185, 186 (2008); Brenda V. Smith, *Battering, Forgiveness, and Redemption*, 11 AM. U. J. GENDER SOC. POL'Y & L. 921, 937 (2003). *But see* Elizabeth Beck et al., *Seeking Sanctuary: Interviews with Family Members of Capital Defendants*, 88 CORNELL L. REV. 382, 414 (2003) (advocating application of a restorative justice response to families of capital defendants).

272. DITTON, *supra* note 95, at 4 (“[T]he majority of mentally ill offenders in jail or probation had committed a property [31.3% and 30.4%, respectively] or public-order offense [23.2% and 24.7%, respectively].”); TORREY, *supra* note 76, at 37-41; Torrey, *supra* note 76, at 1612.

alcohol or drug related charges, and trespassing.<sup>273</sup> Indeed, common forms of theft among offenders with a mental illness included shoplifting and a failure to pay for restaurant meals.<sup>274</sup> If there is an identifiable victim, these types of crimes would be particularly appropriate subjects for restorative justice conferencing.<sup>275</sup>

This analysis, however, should not be construed to suggest that all cases where an offender with a mental disorder is charged with a felony or a crime that involved violence should be excluded. Violent crimes are beginning to be referred to more advanced restorative justice programs, although these cases do require more preparation and mediators schooled in advanced techniques.<sup>276</sup> The safety of the victim and society should be key factors in deciding whether to allow an offender with a mental disorder who committed a violent crime to participate, although the mere presence of a mental disorder should not serve as the basis for concluding that a high risk is posed by the offender, as mental disorders are generally not associated with dangerousness.<sup>277</sup> Thus, a restorative justice approach may be possible for these cases as well if the victim and the offender are willing participants and adequate steps to ensure the protection of the victim and society have been instituted.<sup>278</sup>

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273. Torrey, *supra* note 76, at 1612.

274. *Id.*

275. As noted, *supra* note 191, some restorative justice programs are amenable to also addressing so-called “victimless” crimes—such as traffic offenses, drug possession, prostitution, and gambling—with a focus on repairing harm to or “restoring” the community at large. See BAZEMORE & SCHIFF, *supra* note 195, at 27.

276. See Bloch, *supra* note 218, at 207; see, e.g., Laurie S. Kohn, *What’s So Funny About Peace, Love, and Understanding? Restorative Justice as a New Paradigm for Domestic Violence Intervention*, 40 SETON HALL L. REV. 517, 576 (2010); see also MARK S. UMBREIT, CTR. FOR RESTORATIVE JUSTICE & PEACEMAKING, RESTORATIVE JUSTICE CONFERENCING: GUIDELINES FOR VICTIM SENSITIVE PRACTICE 6-7, 17-19 (2000), available at [http://www.cehd.umn.edu/ssw/rjp/resources/rj\\_dialogue\\_resources/Restorative\\_Group\\_Conferencing/RJC%20Guidlines%20Victim%20Sensitive%20Practice.pdf](http://www.cehd.umn.edu/ssw/rjp/resources/rj_dialogue_resources/Restorative_Group_Conferencing/RJC%20Guidlines%20Victim%20Sensitive%20Practice.pdf).

277. See ELYN R. SAKS, REFUSING CARE: FORCED TREATMENT AND THE RIGHTS OF THE MENTALLY ILL 50 (2002); *supra* note 5 and accompanying text.

278. See UMBREIT, *supra* note 276, at 17-19.

A second step that could limit the participation of an offender with a mental disorder<sup>279</sup> is the expectation that the offender and the victim are prepared and able to participate in the program and embrace the results. The necessary remorse, apology, and forgiveness are unlikely to occur if the parties are unwilling or unable to communicate with each other and tell their stories, or obtain a certain level of empathy for and understanding of one another. Symptoms of a mental disorder that are present at the time of a restorative justice session may curtail the offender's ability to participate and impede the likelihood the program will succeed in general. For example, some offenders may not understand the purpose of the program or trust the participants, others may not have sufficient insight into their behavior to feel the remorse and responsibility necessary to make the process work, and still others may be unable to adequately communicate with the victim and express regret for their actions.<sup>280</sup> Such symptoms may also limit the willingness of victims to accept an offender's expressed apology as genuine, sincere, and enduring. Victims may also lack an adequate understanding of mental disorders in general or the offender's mental disorder in particular, which in turn may contribute to such a heightened level of fear, antipathy, or distrust that a victim will be unable to interact with the offender in such a way as to enable the process of restorative justice to proceed.<sup>281</sup>

Thus, offenders with a mental disorder should have the functional ability to participate in the gathering. If their mental disorder may significantly impair their factual or rational understanding of the proceedings or their ability to

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279. The following caveats may apply as well to a victim who is unable to participate and embrace the results because of a mental disorder.

