Title: How Should Mental Illness Be Relevant to Sentencing

# Abstract

In addition to the nationwide phenomenon of mass incarceration,[[1]](#footnote-1) there exists a sub-problem in the U.S. of overrepresentation in prisons and jails of those with severe and persistent mental illnesses (SPMI).[[2]](#footnote-2) The disproportionate imprisonment of those with mental illnesses is one driving force of mass incarceration.[[3]](#footnote-3) Furthermore, we have reached an era characterized by the “criminalization of mental illness.”[[4]](#footnote-4) Driving this is another feature of the mass incarceration era, the change in the types of institutions that incarcerate those subject to social control in American society.[[5]](#footnote-5) With the deinstitutionalization movement, and the closure of mental health institutions (largely brought about by the 1963 Community Mental Health Act),[[6]](#footnote-6) there has been a shift towards incarcerating the mentally ill in criminal justice institutions such as prisons and jails.[[7]](#footnote-7) This essay will consider the role mental illness should play in sentencing, and how this might reduce the disproportionate levels of prisoners with mental illness. More specifically, this paper examines the sentencing rules where the defendant has a SPMI, but has failed to successfully meet the insanity defense.

# Introduction

In addition to the nationwide phenomenon of mass incarceration,[[8]](#footnote-8) there exists a sub-problem in the U.S. of overrepresentation in prisons and jails of those with severe and persistent mental illnesses (SPMI).[[9]](#footnote-9) The disproportionate imprisonment of those with mental illnesses is one driving force of mass incarceration.[[10]](#footnote-10) Furthermore, we have reached an era characterized by the “criminalization of mental illness.”[[11]](#footnote-11) Driving this is another feature of the mass incarceration era, the change in the types of institutions that incarcerate those subject to social control in American society.[[12]](#footnote-12) With the deinstitutionalization movement, and the closure of mental health institutions (largely brought about by the 1963 Community Mental Health Act),[[13]](#footnote-13) there has been a shift towards incarcerating the mentally ill in criminal justice institutions such as prisons and jails.[[14]](#footnote-14) This essay will consider the role mental illness should play in sentencing, and how this might reduce the disproportionate levels of prisoners with mental illness. More specifically, this paper examines the sentencing rules where the defendant has a SPMI, but has failed to successfully meet the insanity defense.

To begin, it is important to understand what we mean by severe and persistent mental illness (SPMI). SPMI covers more serious mental illness diagnoses such as schizophrenia, bipolar disorders, and severe forms of depression.[[15]](#footnote-15) Generally, when the author refers to mental illness, we are referring to severe and persistent mental illness.

In Section I, we will examine why overrepresentation of prisoners with severe and persistent mental illnesses occurs. Section II looks at how and why mental illness should be a factor in sentencing. Section III outlines the interaction between current federal Sentencing Guidelines and mental illness. Finally, Section IV provides viable legislative, judicial and policy changes - the most important of which is to impose a 10% reduction in sentence length where mental illness is present.[[16]](#footnote-16)

# SECTION I: Overrepresentation

## SECTION I (a) What is the extent of the problem?

The problem of over-representation (i.e. the percentage of overall population with mental illness compared to percentage of the prison population without mental illness) of prisoners with mental illness is both a qualitative and quantitative issue. Quantitatively, it is difficult to ascertain how many prisoners have a serious and persistent mental illness as this data is unfortunately not collected upon entry to the criminal justice system. Although there are a number of studies in the literature,[[17]](#footnote-17) the most reliable source of such statistics, is an outdated Bureau of Justice Statistics study where data was collected in 2004 and in 2002. This study found that 56 percent of state prisoners, 45 percent of federal prisoners, and 64 percent of jail inmates had a mental health problem.[[18]](#footnote-18) Other estimates range from 15 percent to 60 percent of prisoners.[[19]](#footnote-19) It has been said that “America’s jails and prisons have become our new mental hospitals.”[[20]](#footnote-20) There are now three to ten times more individuals with serious mental illnesses in U.S. prisons than U.S. mental hospitals.[[21]](#footnote-21) Torrey et al., argue that we have “returned to the early nineteenth century, when mentally ill persons filled our jails and prisons.”[[22]](#footnote-22) Historically from around 1770 to 1820, mentally ill people were traditionally dealt with through prison incarceration. As a result of a reform movement, the US moved towards a “more humane treatment of mentally ill persons... in hospitals” until the 1970s.[[23]](#footnote-23) We have now come full circle, whereby the primary institutions dealing with the mentally ill are prisons, rather than hospitals.[[24]](#footnote-24)

