EXTENDING THE LOGIC OF THE JUVENILE JUSTICE SYSTEM TO A SEPARATE JUSTICE SYSTEM FOR MENTALLY ILL OFFENDERS

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I. INTRODUCTION

The journey of a mentally ill person through the U.S. criminal justice system is not just heartbreaking, but unacceptable. What has come to be known as the criminalization of mental illness in the United States is one of the greatest modern tragedies. Seriously mentally ill offenders comprise between fourteen and twenty-five percent of U.S. prison and jail populations.[1] Yet, for making up such a significant portion of prison populations, there exists a profound failure in adequately handling seriously mentally ill offenders at every step of the United States' criminal justice system, beginning with the conditions under which arrests are made, to incarceration and their subsequent release back into the community.

In thinking about the special needs of mentally ill offenders and searching for a precedent for the initiation of change in the legal system, it should be asked whether any groups of individuals are treated differently from the healthy adult offender in the United States' legal system, and if the treatment is to their benefit. If so, can the logic used in this example be applied in building a more efficient system for severely mentally ill offenders?

A fitting example here would be the case of juveniles. Juveniles are a group of individuals that have an independent justice system for their legal needs that is based upon their special personal characteristics.[2]

In this paper, I will begin by briefly visiting the history of the juvenile justice system, and discussing some of the reasons for its foundation, focusing on the personality characteristics of juveniles that helped propel the reform. Next, I will explain how empirical research in the 20th century has provided psychological and neuroscientific evidence to support the behavioral observations that served as the basis of legal reform for juveniles, and how these findings (along with the original observations) are still used to support the notion that adolescents are

[1] Jennifer L. Skeem et al., *Correctional Policy for Offenders with Mental Illness: Creating a New Paradigm for Recidivism Reduction,* 35 L. & HUM. BEHAV. 110, 110 (2010); *What Percentage of the U.S. Jail and Prison Population is Mentally Ill?,* FRONTLINE, http://www.pbs.org/wgbh/pages/frontline/shows/asylums/etc/faqs.html (last visited Feb. 20, 2015).

[2] *See* Barry C. Feld, *Juvenile and Criminal Justice Systems' Responses to Youth Violence*, 24 CRIME & JUST. 189, 192–93 (1998).

fundamentally different from adults and should thus be legally treated as such. Then, I will examine the reasons why a similar system has not been implemented for individuals with severe mental illness who enter the justice system. I will delve into the difficulty of diagnosing mental illness, as well as the stigma that still accompanies the label, and how these two issues hinder reform. I will also discuss the lack of understanding of mental illness and the biology behind the disorders, which contributes to the problem of stigma. I will then borrow from the logic of the juvenile justice system to argue for a separate justice system for severely mentally ill offenders. This last section will discuss the characteristics of severely mentally ill offenders that deem them as significantly different from healthy offenders, using recent evidence to support a biological foundation for neurological dysfunction that support classic behavioral observations. Further, I will touch upon the detrimental effects that incarceration has on the mentally ill mind. Lastly, from a practical standpoint, I will argue that the criminal justice system does itself no favors with its current methods as the methods do not reduce recidivism since incarceration is not a cure.

II. FOUNDATION OF THE JUVENILE JUSTICE SYSTEM

In the legal system, the notion of reform for juveniles began to emerge early in the 19th century.[3] However, it was not until the Illinois Juvenile Court Act passed in 1899 that the first juvenile court was established in Chicago.[4] The creation of a special court for "neglected, dependent, or delinquent children under age 16"[5] was a landmark event. The Act instated the court with a rehabilitative purpose for juveniles rather than a punitive one, as well as initiating the separation of juveniles from adults in detention facilities.[6] This court served as a model for other states with most states adopting juvenile courts by 1920.[7] In current times, all fifty states of the United States have independent juvenile justice systems that are not federally mandated but

[3] *See* Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1189–90 (1970).

[4] Robert E. Shepherd Jr., *The Juvenile Court at 100 Years: A Look Back*, 6 J. OFF. JUV. JUST. DELINQ. PREVENTION 13, 15–16 (1999).

[5] *Id.* at 15.

[6] *Id.* at 15–16.

[7] Theodore N. Ferdinand, *History Overtakes the Juvenile Justice System*, 37 CRIME & DELINQ. 204, 209 (1991).

rather instated by each individual state.[8]

Why was a separate system for juveniles established at all? In the 19th century, juveniles began to be viewed as fundamentally different from adults in their behavioral and emotional development and it was believed that the state was needed to aid in rehabilitating those who strayed into the criminal world.[9] The reinforcement of this belief drove the separation of the justice systems.[10] The characteristics that are often used to describe juveniles in the present day (e.g. impulsive, immature) were also historically used, and were the basis for this reform.[11] The main argument posited was that juveniles' maturity, decision-making abilities, and behavioral control were not developed to their full potential, and thus, juveniles could not be held to the same standards as adults on such issues as deciding right from wrong, or being expected to act in accordance with their understanding of moral accountability.[12] The argument also stated that adolescents were not mature enough to fully comprehend the consequences of their actions, and that, if they did understand, their impulsivity and recklessness would preclude them from acting responsibly in accordance with their understanding.[13] In addition to immature personality characteristics, the malleability of youths' actions was thought to be a powerful reason that this population was amenable to reform within a rehabilitative system.[14] It was thought that adolescents could be saved and

[8] *Id.*; *see* ROBERT W. TAYLOR & ERIC J. FRITSCH, THE JUVENILE JUSTICE SYSTEM 4 (3d. ed. 2011); *see, e.g.,* CHRISTINE P. COSTANTAKOS, 4 NEB. JUV. CT. L. & PRAC. §1:1 (2014) (for example, the Nebraska juvenile court is governed not by federal law, but by Nebraska state law).

[9] *See* Elizabeth. S. Scott & Thomas Grisso, *The Evolution of Adolescence*, 88 J. CRIM. L. & CRIMINOLOGY 137, 141 (1998).

[10] *Id.* at 141–42.

[11] *See id.* (explaining that Progressive views on adolescents were that they were "'not fully formed'" and that Progressives described adolescents "in more childlike terms." Additionally, a prominent early reformer argued that "'our laws against crime [are] as inapplicable to children as they [are] to idiots.'").

[12] *See* Martin R. Gardner*, The Right of Juvenile Offenders to be Punished*, 68 NEB. L. REV. 182, 185–86, 196 (1989); *see also* FRANKLIN E. ZIMRING, THE CHANGING LEGAL WORLD OF ADOLESCENCE 22 (1982) (proposing that today's children "remain not fully adult" for a longer period than ever before).

[13] Scott & Grisso, *supra* note 9, at 143; *see* Martin L. Forst & Martha-Elin Blomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 323, 324 (1990).

[14] *See* Forst & Blomquist, *supra* note 13, at 325; Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 694 (1991); Scott & Grisso, *supra* note 9, at 144; *see also* Janet E. Ainsworth, *Re-imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the*

transformed into responsible, law-abiding adults.[15] Another driving force for separating juveniles from the adult justice system was the realization that housing juveniles with adults in the same detention and corrections facilities led to juvenile abuse; an unacceptable situation given the innocence and vulnerability of juveniles.[16]

The combination of the reasons listed above spurred the separation of a new juvenile justice system. This system included independent courts, as well as separate correction and detention facilities, with a focus on rehabilitation rather than punishment of the juvenile offenders.[17] It should be noted that over the years, particularly in the 1990s, there has been a slight shift from rehabilitation to punishment in the juvenile justice system.[18] However, most state legislatures have retained juvenile codes that contain an underlying rehabilitation theme.[19] A thematic move toward punishment in the juvenile code reflects the need for overall change in the system to make it most effective.[20] Yet, there is hardly any argument for abolishing the system altogether as it is commonly understood to be beneficial and in the interest of its juvenile recipients.[21] Therefore, the current day juvenile justice system maintains its goal of rehabilitation, and the current paper focuses on this goal.

