

INTRODUCTION: THE CRIMINALIZATION OF MENTAL ILLNESS

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The fact that the incarceration rate in the United States is one of the highest in the world, certainly in the industrialized world, draws a great deal of attention from criminal justice reformers.¹ What lurks beneath this data point is something far more troubling. The three largest psychiatric facilities in the country are not mental health treatment facilities, halfway houses, community mental health centers, or outpatient hospitals. No, they are the county jail systems of Los Angeles County and Cook County, as well as that found on Rikers Island in New York City.² This last facility, which provides treatment to tens of thousands of individuals with psychiatric disabilities every year, has been at the center of litigation that has now spanned over fifteen years. That lawsuit, *Brad H. v. The City of New York*, claims that Rikers Island, because of the extensive treatment it provides to those incarcerated there (under the City's constitutional obligations), is, for all intents and purposes, a mental health facility. As such, it has obligations under state law to provide what is known as discharge planning services: the provision of assistance to individuals leaving an inpatient facility to ensure that those individuals can continue their treatment upon release.³

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¹ For a discussion of the incarceration rate in the United States, see, William T. Pizzi, *Understanding the United States' Incarceration Rate: What Has Caused Prison Sentences to Climb So Sharply and Consistently in the Last Four Decades*, 95 JUDICATURE 207 (2012).

² NPR Staff, *Nation's Jails Struggle with Mentally Ill Prisoners*, NPR (Sept. 4, 2011, 2:53 PM), <http://www.npr.org/2011/09/04/140167676/nations-jails-struggle-with-mentally-ill-prisoners>.

³ For a procedural history of *Brad H.*, see the decision of the New York Court of Appeals in that case, which is available at 951 N.E.2d 743, 744–47 (N.Y. 2011). For a discussion of the value of state-based litigation to obtain services for individuals with psychiatric disabilities in the criminal justice system, see Katie Ayer, *Litigating for Treatment: The Use of State Laws and Constitutions*

As a result of that litigation, that municipal jail at Rikers Island is obligated to provide discharge planning to inmates leaving the facility, an obligation imposed under state law to psychiatric facilities in New York State.⁴ Because Rikers Island had become a de facto psychiatric facility, it had the obligation to provide discharge planning services to inmates leaving the facility who had received mental health treatment while incarcerated: i.e., prior to release, individuals receiving treatment at the jail had to receive some form of means of connecting to treatment, shelter and medication once they were released from the facility.⁵ The case has worked its way through the New York State court system, and has gone to its highest court, but the obligation still stands, an obligation that speaks volumes about the state of the mental health system, not just in New York City, but in the nation as a whole.

Few could argue with the proposition that someone coming out of a facility where he or she was receiving psychiatric treatment should receive some assistance connecting that individual to services in the community. Prior to the lawsuit, the discharge “plan” for individuals receiving mental health treatment while in the jail was the same as for those not receiving such treatment. This plan, such as it was, was summed up by trial judge Richard Braun as follows: “all that is done for inmates released from Rikers Island is that they are taken by bus to the Queen Plaza subway station between 2:00 A.M. and 6:00 A.M. and given \$ 1.50 plus two subway tokens or a two-fare MetroCard.”⁶

If these former inmates were homeless before being arrested, they would be homeless again. If they had been taking serious anti-psychotic medication while in jail, they would leave it without any. If they had been in treatment and therapy while in the jail, such care would abruptly stop. If they had no means of acquiring their prescriptions—like a referral to a doctor and a means of paying that doctor—they would have to do without. Of course, for some, they had but one way to get their treatment and medication: re-enter the jail system’s revolving door by getting re-

in Obtaining Treatment Rights for Individuals with Mental Illness, 28 N.Y.U. REV. L. & SOC. CHANGE 1 (2003).

⁴ *Brad H.*, 951 N.E.2d at 744.

⁵ *See id.*

⁶ *Brad H. v. City of New York*, 712 N.Y.S.2d 336, 339–40 (Sup. Ct. 2000). In the interest of full disclosure, this author was a member of the co-counsel team serving the plaintiff class in *Brad H.* from 1999 through 2001.

arrested and sent back to the mental health ward on Rikers Island, often for doing nothing more than committing a so-called “quality of life” crime.