## SECTION I (b) Causes of overrepresentation

We now discuss what the causes are of such reliance on the prison system to act as a provider of mental health treatment. One causal factor of such over-representation and of the trend of trans-institutionalization (moving those with mental illnesses from mental health hospitals/asylums to prisons)[[25]](#footnote-25) was the closure of asylums.[[26]](#footnote-26) Unfortunately, many of those released were not afforded adequate care, support or funding in the community.[[27]](#footnote-27) With deinstitutionalization, it was unfortunately common for individuals to fall “outside the country’s social safety net”.[[28]](#footnote-28) As a result, this population experienced (and continues to experience) problems of homelessness,[[29]](#footnote-29) poverty,[[30]](#footnote-30) addiction, [[31]](#footnote-31) unemployment[[32]](#footnote-32) and associated discrimination[[33]](#footnote-33) - the very criminogenic social determinants and factors that have such strong correlations with police contact and prison entry.[[34]](#footnote-34) These drivers of interaction with the criminal justice system have since been experienced disproportionately by those with mental illness.[[35]](#footnote-35)

Other causes include how criminal justice actors interact with those with mental illness. For instance, police can misinterpret behavior associated with mental illness as threatening behavior and divert individuals into the criminal justice system as opposed to the mental health system.[[36]](#footnote-36) Interestingly, Lurigio argues that the harsh policies implemented by the police and other criminal justice actors are primarily to blame for the criminalization of poverty and disporpotionate levels of incarceration for this sub-population, particularly America’s draconian drug laws.[[37]](#footnote-37) The war on drugs has had a disproportionately harsh impact on those with mental illnesses.[[38]](#footnote-38) This is due to concurrent characteristics that put persons at risk of using drugs and engaging in criminality, and due to concurring drug and alcohol dependence amongst the mentally ill.[[39]](#footnote-39)

As stated above, the treatment by police of those with mental illnesses is also to blame. For instance, the issue of police targeting those with mental illness has been raised in some reports and articles in the literature.[[40]](#footnote-40) Furthermore, often police, as frontline responders, act as gatekeepers to both the criminal justice system, and at the same time, to mental health services.[[41]](#footnote-41) At times, police fail to recognize symptoms of mental illness and misinterpret this behavior as dangerous,[[42]](#footnote-42) and in doing so use their discretion[[43]](#footnote-43) to divert the individual into the criminal justice system as opposed to other options such as civil committal.[[44]](#footnote-44) More generally, those with mental illnesses may be more susceptible to coercive police tactics, with a higher likelihood to acquiesce and give false statements.[[45]](#footnote-45) It is no wonder then that those with mental illnesses are at a heightened risk of experiencing wrongful convictions.[[46]](#footnote-46)

Finally, and most importantly for the purposes of this essay, it is argued that current sentencing laws and practices are a root cause of the problem. The punitive nature of the current sentencing regime is largely to blame.[[47]](#footnote-47) It appears that judges are not aware or not willing to use the discretion afforded to them to award lesser sentences to those with mental illnesses, particularly in cases where the defendant fails to establish the insanity defense but has a mental illness.[[48]](#footnote-48) In fact, mental illness in some cases has acted as an aggravated circumstance, rather than a mitigating factor.[[49]](#footnote-49) For instance, the factors laid out in §3553(a) of the Sentencing Guidelines include circumstances that “protect the public from further crimes of the defendant.” Here mental illness acts as an aggravating factor, via the apparent ‘inherent’ future dangerousness and stigma associated with mental illnesses.[[50]](#footnote-50) One study, by Davidson and Rosky, found longer sentences were given if a defendant had a mental illness.[[51]](#footnote-51) The case law around the discretion to consider mental illness as either a mitigating or aggravating factor is arbitrary in this regard.