III. SPECIAL CHARACTERISTICS OF JUVENILES AS REASON FOR DIFFERENTIAL LEGAL TREATMENT

The personality traits mentioned above that are often used to describe juveniles, in a stereotypical manner, were derived from observations of this population's behaviors.[22] The differences in

Juvenile Court, 69 N.C. L. Rev. 1083, 1098-99 (1991) (noting that the goals of the juvenile court were to "mold wayward youths into good citizens."); Thomas Grisso et al., *Competency to Stand Trial in Juvenile Court*, 10 INT'L J. L. & PSYCHIATRY 1, 1 (1987) (noting that the goals of the juvenile courts were to be focused on treatment, not punishment).

[15] *See* Forst & Blomquist, *supra* note 13, at 325.

[16] Fox, *supra* note 3, at 1189.

[17] *History of Juvenile Justice System*, MD. DEP'T OF JUV. SERV., http://www.djs.state.md.us/history.asp (last visited Feb. 9, 2015).

[18] JAMES C. HOWELL, PREVENTING & REDUCING JUVENILE DELINQUENCY 39–40 (2003).

[19] Donna M. Bishop, *Public Opinion and Juvenile Justice Policy: Myths and Misconceptions*, 5 CRIMINOLOGY & PUB. POL'Y 653, 659 (2006).

[20] *See id.* at 653.

[21] *Id.* at 657.

[22] *See, e.g.,* Roper v. Simmons, 543 U.S. 551, 569 (2005).

personality characteristics between adults and juveniles are still cited today and used to defend differential legal treatment of juveniles.[23] For example, in a Supreme Court ruling on the constitutionality of the death penalty for juveniles,[24] the Court recognized three characteristics that make juveniles very different from adults and that reduce the blameworthiness of criminal activity in those under the age of eighteen: immaturity, vulnerability, and changeability.[25]

Expanding upon prior behavioral observations, psychological and neuroscientific research has, over the years, provided empirical evidence for these observations.[26] The classic juvenile stereotype is supported by assessments of behavioral changes in risk-taking,[27] impulsivity,[28] and decision-making[29] over development. Research has shown that juveniles are more sensitive to rewards and socio-emotional contexts, while having immature behavioral control and a decreased sensitivity to risk, as compared to adults.[30] For example, developmental decision-making studies have shown that children and adolescents get better with time on choosing goal-directed actions over attractive distracting options.[31] Neuroimaging studies have supported the

[23] *See id.* at 570–71.

[24] *Id.* at 573.

[25] *Id.* at 569–70.

[26] *See* Adriana Galvan et al., *Risk Taking and the Adolescent Brain: Who is at Risk?*, 10 DEV. SCI. F8, F12–F13 (2007); L.P. Spear, *The Adolescent Brain and Age-related Behavioral Manifestations*, 24 NEUROSCI. & BIOBEHAVIORAL REV. 417, 417, 421–22 (2000); B. J. Casey et al., *The Adolescent Brain*, NCBI, http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2500212/ (last visited Feb. 20, 2015).

[27] Jeffery Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 DEV. REV. 339, 340–41 (1992).

[28] *See* Laurence Steinberg et al., *Age Differences in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-report: Evidence for a Dual Systems Model*, 44 DEV. PSYCHOL. 1764, 1764, 1774 (2008).

[29] Dustin Albert & Laurence Steinberg, *Judgment and Decision Making in Adolescence*, 21 J. RES. ON ADOLESCENCE 211, 211–12, 214 (2011); Elizabeth Cauffman & Laurence Steinberg, *(Im)maturity of Judgment in Adolescence: Why Adolescents May be Less Culpable than Adults,* 18 BEHAV. SCI. & L. 741, 741–43, 756–57 (2000).

[30] Casey et al., *supra* note 26.

[31] *See* John H. Flavell, et al., *Spontaneous Verbal Rehearsal in a Memory Task as a Function of Age*, 37 CHILD DEV. 283, 297 (1966) (recognizing that the progress of kindergarten-age subjects was at least partially due to a "time-binding, goal-directed effort . . . ."). *See generally* Daniel P. Keating & Bruce L. Bobbitt, *Individual and Developmental Differences in Cognitive-Processing Components of Mental Ability*, 49 CHILD DEV. 155, 155, 159, 165 (1978) (studying the developmental and/or individual differences responsible for the difference in

fact that the prefrontal cortex, a region involved in behavioral control and emotion regulation, continues growth and change into early adulthood.[32] Functional development of this region, along with other regions involved in behavioral and emotion regulation, continue to mature through adolescence, as well.[33] Findings such as this have corroborated the classical behavioral and psychological evidence and when included in amicus briefs for court decisions, have even helped sway the judgment of the Supreme Court in cases concerning juveniles.[34] For example, in *Roper v. Simmons*, the Supreme Court ruled that it is unconstitutional to impose capital punishment for crimes committed while under the age of eighteen, with scientific studies being cited in the ruling.[35] The ruling stated that modern science supports the notion that juveniles are more immature and less responsible than adults.[36] A more recent ruling from the Supreme Court, *Miller v. Alabama*, ruled that mandatory sentences of life without the possibility of parole are unconstitutional for juvenile offenders, citing psychological and neuroscientific evidence from an American Psychological Association amicus brief that juveniles have special characteristics, such as immature decision-making and increased risk-taking, that is supported by empirical research.[37] Although the original behavioral observations were sufficient to initiate initial reform, a recent report from the National Research Council confirms that scientific knowledge about adolescent development should continue to be used and should be the foundation for legal

cognitive abilities between younger children and older children).

[32] *See* Jay N. Giedd et al., *Brain Development During Childhood and Adolescence: A Longitudinal MRI Study*, 2 NATURE NEUROSCIENCE 861, 861–62 (1999); Nitin Gogtay et al., *Dynamic Mapping of Human Cortical Development During Childhood Through Early Adulthood*, 101 PNAS 8174, 8175–77 (2004); Elizabeth R. Sowell et al., *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships during Postadolescent Brain Maturation*, 21 J. OF NEUROSCIENCE 8819, 8819 (2001); Christian K. Tamnes et al., *Brain Maturation in Adolescence and Young Adulthood: Regional Age-Related Changes in Cortical Thickness and White Matter Volume and Microstructure*, 20 CEREBRAL CORTEX 534, 534, 542 (2010).

[33] Beatriz Luna et al., *What Has fMRI Told Us About The Development of Cognitive Control Through Adolescence?*, 72 BRAIN & COGNITION 101, 102 (2010).

[34] Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?,* ISSUES IN SCI. & TECH. (Nov. 27, 2013), http://issues.org/28-3/steinberg/.

[35] Roper v. Simmons, 543 U.S. 551, 569–71 (2005).

[36] *Id*. at 569.

[37] Miller v. Alabama, 132 S. Ct. 2455, 2464 n.5 (2012).

options for juveniles.[38]

Consequently, the principle upon which the juvenile justice system was founded, that juveniles are significantly different from adults in their personality characteristics, still holds today. In fact, it is better supported in modern day with empirical scientific evidence that supports previously observed behaviors.

IV. NO SEPARATE JUSTICE SYSTEM FOR MENTALLY ILL, DESPITE SPECIAL CHARACTERISTICS

The United States currently does not have a completely separate justice system for mentally ill offenders despite the fact that these offenders have very special characteristics.[39] The lack of a proper method for dealing with this special type of offender is likely part of the reason the criminalization of mental illness exists in the United States.

There are many factors that contribute to the problem of criminalization of mental illness, but the deinstitutionalization of mental hospitals is thought to have contributed greatly.[40] Deinstitutionalization of public mental hospitals began in the United States in the middle of the 20th century during the anti-psychiatry movement when a series of journalistic exposés revealed to the public the inhumane and barbaric practices that occurred within the walls of these asylums.[41] Many believed that asylum patients were committed against their will,[42] deprived of freedoms and, therefore, deserved to be released.[43] Deinstitutionalization was propelled again when Ronald Reagan,

[38] *Juvenile Justice Reforms Should Incorporate Science of Adolescent Development*, NEWS FROM THE NAT'L ACAD. (Nov. 13, 2012), http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=14685.

[39] *See* Robert Bernstein & Tammy Seltzer, *Criminalization of People with Mental Illnesses: The Role of Mental Health Courts in System Reform*, 7 UDC/DCSL L. REV. 143, 145–46 (2003).