This cycle of inadequate services, criminalized conduct, arrest, incarceration, treatment, release and re-arrest is played out in community after community, courtroom after courtroom, and jail after jail, throughout the country, every day. The community mental health system, envisioned so boldly by advocates, and supported by President Kennedy, in the early 1960s, never materialized.⁷ De-institutionalization led not to treatment in a less-restrictive and caring environment, but to abandonment, and re-institutionalization. Rethinking this revolving door is a critical step towards creating a more humane, less costly, and, in the end, safer community for everyone. This rethinking requires hard work on the part of policy makers, government officials, mental health specialists, lawyers, judges, consumers of mental health services and their family members and loved ones, academics and researchers. This issue of the *Albany Government Law Review* is an attempt to enlist just some of these experts to

⁷ I borrow the following succinct recounting of this history:

In the mid-1900s, the discovery of effective psychotropic medications helped to once again revolutionize the treatment of the mentally ill. Medications such as Thorazine, the first medication known to control the symptoms of schizophrenia, dramatically reduced symptoms of psychosis and led many to believe that the mentally ill could return to the mainstream community. This approach to treatment was called the *Community Mental Health Movement*. The idea behind this movement was to decrease the cost associated with the state psychiatric hospitals and return the mentally ill to their communities where they could receive comprehensive, humane treatment, without being deprived of their freedom. In an effort to support and expedite this movement, Congress passed the *Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963*, and President Kennedy authorized the appropriation of three billion dollars to begin creating a national community mental health system. Sadly, none of the three billion dollars authorized by President Kennedy to establish a network of community mental health centers was ever appropriated to fulfill the promise of moral, ethical and humane treatment for the mentally ill, and the national community mental health system was never developed.

Amy Carter, *Fixing Florida's Mental Health Courts: Addressing the Needs of the Mentally Ill by Moving Away from Criminalization to Investing in Community Mental Health*, 10 J.L. Soc'Y 1, 5–6 (2009) (footnotes omitted).

address the issue of the criminalization of mental illness: i.e., the substitution of a continuum of care for those with psychiatric disabilities for a community response through which a physical ailment is cause for incarceration and institutionalization. We would never dream of treating those with cancer or another form of physical illness or disability the way we treat those with psychiatric disabilities. And a more thoughtful and more humane response to those whose psychiatric disabilities is necessary to ensure we are living up to the ideals of a modern and advanced society that treats all of its members as individuals, with certain unalienable rights.

The articles in this volume attempt to address just some of the many questions that the trend towards criminalization of mental illness raises. They offer insightful analysis and offer compelling, if, at times, controversial, responses to these questions. Each article is discussed, in turn, below.

Professor Michael L. Perlin is the Director of the International Mental Disability Law Reform Project and the Online Mental Disability Law Program at New York Law School. Professor Perlin has been a prolific scholar on the subject of mental disability law. He has written twenty-three books and countless articles on the subject. His contributions to this field of study are simply without compare. His co-author on his piece in this issue is Meredith R. Schriver, who holds a master's degree in mental disability law studies and is a court advocate for people with psychiatric disabilities. Their piece traces the aftermath of the U.S. Supreme Court's 2003 decision in *Sell v. United States*, and looks at its implications through the lens of international human rights law, including the United Nations' Convention on the Rights of Persons with Disabilities (CRPD).⁸ They also take on the intersection of economic inequality and mental health.⁹ In doing so, they ask, specifically, how differences in bail determinations with respect to those with psychiatric disabilities who are indigent and those of substantial means have profound impacts on the long-term wellbeing and criminal justice outcomes for these individuals.¹⁰ Using the frame of therapeutic

⁸ Michael L. Perlin & Meredith R. Schriver, "You Might Have Drugs at Your Command": *Reconsidering the Forced Drugging of Incompetent Pre-Trial Detainees From the Perspectives of International Human Rights and Income Inequality*, 8 ALB. GOV'T L. REV. 381, 381, 384 (2015).

⁹ *Id.* at 390.

¹⁰ *Id.* at 393–96.

jurisprudence to address this question, they identify the important policy issues this intersection poses.