## SECTION I (c) Problems with overrepresentation

Having disproportionate numbers of individuals with mental illness in our prisons and jails brings about an array of negative results, such as overcrowding and deterioration of prisoners’ mental health.[[52]](#footnote-52) Primarily, such incarceration of those with mental illnesses (as opposed to treating them through alternatives to prison such as inpatient or outpatient mental care), contributes to mass incarceration greatly. If it was possible to divert those with mental illnesses out of our prisons and jails, and into mental hospitals, this would result in a significant reduction in prison numbers.[[53]](#footnote-53) Furthermore, having such large numbers of individuals with mental illness in prison costs a large amount of expenditure covered by the taxpayer.[[54]](#footnote-54) Kondo states that “the cost of incarcerating mentally ill offenders is exorbitantly high. In 1996, the Bureau of Justice Statistics reported that national spending (on inmates with mental illness) was $22 billion for state prisons and $2.5 billion for federal prisons, for a total annual expenditure of $24.5 billion.”[[55]](#footnote-55) In comparison, a prisoner without a mental illness costs an average $31,286 per year.[[56]](#footnote-56) According to one study, a prisoner *with* a mental illness can cost 20 times greater than a prisoner without a mental illness.[[57]](#footnote-57) This is particularly important in today’s political and economic climate. The increased cost of housing a prisoner with mental illness is due to costs associated with medication, hospitalization,[[58]](#footnote-58) misconduct[[59]](#footnote-59) and recidivism.[[60]](#footnote-60) In terms of managing prisons and safety concerns, those with mental illness are much more likely to be involved in physical attacks on other prisoners and staff.[[61]](#footnote-61) They are at a much higher risk of victimization,[[62]](#footnote-62) with 1 in 12 prisoners with mental illnesses suffering sexual victimization, with even rates higher for female inmates.[[63]](#footnote-63) They are also disproportionately punished by solitary confinement,[[64]](#footnote-64) and suffer from suicides at a higher rate.[[65]](#footnote-65) All of the above often results in a “(d)eterioration in the psychiatric condition”,[[66]](#footnote-66) and in turn the prisoner with a mental illness experiences a harsher sentence. Fundamentally, these issues also contribute to the higher recidivism rates for prisoners with mental illness.[[67]](#footnote-67)

## SECTION I (d) Consequences of Overrepresentation

The primary and most alarming result of the overrepresentation of the mentally ill is that the criminal justice system is punishing those with mental illness, on the basis of their mental illness. Furthermore, the criminal justice system is ‘treating’ those with mental illness inappropriately or in some instances, not treating them for their conditions at all.[[68]](#footnote-68) Such individuals should be diverted away from the criminal justice system, which restricts their access to adequate healthcare, puts them at greater risk of abuse[[69]](#footnote-69) and deteriorates their mental illness.[[70]](#footnote-70) Furthermore, from a penal policy perspective, by imprisoning those who do not deserve to be there or who would be more adequately treated elsewhere, we are contributing to prison overcrowding.[[71]](#footnote-71)Again, similar to the disproportionate imprisonment of blacks, any disproportionately and criminalizing of certain groups in society can not only lead to sustainability of these disproportionate practices, but also lead to greater questions on the legitimacy of the criminal justice system as a whole.[[72]](#footnote-72) Also, if we are overcriminalizing and punishing those with prison sentences who do not deserve them, we are saying something about the society that we live in (our national self-image), but also expressing what we think about those with mental illness.[[73]](#footnote-73) By disproportionately imprisoning those with mental illness we are perpetuating and contributing to the myth of dangerousness that attaches to those with mental illnesses.[[74]](#footnote-74) Another concern is whether the US is in compliance with international human rights law, particularly if the US goes on to ratify the Convention on the Rights of Persons with Disabilities (CRPD). The current disproportionate incarceration, and mistreatment, of the mentally ill in prisons may fall foul of Article 13 on Access to Justice, Article 14 on the Liberty of the Person, Article 3 on adequate mental health care,[[75]](#footnote-75) and Article 15 on Freedom from torture or cruel, inhuman or degrading treatment or punishment[[76]](#footnote-76).[[77]](#footnote-77) Finally, we are also adding the ‘usual’ collateral consequences[[78]](#footnote-78) to a population who is already at social disadvantage when it comes to housing, employment and education discrimination.[[79]](#footnote-79)

# SECTION II: Should mental illness be a factor in sentencing?

In order to become relevant in sentencing, mental illness should be viewed through the lens of the current sentencing framework, i.e. one framed by limited judicial discretion, mandatory minimums and sentencing guidelines. Since US v Booker the following of the sentencing guidelines has become advisory rather than compulsory.[[80]](#footnote-80) Although Booker left the door open for more discretion on the part of sentencing federal judges, this opportunity has yet to be fulfilled. In regards to mental illness, it appears that institutionally the judges are still treating the guidelines as quasi-compulsory. This section argues that the fact of mental illness should be made available to the sentencing judge, and should be relevant to the sentencing decision.