[40] H. Richard Lamb & Leona L. Bachrach, *Some Perspectives On Deinstitutionalization*, 52 PSYCHIATRIC SERV. 1039, 1042 (2001).

[41] Michael Vitiello, *Addressing the Special Problems of Mentally Ill Prisoners: A Small Piece of the Solution to Our Nation's Prison Crisis,* 88 DENV. U. L. REV. 57, 59–60 (2010).

[42] *See id.* at 60 (noting the concern surrounding cases where a sane individual was involuntarily committed and kept in an asylum for a prolonged period); Thai Phi Le, *Mind Over Murder?*, WASH. LAW (Feb. 2012), http://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/february-2012-mental-health.cfm (a prominent advocate of the mentally ill stated that if people were to be confined against their will that they should be afforded adequate care in an attempt to help them get better).

[43] *See* Phi Le, *supra* note 42.

as president of the United States, sought to reduce federal funding to social programs and thus shifted funding away from state hospitals.[44] Patients were released with the hope that community mental health care centers would take the place of state-funded mental institutions.[45] However, this never came to fruition due to a lack of governmental funding, as mass amounts of federal money were being poured into the Vietnam War.[46] Since the deinstitutionalization of mental hospitals in the United States, individuals with mental illness have had limited options for treatment and care in the community.[47] Without access to mental health community care, many individuals find that the expression of their mental illness symptoms can be interpreted as problematic behavior by society and therefore results in interactions with the legal system. Oftentimes, these crimes are classified as disruptive behavior (e.g. intoxication in public, trespassing, substance-abuse) or "crimes of necessity" (e.g. prostitution, low-level drug sales).[48] Individuals with mental illness are frequently thrust into the justice system as a result of behaviors they often cannot control.[49] Today, in the United States, there is evidence that prisons hold more mentally ill individuals than psychiatric hospitals.[50] The Los Angeles County Jail is the largest psychiatric inpatient treatment facility in the country.[51]

While the criminal justice system provides mental health care to prisoners, it is quite limited and typically not adequate for all

[44] Gerald N. Grob, *The Paradox of Deinstitutionalizaton*, 32 SOC'Y 51, 52 (1995).

[45] Vitiello, *supra* note 41, at 61–62.

[46] ARTHUR J. LURIGIO & JANES A. SWARTZ, NAT'L INST JUST., 3 CHANGING THE CONTOURS OF THE CRIMINAL JUSTICE SYSTEM TO MEET THE NEEDS OF PERSONS WITH SERIOUS MENTAL ILLNESS 55 (2000), *available at* https://www.ncjrs.gov/criminal_justice2000/vol_3/03front.pdf; Grob, *supra* note 44, at 52; Arthur J. Lurigio*, Responding to the Needs of People with Mental Illness in the Criminal Justice System*, 35 J. CRIME & JUST. 1, 4 (2012).

[47] *See* Jeanette M. Jerrell & Richard Komisaruk, *Public Policy Issues in the Delivery of Mental Health Services in a Jail Setting*, *in* AMERICAN JAILS: PUBLIC POLICY ISSUES 100, 100 (Joel A. Thompson & G. Larry Mays eds., 1991); Lamb & Bachrach, *supra* note 40, at 1039–40; Vitiello, *supra* note 41, at 62–63.

[48] Lamb & Bachrach, s*upra* note 40, at 1041–42.

[49] *See* Vitiello, *supra* note 41, at 67–68.

[50] Steven Leifman, Op-Ed., *Mentally Ill and in Jail*, WASH. POST, Aug. 16, 2001, at A25.

[51] Steven S. Sharfstein, *The Case for Caring Coercion* (Catalyst Treatment Advoc. Center, Arlington, Va.), Summer 2001, at 2.

mentally ill persons.[52] One survey found that of 3,000 jails across the nation, just thirty-five could be used as a model for mental health treatment programs in jail.[53] In addition to inadequate mental health care, mentally ill individuals are subject to being targeted, more so than other prisoners, by fellow prisoners for assaults and rapes, as well as by the administration for solitary confinement.[54] The stress from assaults and punishment has negative effects on mental illness.[55] When released from incarceration, individuals with serious mental illness may have difficulties finding employment and housing due to both their untreated mental illness and their criminal record.[56] Mental health care in communities may or may not provide the needed treatment for a newly released mentally ill offender. It is common for a released mentally ill prisoner to eventually commit another offense, landing them right back in front of the judge's bench.[57] It appears that throughout the system, it is simply not recognized what the needs are for these types of offenders. For example, police officers arresting the mentally ill for crimes are often not trained in assessing the situation with which they are confronted.[58] A recent investigation found that about half of the people shot by police are mentally ill,[59] often under mistaken perceived threat. The report indicates that the finding is likely due to many factors such as cutbacks in mental health services nationwide and lack of oversight and accountability, but that lack of police training in crisis intervention fuels the problem.[60] Even within jails, a survey revealed that of 1,330 jails, eighty-four percent of the jails offered three hours or less of training on how

[52] *Guilty of Mental Illness*, PSYCHIATRIC TIMES (Jan. 1, 2004), http://www.pyschiatrictimes.com/guilty-mental-illness.

[53] KENNETH E. KERLE, AMERICAN JAILS: LOOKING TO THE FUTURE 23 (1998).

[54] *Guilty of Mental Illness, supra* note 52; Tom Moroney, *America's Mentally Ill Prisoners Outnumber Hospital Patients, Tenfold*, BLOOMBERG BUS. (Apr. 8, 2014), http://Bloomberg.com/bw/articles/2014-04-08/Americas-mentally-ill-prisoners-outnumber-hospital-patients-tenfold.

[55] *Guilty of Mental Illness, supra* note 52.

[56] HOLLY HILLS ET AL., EFFECTIVE PRISON MENTAL HEALTH SERVICES: GUIDELINES TO EXPAND AND IMPROVE TREATMENT 70 (2004).

[57] *See* Vitiello, *supra* note 41, at 68.

[58] *See, e.g., Deadly Force: Police & the Mentally Ill*, PORTLAND PRESS HERALD, http://www.pressherald.com/interactive/maine_police_deadly_force_series_final/ (last visted Jan. 20, 2014) (exploring Maine's police force and its involvement with the mentally ill).

[59] *Id.*

[60] *Id.*

to handle the mentally ill.[61]

Although the deinstitutionalization of mental hospitals in the United States in the middle of the twentieth century[62] is partly to blame for the increased frequency that mentally ill individuals collide with the justice system, it is not to blame for the continued widespread neglect of these offenders today.

Due to the issues listed above, some counties have proposed to address the issue of criminalization of mental illness with mental health courts, a type of diversion from jail or prison program.[63] The key, of course, is to examine the root of the problem and aim to address that, which is essentially to get mental health treatment for mentally ill offenders. Mental health courts have a separate docket for mentally ill defendants, as well as dedicated judges, prosecution, and defense teams.[64] Typically in mental health courts, participation is voluntary and defendants can avoid jail time by agreeing to a community treatment program.[65] The ultimate goal is to make more informed decisions by bridging communication between the justice system and mental health professionals.

Since the creation of the first mental health court in Broward County Florida in 1997, there has been slight amelioration of the criminalization of mental illness.[66] However, this improvement is found only within the few hundred counties where mental health courts are implemented.[67] There exists no consistent

[61] KERLE, *supra* note 53, at 20.

[62] Lamb & Bachrach, s*upra* note 40, at 1039.

[63] *See* Henry J. Steadman et al., *Comparing Outcomes for Diverted and Nondiverted Jail Detainees with Mental Illnesses*, 23 L. & HUM. BEHAV. 615, 616 (1999).

[64] Bernstein & Seltzer, *supra* note 39, at 150.