280. Conversely, offenders with a mental disorder, such as individuals who suffer from depression, may feel an overwhelming sense of guilt and unhappiness that makes it difficult for them to accept forgiveness by the victim. See Lynn E. O'Connor et al., *Empathy and Depression: The Moral System on Overdrive*, in *EMPATHY IN MENTAL ILLNESS* 49, 49-51 (Tom Farrow & Peter Woodruff eds., 2007).

281. As will be discussed, a properly trained facilitator should be prepared to address any unfounded stereotypes, beliefs, or fears regarding mental disorders. See *infra* note 288 and accompanying text.

communicate with the parties involved, or may result in the offender being disruptive or threatening,<sup>282</sup> it may be necessary for the facilitator to screen them (which will often necessitate input from a mental health professional) to determine whether they are capable of participating in the restorative justice proceeding. However, because of the significant benefits that may accrue, the presumption should be that offenders are capable of participating, and it should be recognized that most offenders, including those with a mental disorder, are found competent to stand trial within the CJS.<sup>283</sup>

Nevertheless, a relatively small number of offenders with a severe mental disorder may not be able to reach the requisite standard for participation without extended treatment, if at all. Even if treatment is ultimately effective for them, the approach described in this Article may not be an effective CJS alternative<sup>284</sup> if a large gap of time has

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282. These requirements parallel the standards associated with a criminal defendant's competency to stand trial and a judge's determination that a disruptive criminal defendant should be removed from the courtroom. *See Dusky v. United States*, 362 U.S. 402, 402 (1960) ("[T]he test [for competency to stand trial] must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." (quoting Brief of the Solicitor General)); *Drope v. Missouri*, 420 U.S. 162, 171 (1975) ("It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial."); *Faretta v. California*, 422 U.S. 806, 835 n.46 (1975) (no right "to abuse the dignity of the courtroom"); *id.* at 834 n.46 (no right to "engag[e] in serious and obstructionist misconduct").

283. GARY B. MELTON ET AL., *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* 141 (3d ed. 2007); Daniel C. Murrie et al., *Clinician Variation in Findings of Competence to Stand Trial*, 14 *PSYCHOL. PUB. POL'Y & L.* 177, 179 (2008); *see also* SAKS, *supra* note 277, at 47 ("*Incompetency* is a very low standard, and many if not most mentally ill people are competent in many if not most areas of their lives." (emphasis added)).

284. It should be noted that such offenders may be deemed incompetent to stand trial by the CJS as well. Alternatively, pursuant to an insanity defense, or some variant thereof, the CJS may determine that they should be acquitted because they lack, as a result of their mental disorder, the requisite criminal

passed since the occurrence of the criminal behavior.<sup>285</sup> This delay may result in the damage to the victim becoming either so entrenched or distant in time as to make recovery relatively unlikely, as well as diminish the ability of the parties to sufficiently recall the relevant underlying events and circumstances to engage in the needed exchange of information.<sup>286</sup> However, a prompt adjustment of medication or another form of treatment may enable even offenders with a severe mental disorder to actively participate in a restorative justice session. At the same time, voluntary participation is a key to these sessions and coercion is generally antithetical to the principles of procedural justice and oftentimes counterproductive with this population. Thus, forced treatment should not occur in conjunction with or in preparation for these sessions.<sup>287</sup>

Because a mental disorder may influence interactions between the parties in a variety of adverse ways, the facilitator of the session should be specially trained to work with such offenders and be prepared to implement the program with the offender's mental disorder in mind. Appropriate preparations may include having discussions with the victim about the nature of mental disorders in

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responsibility. See LAFAVE, *supra* note 47, at 390, 424-34. However, such matters reach beyond the scope of this Article.