First, mental health is very relevant to blameworthiness. Those with mental illness do not have the same culpability as those without mental illness,[[81]](#footnote-81) and their sentence should reflect this.[[82]](#footnote-82) As such, mental illness should act as a mitigating factor in sentencing law.

It is important at this juncture to examine how the key justifications for punishment (incapacitation, deterrence, rehabilitation, and retribution) apply to those with mental illnesses.[[83]](#footnote-83) Incapacitation focuses on protecting society from violent criminals.[[84]](#footnote-84) For instance, prison physically prevents offenders from committing further crimes. It appears that incapacitation plays a role in the sentencing judge’s mind in some cases where mental illness acts as an aggravating factor due to fears around the likely future dangerousness of those with mental illness.[[85]](#footnote-85) The deterrence principle too focuses on preventing future crime and recidivism. It calls for proportionate sentencing to the seriousness of the crime and likelihood of reoffending.[[86]](#footnote-86) It can become relevant to those with mental illness, as it relies on such individuals being capable of making rational choices when it comes to crime, which is often not the case for those with mental illness. The rehabilitation principle is most applicable and advantageous to those with mental illnesses. It too focuses on reducing crime but as a result of changing offenders’ behaviour.[[87]](#footnote-87) As such, it provides a strong justification for opting for the provision of adequate healthcare and diversionary programs, instead of prison time, to offenders with mental illness.[[88]](#footnote-88) Finally, retribution, which has been the dominant principle during the era of the war on crime and drugs, focuses on the just deserts - that people who commit crimes deserve punishment.[[89]](#footnote-89) This is often not applicable to those with mental illnesses as they have a reduced culpability for the crimes they commit.[[90]](#footnote-90)

We can see here, how theoretically, mental illness is relevant to all of the justifications for punishment, and so should be made relevant to the sentencing decision. However, it appears in practice that mental illness does not factor into a judge’s consideration of what an appropriate sentence should be. Bagaric offers a viable solution that could realistically operate under the US system of sentencing, where judicial discretion is severely restricted.[[91]](#footnote-91) By allocating a fixed reduction of 10% in cases where a mental illness is found, disparity will be reduced and the inherent difference in culpability will be recognized.[[92]](#footnote-92) He believes that proving the link between mental illness and committing the crime should be discontinued as it is too difficult to prove and does not add much to the equation. Instead, it should be assumed that mental illness played a role in the commission of the crime.[[93]](#footnote-93)

One countervailing factor to this is how mental illness is proven at the time of the commission of the crime, particularly given the complexity of mental illness.[[94]](#footnote-94) Furthermore, from a harm perspective, the same amount of harm is caused to the victim, regardless of whether the offender has a mental illness or not.[[95]](#footnote-95) Also, from an equality perspective, should disability be disregarded completely and have those with mental illnesses receive the same treatment as those without? Surprisingly, certain segments of the disability community have advocated for this view (such as Christopher Slobogin and Tina Minkowitz), and called for the abolition of disability-specific defenses such as the insanity defense.[[96]](#footnote-96)

Interestingly, in other jurisdictions such as Australia, individuals can receive a harsher sentence due to their mental illness on the basis of future dangerousness.[[97]](#footnote-97) In certain instances, this has also occurred in the US. This, however, can reinforce negative stereotypes (in a similar manner to the ‘black criminal’).[[98]](#footnote-98) Again, similar to the problem of the ‘black criminal’ and young African-American males, statistically people with mental illness are probably more likely to commit crimes, but is this because of their inherent criminality or due to systemic problems (such as police profiling, systemic prejudices or structural issues such as poverty)?[[99]](#footnote-99) On the other hand, generally speaking, ordinary defendants do receive higher sentences if they are at a higher risk of threat to society in future. Is mental illness a good indicator of future dangerousness, and is it fair to do so?[[100]](#footnote-100) Studies have found that there is not sufficient data to come to this conclusion.[[101]](#footnote-101)