[65] *See* JOHN S. GOLDKAMP & CHERYL IRONS-GUYNN, EMERGING JUDICIAL STRATEGIES FOR THE MENTALLY ILL IN THE CRIMINAL CASELOAD viii (2000), *available at* https://www.ncjrs.gov/pdffiles1/bja/182504.pdf; JOHN PETRIL ET AL., PRELIMINARY OBSERVATIONS FROM AN EVALUATION OF THE BROWARD COUNTY MENTAL HEALTH COURT 19 (2001), *available at* https://www.portal.state.pa.us/portal/server.pt/document/1037378/doc3_petrila_2001_pdf.; *see also* Amy Watson et al., *Mental Health Courts and the Complex Issue of Mentally Ill Offenders*, 52 PSYCHIATRIC SERV. 477, 477 (2001) (stating that defendants in a mental health court program can have their sentences deferred if they agree to enter the mental health court program).

[66] Risdon N. Slate, *From the Jailhouse to Capitol Hill: Impacting Mental Health Court Legislation and Defining What Constitutes a Mental Health Court*, 49 CRIME & DELINQUENCY 6, 12, 15 (2003).

[67] *See generally Mental Health Courts*, NCSC, http://www.ncsc.org/Topics/Problem-Solving-Courts/Mental-Health-Courts/State-Links.aspx (last visited Jan. 19, 2015) (providing a list of counties

standardized method or system of dealing with severely mentally ill offenders and their special needs. Research indicates that despite the helpfulness of mental health courts, the current legal system is inadequately equipped to deal with severely mentally ill offenders.[68]

In the next section, I discuss why reform has been slow to come to the current system regarding mentally ill offenders. I begin the discussion with the difficulties of mental illness diagnoses methods, which act as a barrier to easily separating mentally ill offenders from healthy offenders. Next, I discuss how the stigmatization of mental illness persists, and hinders progress and reform in the justice system.

V. BARRIERS TO REFORM

A. Diagnosis of Mental Illness

The difficulty in diagnosing mental illnesses serves as one of the main obstacles to reform. It is not always easy to distinguish between mentally ill individuals and healthy individuals, as one simple test for identifying all mental illnesses does not exist.[69] The juvenile justice system, in contrast, uses a clear age cut-off to distinguish juveniles from adults (i.e. usually eighteen and under are juveniles),[70] and thus, does not have a categorizing problem. Additionally, mental illnesses are oftentimes difficult to discern

within states that have mental health courts); *What Have We Learned From Evaluations of Mental Health Courts?*, BUREAU OF JUST. ASSISTANCE, https://www.bja.gov/evaluation/program-mental-health/mh2.htm (last visited Jan. 19, 2015) (stating that there is some evidence that mental health courts are having positive impacts).

[68] *See generally* KERLE, *supra* note 53, at 19, 23–24 (stating that "[t]he problem relating to jail and the mentaly ill has gotten worse[,]" and that problems with mental illness in jail have exceeded "the political capacity of community mental health centers to finance jail mental health reform." Also stating that only fifty diversion programs exist nationwide, and eighteen seem to be working effectively, but only fifteen of those eighteen have what could be considered mental health diversion programs.).

[69] *Mental Health: What's Normal, What's Not,* MAYO CLINIC, http://www.mayoclinic.org/healthy-living/adult-health/in-depth/mental-health/art-20044098 (last visited Jan. 16, 2015).

[70] *See* Lauren Baldwin, *Who Decides to Try a Juvenile as an Adult?*, CRIM. DEF. LAW., http://www.criminaldefenselawyer.com/resources/criminal-defense/juvenile/who-decides-try-a-juvenile-adult (last visited Jan. 16, 2015) (while most states consider anyone under the age of eighteen a juvenile, some states have lower cut off ages, sometimes sixteen or seventeen, for their juvenile systems).

from each other since the symptoms are typically on spectrums and tend to overlap.[71] Experts are needed to determine diagnoses, however even with expertise, these issues remain difficult to resolve. If a separate system for mentally ill offenders were to be established and equipped with experienced health care professionals, the process of classifying and separating severely mentally ill offenders from other offenders would remain difficult. A possible first step solution to this dilemma, which is already in use in some mental health courts, could be to exclusively include mental disorders that are classified as Axis I according to the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV)[72] (e.g. major depression, schizophrenia, bipolar disorder).[73] Axis I disorders represent clinical disorders that need treatment, and are sometimes more easily identifiable, or in the least, have better defined criteria for diagnosis within the DSM.[74] That is just one possible solution out of many for setting an inclusion threshold. Deciding on a threshold will be difficult since, as previously mentioned, mental illnesses are typically on spectrums. However, a threshold must be set to deem the system effective.

DSM diagnoses could be a starting point, but perhaps a temporary solution. In an effort to make strides toward more efficient mental illness diagnoses, the National Institute for Mental Health (NIMH) has recently begun viewing mental disorders in a different light.[75] In 2010, the NIMH launched an initiative to encourage researchers to focus on finding the underlying neural circuitry of mental disorders,[76] with the intent of allowing mental health professionals to move toward brain-based diagnoses of mental illness rather than symptom-based diagnoses, as the latter have proven to be inadequate, confusing, and unhelpful.[77] The decision is based on the clinical observation that not all combinations of dimensional symptoms fit neatly into

[71] *See* Robert F. Krueger & Kristian E. Markon, *A Dimensional-Spectrum Model of Psychopathology*, 68 ARCHIVES GEN. PSYCHIATRY 10, 10 (2011).

[72] DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 25–26 (4th ed. 1994).

[73] *Id.* at 19–20, 26.

[74] *See id.* at 25–26.

[75] Thomas Insel et al., *Research Domain Criteria (RDoC): Toward a New Classification Framework for Research on Mental Disorders*, 167 AM. J. PSYCHIATRY 748, 748 (2010).

[76] *Id.* at 749.

[77] Greg Miller, *Beyond DSM: Seeking a Brain-Based Classification of Mental Illness*, 327 SCI. 1437, 1437 (2010).

the DSM categories of mental illness.[78] A former director of the NIMH, Steven Hyman, says of the DSM that it is a "poor mirror of nature."[79] Although the criminal justice system needs thresholds to distinguish between different types of individuals, this does not mean that we need to view the biological foundation for mental illnesses as discrete and categorical. As science moves toward the idea that varying levels of abnormalities in different brain regions lead to wide varieties of phenotypes that are not easily categorized, we can cling (for a limited time) to previously useful distinctions for practical matters (e.g. whether one qualifies for a mental health court).

Inevitably, however, science may prove these distinctions to be unhelpful and, most importantly, harmful to the recipients of the diagnoses. In that case, thresholds will need to be updated as the science of mental illness progresses because it will contribute to better classification schemes. While we are a ways off from brain-based diagnoses of mental illness, it is important to recognize that improvements in the methodology are on the way and may make the task of correctly diagnosing mentally ill offenders a less daunting problem.

B. Stigma

Once a diagnosis, and therefore a label, is in place, the stigma follows. Stigma surrounding mental illness is another reason that the U.S. justice system has been slow in reforming the way it handles mentally ill offenders. Throughout history, individuals with mental illness have been ostracized, feared, and treated cruelly.[80] Not knowing causes of these illnesses, societies blamed parents, immorality, and demons.[81] The stigma of mental illness shamed families into hiding their afflicted loved ones, across time and geography.[82] Evidence suggests that individuals who are diagnosed with a mental illness are socially rejected significantly more than physically ill persons who behave identically.[83] Only

[78] *Id.*

[79] *Id.*; Abraham Peled, *Clinical Brain Profiling; A Neuro-Computational Psychiatry*, REDWOOD CTR. FOR THEORETICAL NEUROSCIENCE (Jan. 26, 2015, 12:00 PM), http://redwood.berkeley.edu/seminar-info.php?id=279.

[80] ROY PORTER, MADNESS: A BRIEF HISTORY 89–90 (2002).

[81] *Id.* at 12, 17, 21, 90.

[82] *Id.* at 89–90; Amy V. Blue*, Greek Psychiatry's Transition from the Hospital to the Community*, 7 MED. ANTHROPOLOGY Q. 301, 305–06 (1993).