285. Similarly, in the CJS, the State is only given a "reasonable period of time" to attempt to restore a defendant to competence. See *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) ("[A] person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future.").

286. This may also occur in the CJS, with the prosecutor sometimes dropping the charges as a result. See LAFAVE, *supra* note 47, at 434.

287. See *supra* notes 172-73, 245 and accompanying text. See generally Kaltiala-Heino et al., *supra* note 142, at 311 (questioning the value of compulsory treatment). In contrast, within the CJS, it has been established that under certain circumstances a criminal defendant may be subject to involuntary treatment to restore competence to stand trial. See *Sell v. United States*, 539 U.S. 166, 178-79 (2003). The principles guiding that ruling are largely inapplicable to a restorative justice conference, particularly as the default option to a restorative justice conference is the return of the offender to the traditional CJS.

general and the mental disorder of the offender in particular, and the impact this may have on the session. A properly trained facilitator should also have the ability and be prepared to address any related unfounded stereotypes, beliefs, or fears about mental illness.<sup>288</sup> Patently false beliefs may be addressed in a prior, private meeting between the facilitator and the victim, particularly if they are likely to lead the victim to decline participation in the session because of concerns about personal safety. However, this topic may well be a suitable subject for the session itself as offenders may be able to provide valuable input regarding their mental disorder, whether and how the mental disorder contributed to the behavior associated with the criminal offense, and what steps the offender has taken to address the mental disorder to significantly diminish the likelihood that such behavior will recur.

The facilitator of these sessions should also be aware that cognitive, emotional, or behavioral disorders of offenders may limit or affect their participation, including their ability to follow and participate in the proceedings, although the facilitator should also guard against presumptions that this will be the case.<sup>289</sup> If the speech or thought of offenders is highly disorganized, it may be hard for victims and other participants to understand, relate to, and interact with the offenders. If the offenders cannot stay on task, the victims may become extremely frustrated or even frightened. They ultimately may perceive the crimes to have been spontaneous and uncontrollable acts and feel vulnerable to further occurrences. After learning more about the nature of a mental disorder, however, victims may

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288. See Bruce G. Link et al., *Public Conceptions of Mental Illness: Labels, Causes, Dangerousness, and Social Distance*, 89 AM. J. PUB. HEALTH 1328, 1331-32 (1999) (characterizing public conceptions of mental illness).

289. See SAKS, *supra* note 277, at 52-53 (“[A]lthough many mentally ill people are impaired, lack judgment, and are less in control than are healthy people, many do not have these characteristics. . . . Because there is so much temptation to find deficits in the mentally ill where none exist, we may want a standard through which we bend over backwards not to treat the mentally ill differently from the healthy. . . . In addition . . . when we estimate their deficits accurately, treating them paternalistically may actually increase those deficits by further marginalizing them, reducing their self-esteem and sense of agency so that they become less capable of caring for themselves and living responsibly in the world.”).

choose to proceed with the session even if the offenders are relatively inarticulate simply because they wish to be heard and to express their sense of injustice at being the target of a crime.<sup>290</sup> In addition, even offenders who are relatively inarticulate or unable to fully understand the nature of the proceedings may benefit from being given an opportunity to participate, which, pursuant to the principles of procedural justice, may enhance their ability to respect and accept the outcomes of this and other proceedings that stem from the commission of the crime.<sup>291</sup>

Restorative justice also relies heavily on the ability of the parties to empathize with each other, which is considered necessary to precipitate change and recovery. Some offenders with a mental disorder may not be sufficiently able to empathize with their victims.<sup>292</sup> Offenders with an anti-social personality disorder, for example, may be limited in their ability to be involved emotionally in this manner with their victims.<sup>293</sup> Empathy and understanding have little relevance to the traditional CJS with its emphasis on punishment, but are vital to the success of a restorative justice session. One commentator has observed that “this [lack of empathy] has implications for how successful conferencing may be . . . . Until there is some awareness of the feelings or emotions of . . . others, conferencing may be unlikely to alter behavior.”<sup>294</sup>

Another potential barrier to participation by offenders with a mental disorder is that the offender may have to acknowledge and disclose his or her mental disorder for the restorative justice program to be successful. In the

290. See UMBREIT, *supra* note 276, at 4.

291. See *supra* Part V. Steps should be taken by the facilitator, however, to ensure that dialogue in the session does not become a one-way street where castigation is dumped on offenders unable to respond.