Secondly, mental illness is relevant to the sentencing decision as it changes dramatically the prison experience for the offender. Prison for those with mental illnesses is not only more likely, or more lengthy, but is a vastly different and harsher experience.[[102]](#footnote-102) Here mental illness is relevant to sentencing when considered through the lens of harm.[[103]](#footnote-103) In other words, vulnerability as a result of mental illness should factor into a court’s evaluation of the severity of a contemplated penalty to ensure that an offender is not overpunished. “Only by treating an offender differently (i.e., by recognizing his susceptibility to serious harm) will he be treated equally (i.e., similarly to those without major mental disorders who are equally blameworthy). ” [[104]](#footnote-104) From the point of view of criminal law jurisprudence, we strive to achieve parity and equality of punishment through our sentencing regimes - defendants who commit similar crimes under similar circumstances should experience similar levels of punishment.[[105]](#footnote-105) However, those with pre-existing mental illnesses are more likely to experience physical and sexual assault, behavioral issues, solitary confinement and exacerbation of their mental illness while in prison.[[106]](#footnote-106) As a result, it is reasonably foreseeable that an individual with a mental illness sentenced to time in prison will experience a harsher sentence than their counterpart without a mental illness. Given the likelihood and proximity of this increased harm occurring, the length of sentence imposed should be reduced to bring about a similar level of suffering or harm. In this way, the essay is cognizant of the lived experience of prison for prisoners with mental illness, and what this means for sentencing. This has led some commentators, such as Johnston and Bagaric, to call for mental illness to act as a mitigating factor for another reason - based on the predicted additional harm they will suffer by virtue of their mental health status.[[107]](#footnote-107)

# SECTION III: Sentencing Guidelines

The US Federal Sentencing Guidelines[[108]](#footnote-108) prescribe certain penalties based upon the criminal history (which is assigned a certain score) and the offense level (again certain factors on the nature of the crime, such as the use of a firearm, are assigned a certain score.) The combination of the defendant’s criminal history and the nature of the crime are used to calculate the appropriate penalty. A sentencing judge can stray from such calculated penalties through the use of adjustments (increases or decreases the penalty by a certain number of levels) and departures.

According to the federal courts, the presence of mental illness can only operate in one direction - i.e. a downward departure and has a mitigating affect.[[109]](#footnote-109) However, mental illness is not ordinarily relevant in determining if a departure is warranted , according to US v McBroom,[[110]](#footnote-110) there are a number of exceptions to this rule under the guidelines. Current sentencing judges should take advantage of the following three avenues that allow for the use of mental illness to reduce the penalty given:

1. § 5H1.3 - mental and emotional conditions can be relevant to the sentencing decision. This section states that “mental and emotional conditions may be relevant in determining whether a departure is warranted, if such conditions, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines.” If this is found in a given case, the judge can impose an ‘outside the range’ penalty.
2. § 3553(a)(1) - This section requires the consideration of the history and characteristics of the offender. Again, mental illness could be found to be relevant here.

1. § 5K2.13 - This applies to cases of diminished capacity and allows for a downward departure from the guideline penalty range. But it only applies if the offender was suffering from a significantly reduced mental capacity at the time of the offense and this substantially contributed to commission of the crime.

Unfortunately, the usage of such sections to bring about a downward departure is rare in the US according to Perlin and Gould.[[111]](#footnote-111)

It is also the case that the Sentencing Guidelines could provide for mental illness as an aggravating factor. Gomez explains that “the § 3553(a) factors appears to encourage higher sentencing... including those designed ‘to protect the public from further crimes of the defendant’. ” [[112]](#footnote-112) The future dangerousness associated with individuals with mental illnesses can be used to increase sentences, acting as an aggravator and warranting higher sentences.[[113]](#footnote-113) See for example, United States v. Hines, where the Court found that Hines posed an “extraordinary danger to the community because of his serious emotional and psychiatric disorders.”[[114]](#footnote-114) Similarly, in United States v Strange the sentencing court was swayed in giving out a lengthier sentence based on the future dangerousness of the defendant who was schizophrenic.[[115]](#footnote-115) In contrast, the Sixth Circuit in United States v Moses[[116]](#footnote-116) vacated the lengthier sentence of a defendant given as a result of his dangerousness and mental illness. Here the Court stated that diversion into civil commitment was more appropriate.[[117]](#footnote-117) Another case where mental illness acted as a mitigating factor is US v Speight, where again the defendant was schizophrenic. As such, the case law is quite random - with some judges ignoring mental illness, others considering it as a mitigating factor, and others still perceiving mental illness as an aggravating factor.[[118]](#footnote-118)

Finally, it is also worth noting that under the current law, the sentencing judge can not only reduce sentence length but can also change the sentence type. Skeem and Peterson point to the US code Title 18 S3563 which empowers the court to “provide as further conditions of probation... that the defendant ... undergo available medical, psychiatric or psychological treatment.” [[119]](#footnote-119) Again, judges should take advantage of such current provisions.