[83] Daniel W. Socall & Thomas Holtgraves, *Attitudes Toward the Mentally Ill:*

sixty-three percent of Americans reported feeling comfortable interacting with an individual receiving treatment for depression, and even less (forty-five percent) reported feeling comfortable interacting with an individual receiving treatment for bipolar disorder or schizophrenia.[84]

What lies behind this stigma? A lack of understanding of the biology and the experience of mental illness are some causes.[85] Much of the public's attitude toward mental illness has often been and still remains, that one should "pull oneself up by one's bootstraps," and that mental illness must be a character flaw.[86] A 1996 survey found that seventy-one percent of Americans believed that mental illnesses could be attributed to mental weakness, while sixty-five percent blamed parenting for mental illnesses.[87] Since then the acceptance of biomedical explanation as causes of mental illnesses has gained traction, with sixty-seven percent believing biomedical causes for major depression and eighty-six percent for schizophrenia.[88] However, a recent study reports that despite the acceptance of biomedical models of mental illness, the public is still largely uncomfortable with and fears those with mental illness.[89] Stigma for mental illness does not persist only in public spheres, but also in institutions such as the U.S. legal system.[90] A review of states' laws showed that approximately one-third of states had statutes restricting the rights of an individual with mental illness, in domains such as voting, participating in juries, holding elective offices, parenting,

The Effect of Label and Beliefs, 33 SOCIOLOGICAL Q. 435, 441 (1992).

[84] MENTAL HEALTH AMERICA, MENTAL HEALTH AMERICA ATTITUDINAL SURVEY 5 (2007).

[85] *See* Bernice A. Pescosolido et al., *"A Disease like any Other"? A Decade of Change in Public Reactions to Schizophrenia, Depression, and Alcohol Dependence*, 167 AM. J. PSYCHIATRY 1321, 1321 (2010).

[86] *See* Patrick W. Corrigan, *The Impact of Stigma on Severe Mental Illness*, 5 COGNITIVE & BEHAV. PRAC. 201, 206–07 (1998) (three common opinions on mental illness are that people with mental illnesses should be feared and kept out of communities, that they are irresponsible and their life decisions need to be made by others, and that those with mental illnesses are like children and need to be taken care of).

[87] Sue Abderholden, *Changes in the Mental Health System,* COUNCIL ON CRIME AND JUST., http://www.crimeandjustice.org/councilinfo.cfm?pID=55 (last visited Feb. 10, 2015).

[88] Pescosolido*, supra* note 85, at 1323.

[89] Jason Schnittker, *Public Beliefs About Mental Illness, in* HANDBOOK OF THE SOCIOLOGY OF MENTAL HEALTH 75, 88 (2d ed. 2013).

[90] *See* Dierdre M. Smith, *The Disordered and Discredited Plaintiff: Psychiatric Evidence in Civil Litigation*, 31 CARDOZO L. REV. 749, 753–54 (2010).

and remaining married.[91] Another disturbing fact revealed itself in a follow-up study ten years later when it was discovered that practically none of these laws had been revoked or revised to be less discriminatory.[92]

A contributing factor to the perpetuation of stigma is media stories about mentally ill patients that emphasize violence,[93] which increases prejudice.[94] This occurs despite the fact that the association between mental illness and violence has been demonstrated to be relatively weak[95] although the presence of alcohol and drugs does increase the risk of aggressive behavior,[96] and mental illness is sometimes comorbid with substance abuse disorders.[97] Research suggests that what truly underlies stigma is the belief that mentally ill individuals are violently dangerous, incompetent, and irresponsible.[98] Therefore, to counter those beliefs, there is a need for more stories on people with mental illness focusing on their struggles, their triumphs, and their recovery, which are currently notably absent from the media.[99] Individuals that comprise the legal system of the United States do not live apart from the society that persistently stigmatizes mental illness. They watch the same news reports about violent mentally ill individuals, and the same television shows depicting individuals with mental illness as incompetent individuals as

[91] Craig Hemmens et al., *The Consequences of Official Labels: An Examination of the Rights Lost by the Mentally Ill and Mentally Incompetent Ten Years Later*, 38 COMMUNITY MENTAL HEALTH J. 129, 131–33, 135–36, 138 (2002); *see also* Patrick W. Corrigan et al., *Structural Levels of Mental Illness Stigma and Discrimination*, 30 SCHIZOPHRENIA BULLETIN 481, 482 (2004).

[92] Corrigan, *supra* note 91, at 482–83.

[93] Russell E. Shain & Julie Phillips, *The Stigma of Mental Illness: Labeling and Stereotyping in the News, in* RISKY BUSINESS: COMMUNICATING ISSUES OF SCIENCE, RISK, AND PUBLIC POLICY 61, 61–62 (Lee Wilkins & Philip Patterson eds., 1991).

[94] *See generally* Matthias C. Angermeyer & Herbert Matschinger, *Social Distance Towards the Mentally Ill: Results of Representative Surveys in the Federal Republic of Germany*, 27 PSYCHOL. MED. 131, 132, 137–38 (1997) (showing that increasingly negative public perception of the mentaly ill leads to greater social distance and prejudice is a component of social distance).

[95] *The MacArthur Community Violence Study,* MACARTHUR RES. NETWORK ON MENTAL HEALTH & L., http://www.macarthur.virginia.edu/violence.html (last modified Feb. 2001).

[96] JACKIE MASSARO, SUBSTANCE ABUSE & MENTAL HEALTH SERV. ADMIN., OVERVIEW OF THE MENTAL HEALTH SERVICE SYSTEM FOR CRIMINAL JUSTICE PROFESSIONALS 2 (2005).

[97] *Id.*

[98] *See* Corrigan, *supra* note 86, at 207, 209.

[99] *See* Otto F. Wahl, *News Media Portrayal of Mental Illness Implications for Public Policy*, 46 AM. BEHAV. SCIENTIST 1594, 1598 (2003).

does the public. They may or may not have a better understanding of the needs of mentally ill individuals when deliberating over their cases. If a separate system for severely mentally ill individuals were to be put in place, the participants (especially judges) could be specially trained on issues pertaining to mental illness.

Although science and medicine have made great progress over the centuries in elucidating some of the foundations of mental illness, mental disorders remain misunderstood today and the stigma associated with them may be lessened but still remains.[100] In order to establish a system for mentally ill offenders, one must first admit that mental illness is a large problem affecting many members of our society and many people are still largely uncomfortable with that. It is paramount to reduce stigma for the cause for the criminalization of mental illness.

What can be done to reduce stigma? Research indicates that increasing public literacy about the biological correlates of mental disorders does little to reduce stigmatization and discrimination of individuals with mental illness.[101] Studies of this type indicate that despite outreach and educational programs, mental health carries stigma with it and many people in society are uncomfortable in discussing and facing these issues.[102] However, a recent study suggests that presenting information about treatment alongside biomedical accounts of mental illness can help destigmatize mental disorders,[103] and thus provide hope. Additionally, interpersonal contact and simply imagining intergroup contact[104] with mentally ill individuals aids in giving a face to a label and decreases stigmatization.[105] It is interesting that one in five U.S. adults have experienced mental illness in the

[100] *See* Patrick W. Corrigan & Amy C. Watson, *At Issue: Stop the Stigma: Call Mental Illness a Brain Disease*, 30 SCHIZOPHRENIA BULLETIN 477, 477–78 (2004) (stating that the public tends to view people with mental illness responsible for their illnesses).

[101] *Id.* at 478.

[102] *See id.* at 477–78.

[103] Matthew S. Lebowitz & Woo-kyoung Ahn, *Combining Biomedical Accounts of Mental Disorders With Treatability Information to Reduce Mental Illness Stigma*, 63 PSYCHIATRIC SERV. 496, 498 (2012).

[104] Sofia Stathi et al., *Imagining Intergroup Contact Can Combat Mental Health Stigma by Reducing Anxiety, Avoidance and Negative Stereotyping*, 152 J. SOC. PSYCHOL. 746, 746–47, 752 (2012).

[105] S. Evans-Lacko et al., *Association Between Public Views of Mental Illness and Self-Stigma Among Individuals with Mental Illness in 14 European Countries*, 42 PSYCHOL. MED. 1741, 1748 (2011).

past year,[106] and yet prejudice and stigma surrounding mental disorders persists.