292. See, e.g., Kwang-Hyuk Lee, *Empathy Deficits in Schizophrenia*, in *EMPATHY IN MENTAL ILLNESS*, *supra* note 280, at 17, 27 (finding that individuals suffering from schizophrenia may show abnormal empathy deficits). The victim must generally also have the capacity to empathize with the offender for the session to be successful.

293. Mairead Dolan & Rachael Fullam, *Empathy, Antisocial Behaviour and Personality Pathology*, in *EMPATHY IN MENTAL ILLNESS*, *supra* note 280, at 33, 38-39.

294. Kenneth S. Levy, *The Australian Juvenile Justice System: Legal and Social Science Dimensions*, 18 QUINNIPIAC L. REV. 521, 551 (1999).

traditional CJS, offenders with a mental disorder may choose to reveal their disorder as part of a defense or as a mitigating factor during sentencing. However, such a disclosure is not required and, provided there has not been a finding that the offender is incompetent to stand trial, some offenders choose to remain silent about their condition because they are embarrassed or because they fear they may be stigmatized by this disclosure and suffer adverse consequences as a result.<sup>295</sup>

In a restorative justice context, offenders may need to discuss their mental disorder with the victim so the victim can fully understand and forgive the offense.<sup>296</sup> However, offenders may be reluctant to disclose their disorder in general or may feel particularly uncomfortable doing so with either a victim who is a relative stranger or someone who they know but to whom they have never disclosed their disorder.<sup>297</sup> Some offenders may be so unwilling to discuss their condition that they would rather forego the benefits of participation in such a program.<sup>298</sup> Alternatively, for some offenders, the mental disorder may have little relevance to the offense, making its disclosure arguably unnecessary. In general, however, it will be beneficial and perhaps vital for them to reveal their mental disorder openly and to discuss and acknowledge the role that it may have played in the offense. With the assistance of a trained facilitator, such a

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295. See Kevin Dew et al., *'It Puts Things Out of Your Control': Fear of Consequences as a Barrier to Patient Disclosure of Mental Health Issues to General Practitioners*, 29 SOC. HEALTH & ILLNESS 1059, 1059 (2007); Joseph H. Rodriguez et al., *The Insanity Defense Under Siege: Legislative Assaults and Legal Rejoinders*, 14 RUTGERS L.J. 397, 401-02 (1983) (ascertaining that defendants who unsuccessfully assert an insanity defense serve significantly longer sentences than defendants who did not assert an insanity defense).

296. Such disclosures may also be optimal to ensure that the assigned facilitator has the requisite skills and knowledge to properly prepare for and manage the session.

297. See Dew et al., *supra* note 295, at 1059 (discussing reluctance to disclose mental illness).

298. One of the responsibilities of the facilitators of these sessions should be to explore privately with offenders possible consequences that may flow from disclosure and, to the extent that they can, promise to address and ameliorate any deleterious impact. See Dew et al., *supra* note 295, at 1062. Performing such steps will be critical to maintaining the "trust" that offenders place in these sessions, a key from a procedural justice perspective. See *supra* notes 229, 247 and accompanying text.

discussion can generate greater understanding, forgiveness, and support from the victim.

Because offenders with mental disorders vary in how they perceive their disorder, including whether they acknowledge that they have a mental disorder,<sup>299</sup> only those offenders who feel comfortable sharing information concerning their mental disorder should be expected to do so in the course of a restorative justice session. At the same time, if the mental disorder played a central role in the offense and if the restorative process is unlikely without a discussion of the mental disorder, disclosure may be necessary for the program to proceed. A properly trained facilitator can provide valuable input and guidance as to whether and how such disclosures should occur.

## VII. POTENTIAL CRITICISMS OF THIS MODEL AND REBUTTAL

Some judges and lawyers have objected to the adoption of restorative justice programs regardless of the offender's mental state.<sup>300</sup> One criticism is that restorative justice sanctions may lack proportionality and consistency.<sup>301</sup> Because the offender and victim acting jointly are free to adopt the outcome that they deem fit, the restitution imposed on the offender may seem disproportionate to the severity of the offense.<sup>302</sup> In addition, critics argue, offenders

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299. Of late, greater attention has been given to a sub-population of individuals with a mental disorder who are characterized as being rendered unable to recognize their symptoms because of a condition labeled "anosognosia." A somewhat controversial diagnosis, there is an ongoing debate over whether such individuals should be subject to treatment over objection. See Ronald Bassman, *Mental Illness and the Freedom to Refuse Treatment: Privilege or Right*, 36 PROF. PSYCHOL.: RES. & PRAC. 488, 488 (2005). Ultimately, it will be up to the parties, guided by the facilitator, to determine whether a sufficient exchange of information can occur under these circumstances to warrant holding a restorative justice session.