# SECTION IV: Recommendations

As a public policy matter, similar to the relationship of drugs and crime, we should encourage all stakeholders to examine mental illness as a public health matter (rather than a penal policy issue),[[120]](#footnote-120) and examine it through a rehabilitative lens. Although recommendations in the literature focus elsewhere (such as police Crisis Intervention Training,[[121]](#footnote-121) investments in education, healthcare[[122]](#footnote-122) and housing),[[123]](#footnote-123) this essay focuses on rendering mental illness relevant at the sentencing stage if proven, as called for by Weinstock et al. in the early 1990s.[[124]](#footnote-124)

Building upon this, the US should adopt the approach put forward by Bagaric and make a definitive percentage decrease of 10% in every case where mental illness is proven.[[125]](#footnote-125) This is based on their reduced culpability.[[126]](#footnote-126) As Davidson and Rosky explain, “(f)rom this perspective, offenders with a mental illness may be perceived as less blameworthy than offenders without a mental illness due to their weakened ability in some instances to fully understand the wrongfulness of their behavior”.[[127]](#footnote-127) Bagaric calls for a further reduction of up to 50% if the offender is likely to experience a harsher sentence by virtue of their mental illness.[[128]](#footnote-128)

In addition, and as part of the same legislative reform, we should make it compulsory for sentencing judges to consider alternatives to prison in such cases, and provide explicit written reasons if the judge fails to opt for alternatives to a prison sentence.[[129]](#footnote-129) In this way, this paper calls for the fixed approach advocated for by Bagraric but also for the individualized approach called for by Wolff.[[130]](#footnote-130) More broadly speaking, given the complexity of mental illness, Perlin and Gould point out the poor level of understanding of mental illness on the part of the judiciary, outside the context of the insanity defense.[[131]](#footnote-131) As such, judicial training on the role that mental illness can play at the sentencing stage of a trial should be introduced.[[132]](#footnote-132) This is particularly true when we consider the tools to make mental illness relevant to the sentencing decision which exist under the current law and guidelines, but are just not being utilized.

Finally, the judiciary should be encouraged to take advantage of current opportunities to use mental illness as a mitigating factor. In addition to the three avenues outlined above (§ 5H1.3, § 3553(a)(1), and § 5K2.13) more generally, a sentencing judge can depart from the Guidelines if there is an aggravating or mitigating circumstance “not adequately taken into consideration by the Sentencing Commission in formulating the guidelines,” and if it advances the objectives of incapacitation, deterrence, rehabilitation, and retribution which we have outlined above. A downward departure is permitted when a defendant suffers from a “significantly reduced mental capacity” and neither violence in the offense nor the offender’s criminal history indicates a need to protect the public.”[[133]](#footnote-133) US judges should make use of these opportunities in the current law and sentencing guidelines which allow for mental illness to act as a mitigating factor. However, what is currently lacking under the current law and under the current sentencing regime is the clear procedure to opt for non-custodial sentences, such as community placement and supervision.[[134]](#footnote-134) This ought to be a part of the legislative reform advocated for above.

In order for the judiciary to make good sentencing decisions, they not only require a statutory mandate as put forward above, but they also require sufficient information in each case.[[135]](#footnote-135) The presentence report provides an opportunity to get such information before the sentencing judge.[[136]](#footnote-136) This will ensure that the sentencing court has all the information concerning the mental health status of the offender. For instance, Washington state law requires the court to order a presentence report before imposing a sentence where mental illness may be at issue.[[137]](#footnote-137) Absent similar legislative-led enforcement, according to the American Probation and Parole Association, the presentence report should cover the offender’s medical history.[[138]](#footnote-138) So once again, the current system can allow for sufficient information be made available, and so the sentencing judge should take advantage of these reports.

Davidson and Rosky argue that the current political climate is ripe for a shift to viewing mental illness as a public health matter, as part of wider support for criminal justice reform.[[139]](#footnote-139) Advocates should frame the debate in terms of the improvements in recidivism[[140]](#footnote-140) and cost savings[[141]](#footnote-141) that are brought about by making mental illness relevant to the sentencing decision. We are currently in a state of flux where criminal justice reform is finally receiving bipartisan and public support,[[142]](#footnote-142) and we are seeing a shift away from retribution and toward rehabilitation.[[143]](#footnote-143) It is vital to ensure that such criminal justice reform incorporates changes to its treatment of the mentally ill.