Dr. Megan Testa, is a practicing psychiatrist at University Hospitals in Cleveland, OH, with a background in treating individuals with psychiatric disabilities in the criminal justice system. Her article discusses some of the historical factors that have led to the criminalization of mental illness, and establishes that the American correctional institutions have become, in her words, “modern day asylums.”¹¹ She offers alternative approaches to dealing with individuals with psychiatric disabilities who come in contact with the criminal justice system that can help de-criminalize their disabilities and offer more humane options for addressing those disabilities.¹² She focuses primarily on diversion programs—especially pre-booking diversion programs—as ways to prevent the criminalization of mental illness, provide a more humane approach to individuals with psychiatric disabilities, and even offer a less expensive approach than current criminal justice strategies.¹³

The next piece comes from Mona Sobhani, who is a law and neuroscience post-doctoral research fellow at Vanderbilt University. Her work highlights the reasons for having a separate justice system that addresses juvenile defendants and questions whether the time is right to consider the creation of a similar, separate criminal justice system, akin to the juvenile justice system, for defendants with psychiatric disabilities.¹⁴ She examines present examples of this occurring in communities that have created mental health courts, but also discusses the potential barriers to such an endeavor, including difficulties in diagnosing psychiatric disabilities, and the stigma surrounding mental illness.¹⁵ She outlines the potential advantages of such an approach, including the likelihood that it will, in the end, and among other things, save money by reducing recidivism.¹⁶

The next piece in the issue is co-authored by Corey Jessup and Monica Miller. Mr. Jessup received his bachelor’s degree in

¹¹ Megan Testa, *Imprisonment of the Mentally Ill: A Call for Diversion to the Community Mental Health System*, 8 ALB. GOV’T L. REV. 405, 408–09 (2015).

¹² *Id.* at 431.

¹³ *Id.*

¹⁴ Mona Sobhani, *Extending the Logic of the Juvenile Justice System to a Separate Justice System for Mentally Ill Offenders*, 8 ALB. GOV’T L. REV. 439, 440–41 (2015).

¹⁵ *Id.* at 449, 451, 453.

¹⁶ *Id.* at 461.

sociology from the University of Nevada, Reno, and is now pursuing his master's degree in criminal justice. Professor Miller is an Associate Professor at the University of Nevada, Reno, with a split appointment between the criminal justice department and the interdisciplinary doctoral program in social psychology. She also is an adjunct faculty member at the Grant Sawyer Center for Justice Studies there and a faculty associate for the women's studies program. Like the Edwards's piece, their contribution challenges conventional wisdom around legal interventions that seek to reduce criminal violence in the community. Specifically, they question the value of programs like the AMBER alert system that seek to prevent and combat the evils of "stranger danger": the notion that child abductions and other predatory violence against children is often carried out by what they term "sex-crazed lunatics."¹⁷ In reality, they point out, most child abductions are perpetrated by people who are known to the child: i.e., a family member or friend.¹⁸ Their piece highlights this tragic reality and makes policy reform suggestions for how to re-orient violence prevention strategies that will address more common threats.¹⁹ While they make several provocative recommendations that are quite controversial—like suggesting that journalists who engage in irresponsible fear mongering should be jailed—they do raise important questions about the efficacy of violence prevention strategies.²⁰

Griffin Edwards is an Assistant Professor of Economics at the University of Alabama at Birmingham. Edwards's piece describes what he calls "a revolution, of sorts," that has taken place over the last half century in the legal approach in the U.S. to dealing with those with psychiatric disabilities.²¹ He takes the somewhat controversial position that those with certain types of mental illnesses have a propensity towards violence. He assesses the changes to the American legal approach towards those with mental illness in light of the connection he sees between violence and mental illness.²² In his piece, the changes he highlights include duty to warn laws, involuntary commitment, and the

¹⁷ Corey Jessup & Monica K. Miller, *Fear, Hype, and Stereotypes: Dangers of Overselling the AMBER Alert Program*, 8 ALB. GOV'T L. REV. 467, 469 (2015).

¹⁸ *Id.*

¹⁹ *Id.* at 499.

²⁰ *Id.* at 501–02.