300. See Richard Delgado, *Goodbye to Hammurabi: Analyzing the Atavistic Appeal of Restorative Justice*, 52 STAN. L. REV. 751, 758-71 (2000) (examining criticisms of restorative justice); Sharon Levrant et al., *Reconsidering Restorative Justice: The Corruption of Benevolence Revisited?*, 45 CRIME & DELINQ. 3 (1999); Harry Mika et al., *Listening to Victims—A Critique of Restorative Justice Policy and Practice in the United States*, 68 FED. PROBATION 32 (2004).

301. Morris & Young, *supra* note 199, at 21.

302. *Id.*

involved in similar crimes may end up with quite different sanctions, sacrificing the objective of uniformity in sentencing.<sup>303</sup> These critics are concerned that the wishes of the victims may dictate case outcomes that diverge substantially from other cases.<sup>304</sup> However, it should be noted that similar cases are not always treated alike in the traditional CJS;<sup>305</sup> indeed, a number of inappropriate factors such as gender, race, ethnicity, and socio-economic status contribute to these inconsistencies.<sup>306</sup> In addition, offenders with a mental disorder may already be subject to considerable dispositional disparities within the traditional CJS.<sup>307</sup> Inconsistent outcomes in restorative justice programs are at least the “result of genuine and uncoerced agreement between the key parties,” which may be a suitable ground for this disparity.<sup>308</sup>

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303. See, e.g., Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 433; Delgado, *supra* note 300, at 759, 768; see also David Dolinko, *Restorative Justice and the Justification of Punishment*, 2003 UTAH L. REV. 319, 331-34; Paul H. Robinson, *The Virtues of Restorative Processes, the Vices of “Restorative Justice,”* 2003 UTAH L. REV. 375, 381.

304. Andrew Ashworth & Andrew von Hirsch, *Desert and the Three Rs*, in *PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY* 331, 332-33 (Andrew von Hirsch & Andrew Ashworth eds., 2d ed. 1998).

305. Morris & Young, *supra* note 199, at 21.

306. See, e.g., Shawn D. Bushway & Anne Morrison Piehl, *Judging Judicial Discretion: Legal Factors and Racial Discrimination in Sentencing*, 35 LAW & SOC'Y REV. 733, 733 (2001); David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 285 (2001); see also Samuel L. Myers, Jr., *Racial Disparities in Sentencing: Can Sentencing Reforms Reduce Discrimination in Punishment?*, 64 U. COLO. L. REV. 781, 781 (1993).

307. See Michael L. Perlin, *On “Sanism,”* 46 SMU L. REV. 373, 398-99 (1992) (referencing the denial of due process rights to individuals with a mental illness).

308. Morris & Young, *supra* note 199, at 21. As discussed, a critical component of a successful restorative justice program is that agreements are genuine and not coerced. See *supra* note 287 and accompanying text. It also has been argued that the traditional CJS approach is “silent on why equal justice for offenders should be a higher value than equal justice (or, indeed, any kind of justice) for victims.” Morris & Young, *supra* note 199, at 22.

A second criticism is that restorative justice is inadequate to deter offenders.<sup>309</sup> Empirical evidence contradicts this view.<sup>310</sup> Being confronted by one's victim in a restorative justice conference has been found not to be an easy way out.<sup>311</sup> This approach prevents the offender from discounting the victim and requires a level of accountability that is often not required by the traditional CJS.<sup>312</sup>