Another element of legislative and policy reform should center on the gathering of data. While Rumpf et al., call for intake screening, whereby the existence of mental illness would be noted.[[144]](#footnote-144)

Finally, one other possible avenue for reform is the expansion of mental health courts. In mental health courts, specialist judges deal with defendants who have a proven mental illness, and tend to have a wider range of choices when it comes to not only the length of penalties, but also the type of penalties.[[145]](#footnote-145) It is these courts that could take the lead when it comes to the sentencing reform advocated in this essay. The purpose of these mental health courts is already to divert (where appropriate) offenders with mental illnesses away from the criminal justice system.[[146]](#footnote-146) The judge in such courts has the power to enforce compulsory and supervised community treatment plan.[[147]](#footnote-147) Kim et al., have examined the various pilot programs and conclude that there is mixed evidence as to their effectiveness, but go on to say that such courts are a promising approach.[[148]](#footnote-148) Elsewhere, a study by McNiel and Binder found that mental health courts bring about better recidivism rates.[[149]](#footnote-149) In fact, in a review of the literature, Honegger found that the majority of studies found lower recidivism rates when tried in a mental health court.[[150]](#footnote-150) However, given their mixed results and limited availability,[[151]](#footnote-151) the wider reforms called for here (such as a fixed reduction in sentence) should not be limited to these specialty courts, but become engrained in all criminal courts.

# Conclusion

This essay has shown that those with mental illness form a large portion of the current prison population. Their overrepresentation in prison provides its own cohort of problems such as overcrowding and higher costs. The experience of prison is also unique, given their vulnerabilities to further harm. This essay has argued that this higher likelihood of additional harm requires an appropriate reduction in the sentence of such an individual. Furthermore, the sentence should be reduced by a fixed rate of 10% to acknowledge the reduced blameworthiness associated with having a mental illness at the commission of a crime.[[152]](#footnote-152) These are the primary ways that mental illness should be made relevant to the sentencing decision. The proposals for reform in this essay offer recommendations that require changes to the current system, but also importantly offer recommendations that can be incorporated under the current Guidelines regime. The steps outlined above will not only result in more appropriate trans-institutionalization and deinstitutionalization, but also will reduce mass incarceration in general.[[153]](#footnote-153) Finally, it will not only save money for the taxpayer, through more efficient and effective sentencing, but also more importantly produce fairer and more equitable sentences.

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107. Bagaric, *supra* note 9; Johnston, *supra* note 95; Bargaric calls for a future reduction of up to 50% in such instances where mental illness is likely to bring about a harsher punishment. [↑](#footnote-ref-107)
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110. 124 F.3d 533 (3d Cir. 1997). [↑](#footnote-ref-110)
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112. Gomez, *supra* note 41, at 1139. [↑](#footnote-ref-112)
113. Fatma Marouf, *Assumed Insane*, 101 CORNELL L. REV. 25 (2016), at 37; Ellen Byers, *Mentally Ill and Strict Liability*,57 ARK. L. REV. 447 (2004), at 522. [↑](#footnote-ref-113)
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118. Perlin & Gould, note 42, at 434. [↑](#footnote-ref-118)
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121. Megan Testa, *Imprisonment of the Mentally Ill: A Call for Diversion to the Community Mental Health System*, 8 ALB. GOV. L. REV. 405 (2015), at 431. [↑](#footnote-ref-121)
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123. Lurigio is correct when he points out that we must ‘focus on the amelioration of criminogenic factors, not simply on treating mental illness among prisoners with mental illnesses.’ Lurigio, *Id.*, at 66. [↑](#footnote-ref-123)
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125. Bagaric, *supra* note 9, at 5. [↑](#footnote-ref-125)
126. *Id*., at 5. [↑](#footnote-ref-126)
127. Davidson & Rosky, *supra* note 4, at 355. [↑](#footnote-ref-127)
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130. Michael A. Wolff, *Evidence based Judicial Discretion: Promoting public Safety through State Sentencing Reform*,83 N.Y.U. L. R. 5 (2008). [↑](#footnote-ref-130)
131. Perlin & Goulda, *supra* note 42, at 433. More generally when we think of mental illness and the criminal law, our discussions are limited to the all or nothing insanity defense. Fiona Sampson, *Mandatory Minimum Sentences and Women with Disabilities*, 39 OSGOODE HALL L. J. 2/3 (2001), at 589-609. [↑](#footnote-ref-131)
132. William Manovel, *Mental illness is not a crime: the impact of the adversarial judicial system*, 9 AUSTRALASIAN PSYCHIATRY 3 (2001), at 220. [↑](#footnote-ref-132)
133. Gomez, *supra* note 41, at 1135. [↑](#footnote-ref-133)
134. The 2009 Criminal Justice Transition Coalition*, Smart On Crime: Recommendations For The Next Administration And Congress* (2008), at X. [↑](#footnote-ref-134)
135. The Sentencing Project, *Mentally Ill Offenders in the Criminal Justice System: An Analysis and Prescription*, (2002), at 16. [↑](#footnote-ref-135)
136. Morris, *supra* note 90, at 131. [↑](#footnote-ref-136)
137. Council of State Governments, *Criminal Justice/Mental Health Consensus Project*, (2002), at 116. [↑](#footnote-ref-137)
138. *Id.,* at 117-119. [↑](#footnote-ref-138)
139. ##  Davidson & Rosky, *supra* note 4; see also Katherine Beckett, Anna Reosti & Emily Knaphus, *The End of an Era? Understanding the Contradictions of Criminal Justice Reform*, 664 ANNALS AM. ACAD. POLITICAL SOCIAL SCIENCE 1 (2016), at 238-259; Angela J. Thielo, Francis T. Cullen, Derek M. Cohen, & Cecilia Chouhy, *Rehabilitation in a Red State: Public Support for Correctional Reform in Texas*, 15 CRIMINOLOGY & PUBLIC POLICY 1 (2016), at 137-170; Kevin M. Drakulich & Eileen M. Kirk, *Public Opinion and Criminal Justice Reform: Framing Matters*, 15 CRIMINOLOGY & PUBLIC POLICY 1 (2016), at 171-177.