VI. PROPOSAL FOR A SEPARATE JUSTICE SYSTEM FOR MENTALLY ILL OFFENDERS

The argument for recognizing juveniles as offenders with special characteristics that provided the foundation for the juvenile justice system can and should be extended and applied to a similar system for severely mentally ill offenders. This is not meant to equate the two populations but to borrow the logic that a population with special characteristics is significantly different from the healthy adult offender and in need of protection from the state. Common knowledge informs the public of occasional atypical behavior (e.g. increased risk-taking, altered decision-making) of individuals with severe mental illness, just as it has for juveniles throughout history. However, it is likely that states looked upon rehabilitation as a solution to the juvenile delinquency problem because juveniles were known to outgrow their behavior. It is possible that the option of rehabilitation has not been widely extended to the mentally ill because mental illness was, and remains, misunderstood. There is no clear road to rehabilitation in every case of mental illness and although, it is known in the present day that the illness lies in the mind, it is still unknown what or where is the exact problem. There does not exist a time period or event (e.g. adolescence) to which one can point to explain the behavioral differences.[107] However, in the modern day it is well accepted in the scientific and medical fields that organic neurological abnormalities underlie the behavioral expression of mental illness.[108] Further, there exists a precedent for using behavioral, psychological, and neuroscientific evidence to argue for special treatment for unique behavioral characteristics in the justice system.[109] Further, experts agree

[106] U.S. DEP'T OF HEALTH & HUMAN SERV., MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 15 (1999), *available at* http://profiles.nlm.nih.gov/ps/access/NNBBHS.pdf.

[107] *See* Spear, *supra* note 26, at 417.

[108] *See* U.S. DEP'T OF HEALTH & HUMAN SERV., *supra* note 106, at 16; s*ee also* Kirsten Weir, *The Roots of Mental Illness: How Much of Mental Illness Can the Biology of the Brain Explain?,* 43 AM. PSYCHOL. ASS'N 30, 30 (2012).

[109] *See Mental Health, Mental Retardation, and Criminal Justice: General Professional Obligations,* AM. BAR ASS'N, http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_mentalhealth_blk.html (last visited Jan. 24, 2015) (use of

that treatment is needed to reduce criminal activity in individuals with mental illness.[110] The focus of the criminal justice system in its handling of severely mentally ill individuals should be rehabilitative, not punitive—analogous to the juvenile justice system. A separation of justice systems can be founded on three principles (discussed in detail below): (1) mental illnesses are brain disorders, and as provisions are made for juveniles' behavior, which is understood to stem from incompletely developed brains, the same should be extended to the mentally ill; (2) incarceration of the mentally ill as it stands is extremely detrimental to their well-being including their physical, mental, and emotional health, and can, therefore, be argued to be cruel and unusual punishment; and (3) incarceration of the mentally ill in normal prisons and jails does nothing to reduce recidivism, while participation in mental health courts (where offenders are linked with treatment) has proven to reduce recidivism.

A. Rehabilitation, Not Punishment

Although mental illnesses have been viewed with superstition and fear in the past, there is basic agreement among the scientific and medical communities that mental illnesses are brain disorders.[111] Additionally, although the exact neural correlates have not been elucidated, there has been great progress toward this domain as brain-behavior relationships are unraveled ever more.[112] For example, depression has been linked to hypoactivity of neural networks associated with affect, attention, and working memory.[113] More generally, there appear to be significant anatomical differences between the brains of those with serious mental illnesses and healthy individuals, for example in schizophrenia,[114] bipolar disorder,[115] and post-traumatic stress

scientific experts to win mental health litigation).

[110] *See* Dale E. McNiel & Renée L. Binder, *Effectiveness of a Mental Health Court in Reducing Criminal Recidivism and Violence*, 164 AM. J. PSYCHIATRY 1395, 1395, 1401 (2007) (a study providing evidence that treatment in mental court system reduces criminal behavior).

[111] Weir, *supra* note 108, at 30.

[112] *See, e.g.,* Irene Messina et al., *Neural Correlates of Psychotherapy in Anxiety and Depression*, 8 PLOS ONE 1, 7 (2013).

[113] *See* Ilya M. Veer et al., *Whole Brain Resting-State Analysis Reveals Decreased Functional Connectivity in Major Depression*, 4 FRONTIERS SYS. NEUROSCIENCE 1, 1 (2010).

[114] D. Arnone et al., *Magnetic Resonance Imaging Studies in Bipolar Disorder and Schizophrenia: Meta-Analysis*, 195 BRITISH J. OF PSYCHIATRY 194, 194, 197

disorder.[116] Although consistent differences have yet to be found with these kinds of volumetric measurements of specific, discrete neural regions, more recent studies have found patterns of dysconnectivity between fundamental brain systems that underlie behaviors often compromised in individuals with mental illnesses.[117] Additionally, a recent study found that anatomical brain images of individuals with lifelong neuropsychiatric illnesses could be distinguished from each other with close to ninety percent accuracy.[118] Thus, strong evidence for neural dysfunction and abnormality in individuals with mental illness exists, which supports the observations of behavior from this population.

If juveniles are segregated on the premise that their brains, and therefore behaviors, are not fully developed, and further, that they should not be held to the same standards as adults, there are no grounds to prohibit the extension of this logic to offenders with serious mental illness. The scientific evidence exists to support a biological basis for mental disorders, even if the precise mechanisms have yet to be elucidated. Many may argue that the justice system does account for mental illness with the insanity defense. However, any practicing lawyer or judge could attest that the insanity defense is an impractical defense nowadays, and is rarely successful in a court of law.[119]

B. Detrimental Effects of Incarceration on the Mentally Ill Mind

Outside of the courtroom, individuals with mental illness should have the nature of their illness borne in mind when issues of incarceration arise. Data suggests that conditions found inside

(2009); Christos Davatzikos et al., *Whole-Brain Morphometric Study of Schizophrenia Revealing a Spatially Complex Set of Focal Abnormalities*, 62 ARCHIVES OF GEN. PSYCHIATRY 1218, 1218–19 (2005).

[115] Arnone, *supra* note 114, at 194–95, 197.

[116] *See* Hidenori Yamasue et al., *Human Brain Structural Change Related to Acute Single Exposure to Sarin*, 61 ANNALS OF NEUROLOGY 37, 39 (2006).

[117] Joshua W. Buckholtz & Andreas Meyer-Lindenberg, *Psychopathology and the Human Connectome: Toward a Transdiagnostic Model of Risk for Mental Illness*, 74 NEURON 990, 990 (2012).

[118] Ravi Bansal et al., *Anatomical Brain Images Alone Can Accurately Diagnose Chronic Neuropsychiatric Illnesses*, 7 PLOS ONE 1, 13–14 (2012).

[119] *See generally* RICHARD J. BONNIE ET AL., A CASE STUDY IN THE INSANITY DEFENSE: THE TRIAL OF JOHN W. HINCKLEY, JR. (3d ed. 2008) (discussing the diffuculties of invoking the insanity defense due to statutory changes following the Hinckley acquittal).

prisons exacerbate mental illness,[120] and that mental health care in the criminal justice system is profoundly lacking.[121] Due to untreated symptoms, individuals with serious mental illnesses are a risk to themselves and to others.[122] Besides being a danger to themselves, seriously mentally ill offenders are targeted significantly more than other prisoners by fellow prisoners for abuse and rape,[123] which also exacerbates mental illness.[124] Punishment within detention centers is often also administered more frequently to mentally ill offenders.[125] A common punishment in many prisons is solitary confinement, where the prisoner is isolated from social contact for a certain period of time.[126] Effects of long-term solitary confinement on healthy individuals include (but are not limited to): affective disturbances, difficulty with attention and memory, impulse control problems, changes in perception (including hallucinations), extreme generalized anxiety, and depression.[127] Mentally ill offenders are also served this punishment, although it is particularly damaging to these individuals.[128] One of the reasons that solitary confinement is so detrimental to individuals

[120] *Position Statement of AACP on Persons With Mental Illness Behind Bars*, AACP, http://www.communitypsychiatry.org/pages.aspx?PageName=Position_Statement_of_AACP_on_Persons_With_Mental_Illness_Behind_Bars (last visited Feb. 10, 2015).

[121] *Guilty of Mental Illness,* PSYCHIATRIC TIMES (Jan. 1, 2004), http://www.psychiatrictimes.com/forensic-psychiatry/guilty-mental-illness.