Third, critics argue that power imbalances between the offender and victim may result in the victim being used to benefit the offender.<sup>313</sup> For example, victims may feel pressured to agree to a relatively insignificant sanction when the typical penalty for the offense would involve incarceration, or they may be made to feel ashamed of their desire for vengeance and retribution towards the person who harmed them.<sup>314</sup> Indeed, it is important to ensure that victims are not further victimized when they agree to participate in a dialogue with the offender.<sup>315</sup> Further, participation must be voluntary, and the victim must fully agree with any proposed outcome.<sup>316</sup> In fact, in most restorative justice systems, victims are allowed to veto any proposed outcome.<sup>317</sup> Furthermore, facilitators should be trained to recognize and defuse any potential pressures that may be brought to bear on victims before or during a session. They should take steps to shield the victim from this pressure or stop the process when the offender has, or is likely to, abuse the process.<sup>318</sup> For example, when the offense involves a violent offender and a relatively passive

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309. See Bloch, *supra* note 218, at 209; Robinson, *supra* note 303, at 377 (claiming that "restorative justice ideally would ban all 'punishment'").

310. Strang & Sherman, *supra* note 74, at 38-39.

311. See Morris & Young, *supra* note 199, at 22.

312. See *id.* at 17-18.

313. See Bloch, *supra* note 218, at 210; Delgado, *supra* note 300, at 762-63.

314. See ANNALISE ACORN, COMPULSORY COMPASSION: A CRITIQUE OF RESTORATIVE JUSTICE 76 (2004); Morris & Young, *supra* note 199, at 22.

315. Morris & Young, *supra* note 199, at 22. *But see* Daly, *supra* note 232, at 352-53 (criticizing claims of further victimization when compared to the victimizing effects of a formal court case).

316. See Morris & Young, *supra* note 199, at 22.

317. *Id.*

318. See *id.*

intimate partner, an additional party may need to be involved to provide support for the partner.<sup>319</sup> Similarly, if the offender has a mental disorder and intimidates the victim, the proceeding may be suspended, or a mental health professional or other party may be added to the proceeding to support or protect the victim.<sup>320</sup>

Fourth, some skeptics of restorative justice assert that the legal rights of the offender are likely to be infringed in this informal setting.<sup>321</sup> Offenders with a mental disorder may indeed be particularly vulnerable to such an occurrence as they may be relatively incapable of independently asserting their legal rights in this context. For example, some such individuals may be prone to accepting responsibility for an offense even though they lack culpability.<sup>322</sup> Individual legal rights may be protected, however, by directing offenders to consult with their attorney or otherwise obtain legal advice before beginning a restorative justice session.<sup>323</sup> If the offender refuses legal advice, the facilitator of the session may need to explore the reasons for this refusal as part of a larger determination of whether the offender is capable of participating in the

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319. The power imbalance criticism also fails to take into account that in many domestic violence situations victims do not rely on the CJS at all because of perceived deficiencies in that system. *Id.* at 22-23. For example, a victim may want the behavior to stop but not necessarily want the partner to be incarcerated. A restorative justice program can increase the victim's options significantly. See Thomas L. Hafemeister, *If All You Have Is a Hammer: Society's Ineffective Response to Intimate Partner Violence*, 60 CATH. U. L. REV. 919, 923 (2011) ("The most common reason victims provide for not reporting an [intimate partner violence] incident to the police is that the matter is private or personal; other rationales include fear of retaliation, a desire to shield the offender, and police ineffectiveness.").

320. Proponents of the restorative justice approach further maintain that "[c]riticisms about restorative justice 'using' victims . . . ignore the fact that conventional justice uses victims for its own (the State's) interests without offering any corresponding benefits." Morris & Young, *supra* note 199, at 22; see *supra* note 250 and accompanying text.

321. Morris & Young, *supra* note 199, at 23 (citing Kate Warner, *Family Group Conferences and the Rights of the Offender*, in FAMILY CONFERENCING AND JUVENILE JUSTICE: THE WAY FORWARD OR MISPLACED OPTIMISM? 141 (Christine Alder & Joy Wundersitz eds., 1994)).