 [↑](#footnote-ref-139)
140. Thielo et al., *Id.,* at 161. [↑](#footnote-ref-140)
141. *Id*., at 139; Henrichson & Delaney, *supra* note 50, at 68-80; Joan Petersilia & Francis T. Cullen, *Liberal But Not Stupid: Meeting the Promise of Downsizing Prisons*, 2 STANFORD J. CRIM. L. AND POLICY 1 (2015), at 1-43; David Dagan & Steven M. Teles, *Locked In? Conservative Reform and the Future of Mass Incarceration*, 651 ANNALS AM. ACAD. POLITICAL SOCIAL SCIENCE 1 (2014), at 266-276; Torrey has called for cost studies to be undertaken. Torrey et al., *supra* note 10 (2014), at 8, 107. [↑](#footnote-ref-141)
142. Davidson & Rosky, *supra* note 4, at 354. [↑](#footnote-ref-142)
143. Gomez, *supra* note 41, at 1176. [↑](#footnote-ref-143)
144. H. J. Rumpf, C. Meyer, U. Hapke & U. John, *Screening for Mental Health: Validity of the Mhi-5 Using Dsm-Iv Axis I Psychiatric Disorders as Gold Standard*, 105 PSYCHIATRY RES. 3 (2001), at 243-253; Torrey et al Torrey et al., *supra* note 10 (2014), at 8, 107; Lurigio, *supra* note 21, at 77. [↑](#footnote-ref-144)
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146. Torrey et al., *supra* note 10 (2014), at 8, 106; Kim, et al., note 24, at 27-30. [↑](#footnote-ref-146)
147. Laura Honegger, *Does the Evidence Support the Case for Mental Health Courts? A Review of the Literature*, 39 LAW HUM. BEHAV. 5 (2015), at 478. [↑](#footnote-ref-147)
148. Kim et al., note 24, at 27-29. [↑](#footnote-ref-148)
149. Dale E. McNiel & Renée L. Binder, *Effectiveness of a Mental Health Court in Reducing Criminal Recidivism and Violence*, 164 AM. J. PSYCHIATRY 9 (2007), at 1401; Bradley & Brooks Dollar, *supra* note 138, at 649; C.M. Sarteschi, M.G. Vaughn & K. Kim, *Assessing the Effectiveness of Mental Health Courts: A Quantitative Review*, 39 J. CRIMINAL JUSTICE 1 (2011), at 12-20. [↑](#footnote-ref-149)
150. Honegger, *supra* note 140, at 483. [↑](#footnote-ref-150)
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152. Bagaric, *supra* note 9, at 5. [↑](#footnote-ref-152)
153. H. Richard Lamb & Linda E. Weinberger, *Some Perspectives on Criminalization*, 41 J. AM. ACAD. PSYCHIATRY LAW 2 (2013), at 292. [↑](#footnote-ref-153)