[122] *See, e.g.*, Joyce Kosak, *Mental Health Treatment and Mistreatment in Prisons*, 32 WM. MITCHELL L. REV. 389, 391–94, 398 (2005).

[123] LeRoy L. Kondo, *Advoacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders,* 24 SEATTLE U. L. REV. 373, 390 (2000).

[124] Jamie Fellner, *A Conundrum For Corrections, A Tragedy for Prisoners: Prisons as Facilities for the Mentally Ill,* 22 WASH. U. J.L. & POL'Y 135, 137 (2006); *Guilty of Mental Illness*, *supra* note 121.

[125] Richard C. McCorkle, *Gender, Psychopathology, and Institutional Behavior: A Comparison of Male and Female Mentally Ill Prison Inmates*, 23 J. CRIM. JUST. 53, 54 (1995).

[126] Shira E. Gordon, Note, *Solitary Confinement, Public Safety, and Recidivism*, 47 U. MICH. J.L. REFORM 495, 495 (2014).

[127] Bruce A. Arrigo & Jennifer Leslie Bullock, *The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units: Reviewing What We Know and Recommending What Should Change*, 52 INT'L. J. OFFENDER THERAPY & COMP. CRIMINOLOGY 622, 628 (2008); Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450, 1452–53 (1983).

[128] Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYCHIATRY & L. 104, 104–05 (2010).

with mental illness is that they are unable to touch base with reality in a situation with no social or sensory stimulation.[129] This type of confinement on individuals with mental illness is often devastatingly damaging, and can even cause psychotic episodes, self-harm or suicide.[130] Craig Haney, one of the nation's leading experts on inmate mental health, testified at a Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights in 2012, reporting that "solitary confinement precipitates a descent into madness[]" for offenders.[131] The United Nations has suggested that nations ban the use of solitary confinement for "persons with mental disabilities . . . ."[132] In the U.S., a district court in California[133] ruled that housing inmates with serious mental illness in the "Security Housing Unit" (SHU, aka solitary confinement) constituted cruel and unusual punishment under the 8th Amendment of the U.S. Constitution, saying, "if the particular conditions of segregation . . . inflict a serious mental illness, greatly exacerbate mental illness, or deprive inmates of their sanity, then [prison officials] have deprived inmates of a basic necessity of human existence—indeed, they have crossed into the realm of psychological torture."[134] Thus, there are multiple factors about the nature of incarceration in the normal criminal justice system that harms seriously mentally ill offenders, including the environment, social interactions, punishment, and mental health care.

C. Economic Concerns and Recidivism

Rather than treating mental illness, corrections and detention facilities in the U.S. justice system actually contribute to the worsening of mental disorders. As previously mentioned, untreated symptoms are sometimes responsible for the criminal activity seen in this population,[135] thus incarceration does not reduce recidivism since the core of the problem has not been

[129] *Id.* at 105.

[130] *Id.*

[131] Guy Lasnier, *USCS Prison Expert Haney Testifies on the Perils of Solitary Confinement*, U.C. SANTA CRUZ NEWSCENTER (June 19, 2012), http://news.ucsc.edu/2012/06/haney-solitary.html.

[132] *Solitary Confinement Should be Banned in Most Cases, UN Expert Says*, U.N. NEWS CENTRE (Oct. 18, 2011), https://www.un.org/apps/news/story.asp?NewsID=40097#.VMesiyhUj-Q.

[133] Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995).

[134] *Id.* at 1155, 1264.

[135] *See supra* text accompanying notes 56–57.

addressed. Most jails and prisons are not prepared to handle the large number of mentally ill offenders that they house, in that they do not have the mental health resources needed to adequately serve their entire populations.[136] With no proper treatment, paired with the exacerbating conditions listed above, mentally ill offenders may be no better off, if not worse off, when released into the community than when they entered the system. If mentally ill offenders could receive adequate treatment while incarcerated, then perhaps the argument for incarceration would be stronger. This is where the idea of rehabilitation comes in. If a separate justice system could be instituted where rehabilitation is the primary focus, and where offenders are treated for their illness in an acceptable manner, then perhaps the rates of recidivism could drop. Currently, released mentally ill offenders may be paired with a case manager or mental health community service, but this service is not always guaranteed or provided.[137] It is this last link in the chain that leads right through the "revolving door" of the criminalization of mental illness back to the beginning of the system. Without resources and treatment, the behaviors that land individuals with mental illness in trouble with the law are unlikely to have changed, and will, therefore, once again contribute to problems.[138]

D. Reduction in Recidivism with Special Courts

As discussed above, mental health courts are designed specifically for individuals with mental illness who encounter the legal system.[139] These courts aim to link recently released mentally ill offenders with treatment options.[140] How do mental health courts compare to traditional courts, in terms of recidivism? According to several studies, participation in mental

[136] Laura Sullivan, *Mentally Ill Are Often Locked Up In Jails That Can't Help*, NPR (Jan. 20, 2014, 4:50 PM), http://www.npr.org/2014/01/20/263461940/mentally-ill-inmates-often-locked-up-in-jails-that-cant-help.

[137] *See* Marisa Gerber, *Mental Illness Program Could Transform L.A. County Justice System*, L.A. TIMES (Sept. 17, 2014, 10:10 PM), http://www.latimes.com/local/countygovernment/la-me-mental-health-courts-20140918-story.html (Los Angeles's program will require eligible defendants to work with a case worker at the San Fernando Valley Community Mental Health Center).

[138] *Id.*

[139] *See supra* text accompanying notes 63–65.

[140] *See supra* text accompanying notes 63–65.

health courts leads to fewer subsequent arrests, lower subsequent arrest rates, less serious subsequent offenses, and longer time to re-offend, as well as decreases in number of days spent in jail compared to traditional criminal court defendants.[141] Studies have also shown that individuals who received a "full dose" of mental health treatment and court monitoring from mental health court completion had reduced mental health symptoms and improved quality of life.[142] A recent quantitative review of the effectiveness of mental health courts supports these findings.[143] From this evidence, it appears that mental health courts are effective in reducing the amount of individuals with mental illness that are shuffled through the criminal justice system.[144] The main reason that these courts are more helpful is likely because they link participants with community resources to help manage and treat mental illnesses. This is in comparison to their time spent in jails and prisons, where treatment is limited, and they are unable to work toward managing stability in their illness.

E. Economic Concerns

In terms of cost to the state through the criminal justice system, there is practically no support indicating time spent in prison is an effective deterrent for mentally ill individuals from committing illegal acts and cycling through the system more than once.[145] In addition to being a non-effective deterrent, there is evidence that mentally ill individuals are handed longer sentences on average than the typical offender,[146] costing the system more over time. In addition, while in prison, these offenders need special care, which can be very costly, and is

[141] *See* Virgina A. Hiday & Bradley Ray, *Arrests Two Years After Exiting a Well-Established Mental Health Court*, 61 PSYCHIATRIC SERV. 463, 467 (2010); Dale E. McNiel & Renée L. Binder, *Effectiveness of a Mental Health Court in Reducing Criminal Recidivism and Violence*, 164 AM. J. PSYCHIATRY 1395, 1401 (2007).

[142] *See generally* Hiday & Ray, *supra* note 141, at 467.

[143] *Id.*

[144] *See* McNiel & Binder, *supra* note 141, at 1401 (confirming a connection between participation in mental health courts and a lower rate of recidivism among the mentally ill).

[145] *See* Amanda C. Pustlinik, *Prisons of the Mind: Social Value and Economic Inefficiency in the Criminal Justice Response to Mental Illness*, 96 J. CRIM. L. & CRIMINOLOGY 217, 219 (2005).

[146] Eve Bender, *Data Confirm MH Crisis Growing in US Prisons*, 41 PSYCHIATRIC NEWS 1, 6 (2006).

known to be the least effective form of mental health care.[147] For example, in California it is estimated that prison health care for inmates costs $11,600 per inmate,[148] a huge portion of which is attributable to mental health treatment for inmates.[149] Further, as mentioned above, the conditions of incarceration can exacerbate mental illness symptoms and can lead to situations that require expensive treatment options.[150] All in all, mentally ill offenders cost the state more money to incarcerate and to treat as compared to non-mentally ill offenders. In the long run, with inadequate treatment within corrections facilities, the symptoms that landed them in jail go untreated, perpetuating the cycle and increasing the cost of the system.