322. See O'Connor et al., *supra* note 280, at 49-50.

323. See Morris & Young, *supra* note 199, at 23.

proceedings.<sup>324</sup> In addition, a facilitator may ask the parties to enter into a confidentiality agreement prior to the commencement of the proceedings to ensure that the privacy and rights of the parties are respected.<sup>325</sup>

A fifth concern is that restorative justice is too similar to popular justice and vigilantism.<sup>326</sup> Popular justice can be repressive and overly retributive, particularly when offenders with a mental disorder are involved as such offenders tend to generate considerable antipathy from the general public.<sup>327</sup> However, such attitudes are deeply at odds with the themes of restorative justice and there are safeguards that can be applied to prevent such attitudes from prevailing. For example, scholars have suggested that “if there are concerns about communities taking over this process for non-restorative purposes, checks could be introduced—for example, courts could provide some oversight of restorative justice outcomes for the purposes of ensuring that the outcomes are in accordance with restorative justice values.”<sup>328</sup> As discussed, when offenders

324. See *supra* notes 279-83 and accompanying text.

325. See Tina S. Ikpa, *Balancing Restorative Justice Principles and Due Process Rights in Order to Reform the Criminal Justice System*, 24 WASH. U. J.L. & POL'Y 301, 316-17 (2007). It might be argued that such a confidentiality agreement and the discussion of the parties' respective rights may make these proceedings too formal or dissuade the parties from participating in these sessions. It should be noted, however, that similar concerns were raised about law enforcement officials being required to disclose to suspects their “Miranda” rights, but subsequent research has found that the issuance of these warnings has had little, if any, impact on the rate of confessions by these suspects. Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 547 (1996) (“For practical purposes, Miranda’s demonstrable impact on conviction rates today is virtually nil.”). Also, lawyers could be allowed to attend these sessions but they would need to understand the difference between restorative and conventional CJS proceedings and hence the change in their role. Morris & Young, *supra* note 199, at 23. In a conventional CJS setting, lawyers speak for the offender and discourage the offender from talking directly with the victim; in a restorative justice setting, offenders must speak for themselves and a direct dialogue between victims and offenders must take place. The lawyer’s primary purpose in this context would be to protect the offender’s basic rights and not to minimize the offender’s disclosures or responsibility. *Id.*

326. Morris & Young, *supra* note 199, at 23.

327. See Link et al., *supra* note 288, at 1328 (characterizing public conceptions of mental illness).

328. Morris & Young, *supra* note 199, at 23.

with a mental disorder are involved in the restorative justice process, it may be necessary to employ facilitators who have been specially trained to take appropriate steps to defuse society's negative views about individuals and offenders with mental disorders.<sup>329</sup>

A sixth criticism is that "restorative justice leaves untouched a 'hard core' of unrepentant offenders."<sup>330</sup> This is undeniable; there will be some offenders, both with and without a mental disorder, who will scoff at and refuse to embrace and participate in a restorative justice approach.<sup>331</sup> However, no system is likely to be successful universally, and there will be many offenders who will be responsive to this approach. Indeed, research indicates that offenders who participate in a restorative justice program have lower recidivism rates.<sup>332</sup> Arguably, the restorative justice process has greater potential than conventional CJS processes to engage and hopefully reform many offenders with a mental disorder.<sup>333</sup> Although empirical evidence is lacking on the amenability of these offenders to a restorative justice approach, the growing prevalence of mental health courts and the apparent willingness of offenders with a mental illness to participate in the programs offered by these courts suggests that these offenders will similarly be amenable to restorative justice sessions.<sup>334</sup>

A final criticism of restorative justice is that it is costly.<sup>335</sup> Indeed, this process does not occur instantly or automatically. Engaging offenders, victims, and other participants takes time and effort. Multiple meetings may be necessary. Obtaining trained facilitators and a neutral location for sessions generally entails expenses, with many

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329. See *supra* note 288 and accompanying text.

330. Morris & Young, *supra* note 199, at 24.

331. See Delgado, *supra* note 300, at 765.

332. See Strang & Sherman, *supra* note 74, at 38, 39.

333. See generally Kirk & Bersoff, *supra* note 142, at 53-58 (discussing the difficulties associated with forced mental health treatment in the traditional CJS).