²¹ Griffin Edwards, *Recent Advances in the Empirical Evidence Surrounding Mental Health Laws and Crime*, 8 ALB. GOV'T L. REV. 508, 509 (2015).

²² *Id.* at 511.

right to refuse treatment.²³ His findings reveal something incredibly important about these and other laws, similar to the arguments of other authors in this issue: that laws created to reduce incidents of violence perpetrated by those with psychiatric disabilities sometimes have the opposite effect. His assessment of the impact of law on the mentally ill and our ability to reduce violent crimes pose provocative questions and warrant serious consideration.

Mary Zdanowicz is presently a practicing attorney specializing in mental health law. She is formerly the Executive Director of the Treatment Advocacy Center, a non-profit organization that promotes treatment for individuals with psychiatric disabilities. Her contribution to this issue lays out a novel legal argument: that local sheriffs (i.e., those with primary responsibility for overseeing local jails and the services they provide to mentally ill inmates in their custody) should have standing to sue under the Americans with Disabilities Act to force states to provide treatment services in the community to prevent individuals with mental illness from entering the jail system.²⁴

While several pieces in this issue seek alternatives to incarceration for individuals with psychiatric disabilities, Alan R. Felthous's piece explores the importance of ensuring adequate treatment and supervision of individuals with such disabilities when they are incarcerated. Professor Felthous is director of the Forensic Psychiatry Division in the Department of Neurology and Psychiatry at the Saint Louis University School of Medicine, in St. Louis, Missouri.²⁵ His piece questions the wisdom of providing psychiatric medication alone to individuals who are incarcerated without providing adequate in-patient services to them during their incarceration. His article challenges the notion that medication alone is adequate to treat prisoners with mental illness who might need more services, and makes the important point that those who are incarcerated and receiving medication during their incarceration should also receive a full suite of inpatient psychiatric services as appropriate. He argues further that this is not just good policy, but, in many instances, it will be constitutionally required.

²³ *Id.* at 511, 519, 525.

²⁴ Mary T. Zdanowicz, *Keeping the Mentally Ill Out of Jail: Sheriffs as Litigants*, 8 ALB. GOV'T L. REV. 536 (2015).

²⁵ Alan R. Felthous, *Enforced Medication in Jails and Prisons: The New Asylums*, 8 ALB. GOV'T L. REV. 563 (2015).

The last piece in this issue is authored by Michelle Frankel, a third-year law student at Albany Law School (as of the publication time). Her article looks at the potential impact of the discovery of biomarkers that may help identify individuals who are at risk of suicide, particularly teenagers.²⁶ The article explores not just the ways in which this discovery can revolutionize the provision of mental health services, but also examines the constitutional validity of mechanisms for identifying individuals at risk of suicide as a means of targeting services to, and improving services for, these individuals.²⁷

Addressing the problem of the criminalization of mental illness will require interdisciplinary solutions, which must include, at a minimum, providing meaningful and humane interventions to those in need, that address the illness in an ethical and caring way and do not result in incarceration as a result of it. The authors here begin with the premise that the criminalization of mental illness is overwhelming our criminal justice institutions while also threatening the moral fiber of society: such an approach is not just counterproductive, but also immoral. From that point, however, they diverge in myriad ways and seek a range of solutions that warrant discussion, debate, and consideration. Many authors worry that legal interventions to address some of the behavioral manifestations of mental illness can be counterproductive. Instead of reducing violence, they might increase it. With these cautions in mind, any interventions to improve society's response to the needs of individuals with psychiatric disabilities must recognize the need for careful and humane interventions that address the symptoms of mental illness in a way that respects the dignity of the individual and does not seek easy answers that lock problems behind bars as a way of avoiding the challenge of finding solutions that work. The authors in this issue do not all agree on the solutions, but they agree that better approaches are needed, and have all contributed to a discussion that needs to happen to improve outcomes, improve treatment, and improve our response to an issue that affects us all in profound ways.

²⁶ Michelle Frankel, Comment, *Educating Society about the Prevalence of Suicide and Mental Illness to Stimulate Broader Mental Health Care Reform*, 8 ALB. GOV'T L. REV. 614, 616–18 (2015).

²⁷ *Id.* at 626.