VII. WHY ONLY MENTALLY ILL OFFENDERS?

In this discussion, I have searched for precedence in the U.S. legal system for the differential treatment of special types of offenders to justify the necessity of a regulated, organized, and separate justice system for mentally ill offenders. The question can be asked whether creating specialty courts for a special population opens the door too widely for other specialty courts, where it becomes difficult in drawing the line of qualifications for special status in the legal system. For instance, why not have a court for people living in poverty, or with extremely low socioeconomic status? Why not for veterans of war? Or psychopaths? It can be argued, for example, that psychopaths cannot be held responsible for their criminal actions since they

147 E. Fuller Torrey, *Criminalization of Individuals with Severe Psychiatric Disorders*, MENTAL ILLNESS POL'Y ORG., http://mentalillnesspolicy.org/consequences/criminalization.html (last visited Jan. 25, 2015) (arguing that costs of incarcerating the mentally ill are enormous and treatment in prisons overall is poor in quality if provided at all); *see* Pustlinik, *supra* note 145, at 233–34 (explaining that incarcerating individuals with mental illnesses is "significantly more expensive" than incarcerating others).

148 Jasmine L. Kiai & John D. Stobo, *Prison Healthcare in California*, UC HEALTH (Jan. 22, 2010), http://health.universityofcalifornia.edu/2010/01/22/prison-health-care-in-california/.

149 David DeMatteo et al., *Community-based Alternatives for Justice-Involved Individuals with Severe Mental Illness: Diversion, Problem-Solving Courts, and Reentry,* 41 J. CRIM. JUST. 64, 65 (2013).

150 *See* HILLS ET AL., *supra* note 56, at 6 (noting that caring for the mentally ill requires prisons to invest in increased staffing for their care and that prison conditions exacerbate symptoms).

likely lack a moral understanding of their behaviors. However, the list for these special groups can go on infinitely. In the specific case of individuals with mental illness, the most propelling argument is that mental illnesses are now known to be organic brain disorders.[151] On top of decades of observations of abnormal and atypical behavior from mentally ill individuals, scientific evidence now shows true neural abnormalities in this population.[152] Although the exact mechanisms and neural correlates remain elusive, science has provided a basic neural understanding for observed behavior, just as it has done for juveniles over the years.[153] Based on this fact alone, and in comparison to treatment of juveniles, mentally ill offenders should not be treated as healthy, normal offenders, in the courtroom or in detention facilities. Although this paper has focused on the argument for a specialty justice system for mentally ill offenders for simplification, the logic can, and should be, extended to other groups that also have well-defined, empirically supported neural deficits (e.g. individuals with developmental delays). As mentioned above, it is ideal to begin with groups that can be separated based on well-accepted measures of classification (e.g. the DSM for individuals with mental illness, or developmental tests for developmental delays) that have been empirically validated, but also to update definitions of these groups as science progresses.

Another argument in support of prioritizing solutions to the criminalization of mental illness is the sheer numbers associated with the problem; that is, the numbers of individuals with mental illness in prison, as well as the numbers in dollars of cost of treating mental illness in jails and prisons. The numbers

[151] *See* Insel et. al., *supra* note 75, at 749.

[152] *See, e.g.,* William J. Honer et al., *Abnormalities of SNARE Mechanism Proteins in Anterior Frontal Cortex in Severe Mental Illness*, 12 CEREBRAL CORTEX 349, 349 (2002) (explaining that severe mental illnesses may be the consequence of abnormalities in neural connections).

[153] *See* T.M. Luhrmann, *Redefining Mental Illness*, N.Y. TIMES, Jan. 17, 2015, at SR5 (reporting that science has failed to identify specific biological mechanisms for mental illness); Anne Trafton, *A Turning Point*, MIT TECH. REV. (Dec. 18, 2014), http://www.technologyreview.com/article/533056/a-turning-point/ (noting a connection between neural circuits and behavior and emotions); *Adolescence, Brain Development, and Legal Culpability*, AM. BAR ASS'N. (Jan. 2004), http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_juvjus_Adolescence.authcheckdam.pdf (noting scientific developments that further the understanding of juvenile decision making capability).

argument is an economic argument that few can counter. A mentally ill offender costs more to the state than healthy offenders,[154] and thus, the huge influx of this type of offender is cause for economic concern. Additionally, now that mental illness has been shown to stem from the brain and treatment is better understood, there is a need for more humane treatment for this group of particularly vulnerable individuals. As mentioned above, individuals with serious mental illness are currently sent to jails and prisons when arrested for crimes, which is hardly an ideal therapeutic setting. Treatment received from administration and fellow prisoners, as well as the conditions of confinement, often set back rehabilitation, rather than aid it. Rather than perpetuating the cycle, the criminal justice system should focus on treatment, rather than punishment. While there may be other populations within the justice system in need of special consideration, we begin, in this paper, with defining a population with salient, observable and empirically measurable behavioral features. Although DSM diagnoses are far from perfect, they can serve a purpose in the legal system as criteria in the consideration of special offender classification.

Taken together, the evidence suggests that a separate justice system for mentally ill offenders should be implemented in every state. The establishment of such systems will benefit both the offender recipient and the state.

VIII. CONCLUSION

A review of the factors that have led to the criminalization of mental illness in the United States immediately suggests that changes need to be implemented at multiple levels of the criminal justice system. Oftentimes, it can be easier to forge change when a precedent has been set. In this paper, a group of individuals that are differentially treated in the criminal justice system is sought, and the reasons for this separation are examined. Juveniles, and their participation in the juvenile justice system, emerged as the best example of such a population and independent justice system. In examining the reasons for the foundation of the juvenile justice system, it became clear that juveniles' behavioral characteristics were the driving force of the change. Also, rather than being disproven over time, or even

[154] *See* Pustlinik, *supra* note 145, at 233–34.

outdated, these behavioral differences between juveniles and adults have become supported by new scientific findings, and continue to be cited in juvenile cases.[155] The case of differential treatment for juveniles serves as a fantastic example when thinking about mentally ill offenders. One would only need behavioral observations of, not neural foundations for, mental illness to extrapolate the treatment of juveniles in the justice system to mentally ill individuals. However, not only have observed differences between healthy and mentally ill individuals been established, but also empirical evidence pointing to neural abnormalities in mental illness.[156] Even with consideration of emerging data, stigma and difficulty in diagnosing mental illness has hindered reform in the methods of handling this special type of offender, thus change must begin with reducing stigma. I note that some counties have begun trying to deal with the situation by creating specialty courts (i.e. mental health courts),[157] however, there are not nearly enough mental health courts to stem the issue of criminalization of mental illness. I have also noted that offenders suffer from the current system due to lack of treatment and the conditions of their imprisonment, as well as the system itself, which does itself no favors by leaving mental illness symptoms (those that were likely the cause of incarceration) untreated.[158] A separate system can focus on decreasing abuse and isolation, while increasing the focus on treatment.

Overall, this analysis suggests that the method the current criminal justice system implements in handling mentally ill offenders are outrageously inadequate, inhumane and unsustainable. Mental health courts, in which mentally ill offenders are linked with treatment, are a good option, and there should be a push for other counties to consider the benefits of these specialty courts.

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[155] *See Adolescence, Brain Development, and Legal Culpability*, *supra* note 153; *e.g.,* Roper v. Simmons, 543 U.S. 551, 569–70 (2005) (explaining that, based on recent research, adolescents tend to behave more recklessly or engage in "ill-considered actions and decisions.").

[156] *See Mental Health: What's Normal, What's Not*, *supra* note 69 (noting differences in emotions and behavior between mentally healthy individuals and mentally ill individuals); Honer, *supra* note 152, at 349.

[157] *See generally Mental Health Courts*, *supra* note 67 (listing counties within states that have established mental health courts).

[158] *See Guilty of Mental Illness, supra* note 121; *Position Statement of AACP on Persons With Mental Illness Behind Bars*, *supra* note 120.