334. See *supra* Part III.C.

335. Morris & Young, *supra* note 199, at 24. For a review of the estimated cost-per-case of existing restorative justice programs, see Umbreit et al., *supra* note 186, at 289-90 (observing that it remains difficult to evaluate the cost of implementing such programs on a large scale).

of these offenders lacking the resources to help defray these costs.<sup>336</sup> It has been argued that “if [a restorative justice approach] is used for minor offenses where the impact upon the victim has been slight, then the costs might outweigh the potential benefits.”<sup>337</sup> For example, a loitering offense might otherwise be resolved simply with the payment of a relatively small fine. In addition, minor offenses may seem to have little impact on their victims. Victim support agencies, however, argue that such assumptions are not often accurate.<sup>338</sup> Even a relatively minor offense may be a significant event to the individuals involved. Furthermore, recognizing a victim’s suffering, as well as involving and responding to the victim in a humane fashion, have considerable value in and of themselves.<sup>339</sup> In addition, as discussed, restorative justice offers significant benefits to participating offenders.<sup>340</sup> Instead of perceiving themselves as society’s outcasts, they can be reintegrated into society and assisted in developing a plan for reparation and recovery.<sup>341</sup> Through this process, offenders with a mental disorder may obtain help, support, and services that address their needs and diminish the likelihood of future criminal offenses and entanglement with the CJS.<sup>342</sup> Finally, the price of restorative justice programs must be weighed against the cost of incarcerating mentally ill offenders.<sup>343</sup>

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336. See FRANK & GLIED, *supra* note 80, at 2 (“For the vast majority of people with a severe mental illness, a life in poverty is to be expected; it is almost preordained from the moment of diagnosis, which is often by late adolescence.”); Daphna Levinson et al., *Associations of Serious Mental Illness with Earnings: Results from the WHO World Mental Health Surveys*, 197 BRIT. J. PSYCHIATRY 114, 114 (2010) (finding that individuals with a serious mental illness earn on average a third less than a nation’s median earnings).

337. Morris & Young, *supra* note 199, at 24.

338. *Id.*

339. Steven Kelman, *Cost-Benefit Analysis: An Ethical Critique*, 1 REGULATION, Jan./Feb. 1981, at 33, 36.

340. See *supra* notes 208-11 and accompanying text.

341. See *supra* notes 208-11 and accompanying text.

342. See *supra* Part VI.B.

343. The monetary cost of the criminalization of mental illness includes the direct costs of incarceration as well as the indirect costs of lost productivity and other effects due to an inappropriate response to their mental disorder. For an economic analysis of the direct cost of the public order response to mental illness, see Pustilnik, *supra* note 121, at 219, 231-35 (estimating state prisons

Compared to the cost of the traditional CJS response, such costs may be quite small.<sup>344</sup>

#### CONCLUSION

Traditionalists criticize the restorative justice approach as being a faddish, unrealistic approach that relies too much on promises and misplaced sympathy.<sup>345</sup> The principles underlying the restorative justice approach, however, have deep historical roots,<sup>346</sup> and its expanding application and current research indicate that this approach can frequently better meet the needs of the victims of a criminal offense, the responsible offenders, and society by enhancing recovery, promoting a sense of community and reintegration, and providing a better and more efficient means of responding to many criminal acts.

Offenders with a mental disorder, who are among the most challenging, not to mention expensive, populations with which the CJS struggles, should not be excluded from these benefits if they have the ability to participate in such programs, particularly during an era of limited resources. A restorative justice approach, tempered through the lens of procedural justice, can often better respond to this population without sacrificing other social and legal objectives. Rather than being caught up in a counterproductive CJS response, a restorative justice session can be more beneficial to all concerned parties. In addition to responding directly to the needs of all parties, this approach may promote greater understanding and insight into offenders' mental disorders, as well as the impact of these disorders on them and the people around them. In addition, the outcomes of these sessions can address offenders' special needs, such as treatment and counseling, which, in turn, may increase support in general for such services in the community. These services have traditionally been underfunded and are currently being gutted in many jurisdictions. Furthermore, the underlying

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spend about \$4.75 billion annually to incarcerate non-violent mentally ill offenders).

344. *See id.*; *supra* Part II.

345. *See generally* Delgado, *supra* note 300, at 758-71 (providing a critique of the restorative justice paradigm).

346. BRAITHWAITE, *supra* note 184, at 5; STRANG, *supra* note 184, at 3-5.

values of restorative justice—understanding, forgiveness, and hope—are also more likely to motivate offenders with a mental disorder to reach new therapeutic goals. Given a chance to participate in making amends for their behavior, they may be more likely to want to do a better job in the future. Restorative justice is remarkable in that it facilitates recovery in offenders, victims, and surrounding communities. The opportunities it provides should not be withheld from offenders with a mental disorder.